



GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 2019/25865

- (1) REPORTABLE: **YES**
 (2) OF INTEREST TO OTHER JUDGES: **YES**
 (3) REVISED. **YES**

22 February 2023

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SIGNATURE

In the matter between:

CITY OF EKURHULENI METROPOLITAN MUNICIPALITY

Applicant

and

**THE UNKNOWN INDIVIDUALS TRESPASSING AND/OR
 ATTEMPTING TO INVADE AND OR SETTLE ON THE
 IMMOVEABLE PROPERTY DESCRIBED AS FARM RIET-
 FONTEIN 153 (AND ALSO KNOWN AS PALM RIDGE
 EXTENSIONS 10, 18 TO 30)**

First Respondent

SOUTH AFRICAN POLICE SERVICES (EDEN PARK)

Second Respondent

**CITY OF EKURHULENI METROPOLITAN
 POLICE DEPARTMENT**

Third Respondent

TEMI CONSTRUCTION

Fourth Respondent

MOKGOLOKWANE CIVILS

Fifth Respondent

BUYANEMPUMELELO TRADING CC

Sixth Respondent

MOTHEO GROUP

Seventh Respondent

**THE FURTHER RESPONDENTS and 998 currently represented
 by Swikwambana P Attorneys**

Eighth Respondent

JUDGMENT

SPILG, J

INTRODUCTION

1. Two separate incidents occurred at the RDP housing development (also referred to as the housing project) in Palm Ridge which gave rise to the issues before this court.¹

Each involved a different group of people who attempted to, or had already, come onto the development.

2. It is common cause that the incident which concerns the first group (who the court papers identify as the first respondent) took place in July 2019.

The applicant, which is the City of Ekurhuleni Metropolitan Municipality (“*the Metro*”), brought an urgent application against anyone attempting to occupy the development. Those who came to oppose the interim order granted at the time (in July 2019) put their names on a list required by the court order and identified themselves as falling within the first respondent group. This occurred sometime later in October of that year.

3. Initially the Metro claimed that the second incident, involving a fresh land grab by another group, occurred in June 2021. It brought an application to join this new group in the original proceedings.
4. The Metro contended that, while it remained pending, the interim order granted in July 2019 covered any subsequent attempt at occupation of the development by others, therefore entitling it to join this new group who, it alleged, were attempting to invade the RDP development.

This group came to be cited as the eighth respondent.

5. The eighth respondent group allege that they comprise both individuals who were allocated RDP houses and had resided in the development since January 2020

¹ RDP housing describes the Reconstruction and Development Programme (“RDP”) which is a government funded social housing project. It is to be contrasted with other subsidised housing projects.

as well as others who came onto the development by no later than that date.²

THE FIRST INCIDENT (which concerns the first respondent group)

6. The first incident was an alleged land invasion attempted by a group of individuals in July 2019³. The Metro brought an urgent *ex parte* application interdicting those who it identified as “*The Unknown Individuals Trespassing and/or Attempting to Invade and/or Settle on the Immovable Property Described as Farm Rietfontein 153 (also known as Palm Ridge extensions 10 and 18 to 30)*” from trespassing on, invading or settling in the development.

I granted urgent interim relief on the morning it was sought, which was on 24 July 2019.

7. As already mentioned, the incident giving rise to the urgent application involved the group who comprise the first respondent.

Members of this group reside in the greater Palm Ridge area.⁴

8. Those comprising the first respondent group initially claimed that they should

² Eighth Respondent's AA paras 10.23 and 13

³ In *Occupiers of Skurweplaas 353 JR v PPC Aggregate Quarries (Pty) Ltd* (2012 4 BCLR 382 (CC) the court was critical of the citation of the respondents as the “*people who intend invading the Remaining Extent of the Farm ...*” and the “*unknown people who invaded the Remaining Extent of the Farm ...*”

Yacoob J indicated at para 3 that;

“This description of human beings is less than satisfactory and cannot pass without comment. It detracts from the humanity of the occupiers, is emotive and judgmental, and comes close to criminalising the occupiers. This form of citation should not be resorted to. A more neutral appellation like “occupiers” might well be more appropriate.”

Where the applicant is unable to identify a group of persons, who are attempting to come onto land or have already done so, by name but only by description of the activity which is sought to be interdicted (see below) then it remains possible to describe them by reference to their act of intrusion or incursion as suggested by G Muller and EJ Marais in *Reconsidering counter-spoliation as a common-law remedy in the eviction context in view of the single-system-of-law principle* 2020 TSAR 103 at 105.

The difficulty with using the term “*occupy*”, “*possess*” or their derivatives is that they may be construed as self-defining in what may still be uncertain terrain (See below and compare *South African Human Rights Commission v City of Cape Town* 2022 (5) SA 622 (WCC) at paras 54 and 57)

⁴ See Annexure AA1- Caselines pp 003-29 et sec

have been allocated housing in the development but due to corruption and maladministration others were given preference.

Some in this group produced documents showing that their names had been placed on the official RDP housing list in 1996. That is over a quarter of a century ago.

Their anger and frustration was exacerbated by a concern that this project will be the last RDP development in the area. If so, then when they eventually are given housing they will have to relocate a considerable distance away from the areas where they and their families have established relationships, enjoy a familiar environment and community and where their children have also integrated into a particular schooling and social environment.⁵

It is evident that the reality for the individual households making up the group is that when they are eventually provided housing they will suffer an involuntary removal and displacement to an area which will be a considerable distance from where they have resided. The papers do not indicate that the authorities have allayed their fears by suggesting otherwise.

9. The first respondent's main contentions with regard to the urgent relief obtained are that;
 - a. they were already in occupation of houses in the development and this was known to the Metro when the application was launched. Accordingly, the relief sought was not only misconceived but disingenuous;
 - b. even if they were on the development for a brief time, they had erected structures and the Metro had taken the law into its own hands by forcibly removing them without a court order first being served on them.
 - c. they took occupation to protect their interests in ensuring a fair allocation of housing in the project and to prevent what they said was an imminent

⁵ There is authority that the provision of temporary shelter or permanent housing must be within reasonable proximity to where an illegal occupier has been living.

land invasion by others.

10. It is however common cause that at the time the first respondent filed its conditional answering affidavit, those who claimed to fall within its ambit were neither in occupation nor possession of any site in the development.
11. Perhaps of greatest significance is that the 880 household heads who identified themselves as comprising the first respondent group said that they “*reside in and around the townships of Katlehong and Thokoza, as well as the immediate surrounding areas situated within the jurisdiction of ... the City of Ekurhuleni*”⁶

A little later the deponent to the answering affidavit said that many in the group are also old age State pensioners, low-income earners and unemployed people who are “*homeless, shack and backyard dwellers*” while others are members of the uMkhonto we Sizwe Military Veterans Association (“*the MK Veterans*”) who, despite having applied, are still waiting for housing.⁷

In this context it must be noted that there are also some 670 MK Veterans who have in fact been allocated RDP houses in the development and who the Metro alleges would be prevented from taking occupation by reason any unlawful land occupation.

12. Moreover, the Metro was unaware of the identities of those who were attempting to occupy the development and cited them as “*The Unknown Individuals Trespassing and/or Attempting to Invade and/or Settle on the Immoveable Property described as Farm Rietfontein 153 (and also known as Palm Ridge Extensions 10, 18 to 30)*”.

It therefore sought an additional order in line with the procedure identified by the Full Court in *Mtshali and others v Masawi and others* 2017 (4) SA 632 (GJ) at para 201, which require those who intended opposing the application to identify themselves by name and physical address.

⁶ Answering Affidavit para 16. CaseLines p 003-6

⁷ Id para 18. CaseLines p 003-7

Two features of the list that was later produced by the first respondent group stand out.

The first is that half of the first respondent group can produce an official reference number acknowledging their application for housing. The list provided (Annexure AA1) shows that 446 household heads have been on a waiting list for housing since either 1996 (identified as receiving a C-Form bearing a reference number which acknowledged receipt of their application) or had applied for housing from 2000 onward and received a Government generated sms or other official notification which also bore a reference number. A further twelve or so claim to be from a special MK Veterans unit but have not produced any reference number to indicate that they are on a housing list.⁸

Secondly, the overwhelming number of persons in the group reside on an erf or stand in a proclaimed township since they identify their address by reference to a street name and number within an established township development. This does not mean that they live in the main house. On the contrary they all appear to claim to only occupy a so-called backyard shack, and this allegation is accepted by the court.

13. The litigation got bogged down as it was necessary to extend times for filing affidavits and for complying with court orders requiring the identification of household heads and their family members who contended that they fell within the first respondent group.

14. The first respondent group also counterclaimed that they;

- a. were entitled to the allocation lists and be furnished with the criteria for determining preference.
- b. were entitled to a spoliation order with return of goods and possessions taken by the Metro when evicting them.

15. Since the Metro contended that the information sought for the production of the

⁸ There is some cause for concern in relation to four of the twelve. One was born in 1985 while the other three were born in 1980.

allocation lists and the criteria for determining preference was with the Provincial body, the court was willing to consider granting that part of the counter-application once the Gauteng Government was joined.

16. *Prima facie* I was inclined to grant the relief sought because it would reveal whether there had been corruption or maladministration in the allocation of housing as alleged; the information being peculiarly within the knowledge of either or both spheres of Government. However, despite filing a joinder application the first respondent's counsel advised that it would not be pursued and informed the court that they were or had been engaged in discussions with the authorities.

Since I was not prepared to consider directing production if the Gauteng Government was not joined, the only counter-application which remained was based on spoliation and return of possessions allegedly taken by Metro officials or their agents.

17. In terms of the list finally supplied (annexure "AA1" to the combined answering affidavit⁹), the first respondent group comprises 880 households of over 1 500 individuals.

18. Three issues arise for consideration in respect of the application against the first respondent group and their own counter-application:

- a. Whether, at the time when they were allegedly removed by the Metro, the first respondent members were already in occupation on the development so as to qualify for protection under the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 ("*PIE*"). This issue would also include a consideration of the purpose of the occupation.
- b. Whether the group was in peaceful and undisturbed possession of land on the development and whether the Metro was entitled to rely on counter-spoliation to remove them;

⁹ CaseLines p003-29 et seq

- c. What possessions, if any, owned by individual members of the group were taken by the Metro?

THE SECOND INCIDENT (which concerns the eighth respondent group)

19. While the procedural steps in respect of the urgent application involving the first respondent were still ongoing, in May 2021 the Metro brought another urgent *ex parte* application to join other people who it claimed were at that moment in the process of trying to invade the development.

The Metro identified this group as “*further Respondents*”. They were joined as the eighth respondent.

20. Members of this group do not identify themselves with the residents living in the greater Palm Ridge area who claimed to have an interest in the regular allocation of houses in the project (i.e. the first respondent group).

Save for seven individuals, none of the family heads listed in the annexure to the eighth respondent’s papers claim to have applied for RDP housing, subsidised housing or to have put their name on any list for emergency housing.

The Metro accepts that those who have proof of being lawfully allocated a RDP house in the development are not subject to the application. They are therefore excluded from further consideration.¹⁰

21. Accordingly, no person who has identified himself or herself as part of the eighth respondent group can seek refuge among those who have in fact been allocated housing.

The eighth respondent group profess to have no right other than the protection afforded by the common law against spoliation and the provisions of PIE.

¹⁰ The seven are Thandaxzani Mdletshe, Nomvula Mabizela, Nokubongga Nkosi, Eunice Z Ndebele, MD Madonsela, Bonginkosi Mbingo and Deon Ledonka

22. The eighth respondent contends that all who fall within its group were on the development since no later than January 2020 and therefore;
- a. they cannot fall within the purview of an application brought a year earlier to prevent a land invasion;
 - b. they cannot be subject to the application, which applies only to persons who are trespassing or about to invade land- not those who have already secured occupation on the development.
 - c. they were (in any event) in occupation of sites on the development for well over a year before being joined as a party to the urgent application and therefore can remain on the development until their fate is determined under the provisions of PIE.

As I intend demonstrating the effect is that, provided they are homeless and otherwise qualify for occupation under PIE, they will remain on the development until temporary emergency shelter is provided- which could take a number of years.

23. The eighth respondent group comprises 225 households (excluding the seven mentioned earlier) of more than 700 individuals.¹¹
24. While the list provided by the first respondent identified the overwhelming number of households falling within its group to be living at street addresses in established townships, the list provided by the eighth respondent claimed that all were living on the development.
25. The issues which must be considered in relation to those who make up the eighth respondent are;
- d. whether they can be impacted by an order made some six months before

¹¹ Annexure "TM1" to the eighth respondents' answering affidavit

they claim to have come onto the development;

- e. whether they were already on the development by January 2020 or only attempted to take occupation in May 2021 (when they were first joined as a party).

DISCUSSION

Competing rights and interests

26. It should already be evident that this case cannot be considered from a single factual or legal perspective. A number of competing rights and interests are impacted and in turn they have broader ramifications which should not be overlooked.

27. The introductory paragraphs to this judgment reveal that the Metro has been involved in putting up a massive housing development consisting of just under 6000 houses in respect to which only those on a waiting list for RDP housing qualify.

28. In *Thubakgale and Others v Ekurhuleni Metropolitan Municipality and Others* [2021] ZACC 45; 2022 (8) BCLR 985 (CC) at paras 146 to 148 the majority decision of Jafta J held that s 26(1) of the Constitution, which is to be read with s 26 (2), only imposes a negative obligation not to interfere with the enjoyment of the right to housing. This is because s 26(1) does not give rise to an enforceable self-standing and independent positive right, but is subject to the considerations mentioned in subsection (2) to take reasonable legislative and other measures to realise the right of access to adequate housing. Jafta J expressed it in the following terms at para 149;

“It is the open-endedness of this obligation, which rules out direct enforcement. Without direct enforcement there can be no legal basis for

*concluding that certain individuals must be given houses by a particular date. That proposition cannot flow from section 26(2) as interpreted by this Court.*¹²

The minority view expressed by Majiedt J in *Thubakgale* was that the State had already taken reasonable legislative measures to progressively realise the right to housing, through the Housing Act and the National Housing Code, and established vested rights on which the applicants could rely and could enforce. Accordingly, the minority judgment considered that it was not dealing with the situation where the State had failed to take reasonable legislative measures to progressively realise the right to housing, because it had already taken such measures, but rather that it had failed to meet its obligations established under such legislation (being the Housing Act and National Housing Code).

29. The case before the Constitutional Court concerned subsidies which had already been allocated to the applicants under housing legislation, but because of “*the egregious failure of the Municipality, qua organ of state, to comply with its constitutional obligation to give effect to the right to housing, as encapsulated in the reasonable measures enacted by the State*”¹³ Majiedt J considered that they were entitled to an effective remedy for the infringement of “*their vested rights to a house, granted more than 20 years ago in terms of the national housing policy*”.

Majiedt J also referred in this context to section 237 of the Constitution which requires that all “*constitutional obligations must be performed diligently and without delay*” and cited *Nokotyana v Ekurhuleni Metropolitan Municipality* [2009] ZACC 33; 2010 (4) BCLR 312 (CC) as authority which “*establishes a close relationship between socio-economic rights and section 237 of the Constitution*”.¹⁴

30. As I understand it, the decision of *Thubakgale* does not affect the obligation imposed by the common law on a Municipality to secure vacant possession in favour of a person who it has identified as being entitled to occupy and take

¹² The court was referring to the interpretation given to similar qualifications to socio-economic rights, in other provisions of the Constitution, in the cases of *Mazibuko v City of Johannesburg* [2009] ZACC 28; 2010 (4) SA 1 (CC) at para 48 and 49 citing *Minister of Health v Treatment Action Campaign (No 2)* [2002] ZACC 15; 2002 (5) SA 721 (CC)

¹³ *Thubakgale* at para 89

¹⁴ *Thubakgale* at para 86

transfer of an RDP house, as in the present case.

In other words, while *Thubakgale* restricts the remedy available to a person allocated a RDP house to contempt of court proceedings for the enforcement of a court order against the appropriate authority, there remains an entitlement to insist on that authority securing vacant possession and, because of its common law obligation, the authority may of its own volition bring such an application to court.

31. However, the allocation of an RDP house by the municipality will not secure vacant possession for the beneficiary if someone who has unlawfully occupied it enjoys protection under PIE.

32. The court in *Thubakgale* noted that because the High Court order to provide the applicants with housing did not form part of the appeal, it could not overturn the initial order granted which required the Municipality to do just that.

It however held that:

“In the context of socio-economic rights, the mere adoption of reasonable legislative and other measures gives content to those rights. And reasonableness is the only standard that can be invoked judicially in challenging what was done by the state pertaining to socio-economic rights.”¹⁵

(at para 166)

and that the;

“only route through which socio-economic rights may be enforced by the Judiciary is the review of measures taken by the State on the ground of reasonableness”¹⁶

(at para 166)

¹⁵ Relying on *Mazibuko*

¹⁶ The minority judgment of Majiedt J at para 81 and 89 considered that the case before it went beyond *Mazibuko*.

33. The Constitutional Court further held (at paras 168, 169, 170 and 186) that the High Court was not entitled to order that the applicants receive a house from the Municipality because that order was;

“at odds with the jurisprudence of this Court on the role played by the courts in enforcing socio-economic rights.”¹⁷

and that the applicants would only be entitled to:

*“a reasonable action undertaken within available resources to progressively realise those rights”;*¹⁸

or an order to

“seek the eviction of the unlawful occupiers”¹⁹

34. The effect of *Thubakgale* is that the Municipality or a person who has been allocated RDP housing or other forms of subsidised housing must apply to evict the unlawful occupier.

However, provided the occupier claims protection under PIE no eviction is likely to occur from State owned land (if the occupier is homeless) for as long as the authorities are unable to provide temporary emergency shelter.

And therein lies the rub, for a number of interrelated reasons.

35. Firstly, there are already some 1.2 million people in Gauteng whose names are on a waiting list for RDP housing²⁰. The list was introduced in 1996.

¹⁷ *Thubakgale* at para 170

¹⁸ *Thubakgale* at para 169

¹⁹ *Thubakgale* at para 193. The other alternative raised by the majority decision at paras 186 and 193 of bringing contempt proceedings against the Municipality for a failure to comply with the High Court order to provide housing by a particular date would only have been possible if the order to provide the houses was competent to begin with.

²⁰ The MEC for the Gauteng Department of Human Settlements disclosed in a written reply to a question tabled in the Provincial Legislature during early August 2022 that 1.2 million people have put their names on the waiting list for RDP housing; 256 651 did so between 1996 and 2000. From 2001 to 2010 another 310 637 people put their names down and since 2011 to 2022 a further 696 372 names were added.

However only 10 000 housing units are built annually.

Because of this enormous variance, the housing allocation policy has been revised to prioritise those who had applied for housing between 1996 and 2000.²¹

Leaving aside the prospect of a significant change in budget allocation or the adoption of more vigorous planning and development of low cost housing schemes, the arithmetic is clear: It will take another quarter of a century for the 256 651 people whose names were put on the list between 1996 and 2000 to receive houses before the other 1 million get their opportunity.

36. Another factor is that someone who has been provided with temporary emergency shelter is likely to remain there indefinitely. This results in bottlenecks preventing others from receiving emergency accommodation unless new shelters are provided either on available land or other land is acquired; bearing in mind that there is case law which requires accommodation to be provided within reasonable proximity to where the occupier was living at the time.

The structuring of the National Housing Code read with the Housing Act and related initiatives enables authorities to provide for temporary emergency shelter in cases of natural disasters and is also used in cases of PIE evictions. But they compete with each other for a scarce resource as is evident from the need to provide emergency shelter for those rendered homeless in the wake of the recent floods.

Once provided with such shelter a person should, as the term implies, only remain there temporarily before progressing to more permanent housing and being eligible for subsidised housing as provided for in the Code.

However the authorities claim to be unable to provide for more permanent housing due to the enormous backlog mentioned earlier. In the result, those who have been provided with emergency shelter remain there for a considerable time, if not indefinitely.

²¹ Source: Also the MEC for the Gauteng Department of Human Settlements' written reply of August 2022

The common cause facts set out in a number of reported judgments confirm that those who have been given temporary emergency shelter are still there despite the passage of many years.²²

37. Finally, courts are confronted as a fact with mass land invasions of both State owned and private land. The present case involves just over 1000 households.

38. The competing rights, interests and obligations with which the present case is concerned may be identified as follows (and bearing in mind case law and the recent *Thubakgale* decision);

- a. the right of a person in actual possession of land not to be evicted without a court order;
- b. the right which those entitled to RDP housing have to evict under due process anyone in unlawful occupation;
- c. the right of the Metro as an owner of the land to free and undisturbed possession and not to be deprived of possession without a court order
- d. the obligation which the Metro has to provide vacant possession to persons who have been allocated RDP houses and to evict anyone in unlawful occupation;
- e. the obligation of the Municipality and other spheres of government to adopt reasonable legislative and other measures to give content to the right to housing²³ which, in the context of the National Housing Code and other initiatives, is to provide RDP and other subsidised forms of permanent housing for those entitled to it;
- f. the protective right conferred by occupation to an unlawful occupier who is

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²³ *Thubakgale* at para 166

otherwise homeless not to be evicted unless alternative accommodation is provided- this is in the nature of a basic prefabricated Wendy house type structure with a communal ablution facility immediately nearby. In *Mazibuko* the term used is “ *those most desperately in need* ” and in *Thubakgale* the term “ *desperately poor* ” is also used.²⁴

- g. the interests of those who put their names down for RDP housing or other housing allocations a long time ago to retain their position on the waiting lists and not be leapfrogged by others who may have never applied.²⁵

39. The stark reality in respect of State owned land is therefore:

- a. unless temporary emergency accommodation is provided to those who have invaded and occupied land and who would otherwise be homeless, no order of court evicting them on behalf of either the Municipality or the person who has been allocated the property will be granted;
- b. for reasons which will be discussed later, even if a legal distinction is drawn between “ *possession* ”, so as to protect an individual against an owner evicting without a court order, and “ *occupation* ”, so as to protect an unlawful occupier from eviction, once a spoliation order is granted possession (whether in the form understood for a mandament van spolie or otherwise) becomes *de facto* occupation under PIE and remains so until the authorities provide temporary emergency shelter;
- c. there is little prospect that temporary emergency accommodation will be provided within a period of six or even twelve months for the large number of people who require shelters due to the bottleneck described earlier- and possibly exacerbated in some metropolitan areas by the incidence of homelessness caused by the recent floods;
- d. in cases where occupation has occurred which is subject to PIE of land lawfully allocated under housing programs initiated by authorities under s

²⁴ *Mazibuko* at para 67; *Thubakgale* at para 17

²⁵ Under common law the underlying principle is that an occupier will be evicted from property if the applicant can show a better right to possession

26 of the Constitution, the fate of those entitled to the allocation is unbilically linked to the time it will take to provide the unlawful occupiers with temporary emergency accommodation. This might occur only after several years; festering even greater discontent on the part of those allocated housing and those who are still waiting for an allocation despite putting their names on waiting lists a quarter of a century ago.

- e. furthermore, the interests of those whose names are on lists for housing may not be fully ventilated or taken into account in the papers presented before a court, with the risk that they will be prejudicially affected by a court order despite not being heard or bringing their own counter-application for relief which might have regard to their constitutional rights in the application of PIE.²⁶

40. It is evident therefore that not one interested party can claim exclusivity to any overarching legal right or principle let alone a singularity in respect of all relevant constitutional values or protections under the several Bill of Rights provisions.

The rule of law decries the use of power or force whether it is to take the property of another or to take the law into one's own hands without due process. In short no-one is above the law, neither the spoliator who acts unlawfully and commits a criminal offence or an owner who without a court order evicts a person who is in possession of his or her property.

The keeping of public order is threatened in both instances and in both instances the conduct is unlawful in the broader sense. It cannot be correct that the least violent outcome wins the day because that would undermine the foundation of the rule of law and invite a state of lawlessness.²⁷

The rule of law requires compliance with the law not an abdication to power or anarchy; whether its source be government or individual groups. Moreover the Preamble to the Constitution adopts the foundational principle that "*every citizen*

²⁶ See under the heading "*Finding in respect of the Eighth Respondent Group*"

²⁷ See the analysis later of *Mbangi & Others v Dobsonville City Council* 1991 (2) SA 330 (W) which dealt with non-physical resistance on the part of an owner defeating an intruder's claim of peaceful and undisturbed possession for purposes of the mandament van spolie.

is equally protected by law", s 1(c) provides for the "(s)upremacy of the Constitution and the rule of law". and s 12(1)(c) expressly protects the right to freedom and security of person which includes the right to be free from all forms of violence "*from either public or private sources*".

All those who the housing policy has failed, whether it be a person who after 25 years is about to take delivery of an allocated RDP house or the destitute family who is homeless, will claim equal reliance on the foundational principles that they are entitled to a society based on social justice, democratic values, fundamental human rights where every citizen is equally protected by law and whose quality of life is improved (see the Preamble to the Constitutional) as expressly illustrated by the right to dignity under s 10, and the right of access to adequate housing under ss 26 (1) and (2) as well as to land under s 25(5).²⁸

Those whose land is being invaded and those who are being prevented from doing so without a court order will rely respectively on s 25(1) and s 26(3).²⁹

Social, political and economic dynamics

41. As already alluded to, the issues involve social, political and economic considerations which have broad ramifications. The extent to which the court

²⁸ Sections 26(1) and (2) read:

Housing

(1) Everyone has the right to have access to adequate housing.

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.

Section 25(5)

Property

(5) The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.

²⁹ Section 25(1)

Property

(1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.

Section 26(3)

Housing

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

should take these into account when called on to do so is ultimately informed by the socio-economic rights provisions in the Constitution which provide for the “*progressive realisation*” of the affected right having regard to available State resources.³⁰

42. In the present circumstances, the hopelessness, frustration and despair in which individuals seeking a roof over their heads, a most basic socio-economic right, find themselves and the extent to which this impacts on social stability ought to be taken into considered, but not at the expense of undermining the rule of law entrenched as it is by the Constitution.³¹

Then there is the unenviable position faced by municipal (and then provincial) authorities responsible for providing housing under various initiatives and legislative obligations. These include the provision of RDP housing, subsidised housing and emergency housing programs in circumstances where resources and finances are stretched while the number of people requiring housing has escalated, exacerbated as it was over the past two years by the COVID pandemic.

The court however cannot ignore that some of the root causes which have led so many to resort to land invasions and in some cases paying money to those who organise land grabs, are attributable to raised expectations due to either unfulfilled or unrealistic promises, corruption and other forms of maladministration that fall within the executive and administrative arms of government.

43. In *Thubakgale* the court was scathing of the applicant in the present case. Although Majiedt J was in the minority, there appears to be no quarrel with his factual summation of the present applicant’s conduct. At para 16 the following was said:

“The Municipality and its officials obdurately refused, over a long period of

³⁰ See s 25(5) in respect of property, s26(2) for housing, s 27(2) for health care, food, water and social security. Compare ss 29(1) and (2) in respect of education

³¹ See the specific provisions of the Constitution mentioned earlier

time and in the face of numerous court orders, to comply with their constitutional obligations and to take the requisite steps to correct the mismanagement and corruption that has led to the deprivation of the applicants' right to adequate housing."³²

44. In the present case there were allegations of maladministration and money changing hands to secure an improper allocation to a person not entitled to a RDP house or who already had another RDP house.

However, the relief to which these allegations has relevance required the joining of the Gauteng Province and this was not done. In the meanwhile, ongoing discussions ensued between the legal representatives which appeared to relate to providing housing within the development for those entitled to an allocation.

45. The Metro relies on the enforcement of rights of ownership and furthermore claimed to have brought the application in order "*to protect its Bye Laws and prevent people from taking the law into their own hands by invading the houses built by the applicant in compliance with its constitutional mandate*".

The applicant added that: "*Critically, it was estimated and agreed between the applicant and the intended beneficiaries that the first group of beneficiaries will be given their houses mid-August 2019*".

It also warned that the beneficiaries may themselves take occupation of the structures (even if incomplete) and that the conduct of those against whom the order was sought has the potential of disrupting peace in the area and disrupting the Metro's objectives. The legitimate concern was raised that should the Metro not be granted the order sought then there was a likelihood that unlawful activities would increase, that more people would be mobilised and invade the project which in turn would lead to the unlawful appropriation in the development of more homes and stands by others.

46. By contrast many in the first respondent group believed that they had a prior and stronger right to the houses than did the beneficiaries identified by the Metro.

³² See also para 15 and 39

It was also evident that some of the much older people had placed their names over 25 years ago on official waiting lists for RDP housing and believed that beneficiaries identified by the officials in the Metro had jumped the queue. In another case before me during the same urgent court week the respondents there, who had participated in an abortive land invasion on different land but within the same Metro, claimed that corrupt officials had improperly allocated homes and that there were also those who used their influence to obtain an additional property which they would then on-sell or rent out.

47. But it is also evident that those who have lawfully been allocated RDP housing in the Metro owned development, such as MK Veteran members and those to whom a Land Claims Court judgment applies, cannot take occupation if those who have resorted to land invasion are in fact homeless and have taken occupation on the development- at least not until temporary emergency shelter is provided.

48. In this context one should also take cognisance of the consequences brought about by PIE on existing real and personal rights.

Prior to the enactment of PIE, unlawful occupation was swiftly met with an urgent eviction application.

Now, provided there is unlawful occupation by a person claiming to be homeless, such occupier is likely to benefit from two or more years of occupation on the property before being provided with temporary shelter by a municipality, unless a court determines prior to then that the individual was not (and presumable is not still) homeless or that the extraordinary remedy of an urgent eviction under s 5 of PIE applies.³³

The reasons are that;

- a. an owner's right to prevent occupation of land is met if the other party can demonstrate a better right to be on it. In practical terms, the provisions of

³³ Section 5 of PIE does not appear to apply in the case of State-owned land.

PIE afford a homeless person a superior right to occupy and possess than that held by the actual owner, at least until (if the owner is the State) it is able to provide alternative temporary shelter;

- b. those who may have had poor but adequate shelter elsewhere at the time they unlawfully occupied the land in question in order to improve their living conditions, may well be unable to return to their former place by the time the case is ready to be heard, with the result that they are now rendered homeless. This may occur due to the length of time it ordinarily takes to enable their legal representatives to identify the large number of persons who have intruded on land and seek protection under PIE or to enable all the parties to be given a fair hearing.³⁴

The question therefore arises whether these consequences are also factors to be taken into account when considering what amounts to “*possession*”, when counter-spoliation may be resorted to and, insofar as PIE is concerned what constitutes “*occupation*”. The last question arises because if possession defeats the right to self-help *via* counter-spoliation then is it possible, realistically, for the landowner to bring an urgent application for eviction before “*possession*” hardens into “*occupation*” for the purposes of PIE and can the acquisition of occupation under PIE be suspended pending the case’s finalisation?

49. The upshot remains that courts are being called on to resolve these multi-faceted and complex social, political and economic issues by applying legal principles and legislation informed by our Bill of Rights.

The difficulty is that some legal principles are unlikely to have comprehended the type of situations which are being encountered. However some observations are apposite with regard to legislation.

Legislation

³⁴ In the present case it took some three months despite the original order having required the identification of affected respondents

50. The legislature is responsible for fashioning laws which implement national policy. The courts' responsibility when called on to do so, is to subject legislation to Constitutional scrutiny. Unfortunately the legislature has been slow to clarify its objectives in a number of important statutes. This has resulted in courts being called on to make sense, through a process of interpretation, of what should have been more clearly formulated by Parliament.³⁵

There has also been a failure to effect remedial legislation despite Parliament being given time to do so.

This arose in respect of land reform legislation where the Constitutional Court gave Parliament two years to re-enact the Restitution of Land Rights Amendment Act 15 of 2014.

The failure to do so has seen claimed land being unlawfully invaded with the consequence of adversely affecting the ability of claimants dispossessed of land under apartheid to reclaim ancestral land despite lodging claims for restoration as far back as 1998³⁶. If it is not possible to restore land to its lawful claimants then

³⁵ See criticisms levelled by the Constitutional Court and the Supreme Court of Appeal when obliged to make sense of statutes such as the Criminal Procedure Amendment Act regarding minimum sentencing, the Companies Act and the National Credits Act.

In *National Credit Regulator v Opperman and Others* 2013 (2) SA 1 (CC), which involved the interpretation of s89 (5) of the National Credit Act 34 of 2005, Cameron J in a minority judgment expressed the following in para 105:

"But even if constitutionally impermissible vagueness is not the result, then it seems there is little constitutional purpose in examining alternative meanings that will result in unconstitutionality or depriving the provision of the purpose for which it seems to have been enacted. There is then no particular constitutional imperative to squeeze a meaning from the provision. Rather, we must accept the words of the provision for what they say, even at the cost of accepting that the provision is ineffectual. It is better, in my view, to acknowledge the drafting error, and to leave Parliament to correct it".

³⁶ The land would have special significance to claimants because of cultural and other deep rooted attachments including the burial sites of ancestors and more immediate family members

See *Land Access Movement of South Africa and Others v Chairperson of the National Council of Provinces and Others* 2016 (5) SA 635 (CC); 2016 (10) BCLR 1277 at para 82 (LAMOSA 1) where the legislature was afforded two years to reintroduce the Bill. Parliament's failure to meet the time afforded resulted in LAMOSA 2 declaring the Act unconstitutional. See *National Assembly and Another v Land Access Movement of South Africa and Others* 2019 (6) SA 568 (CC); 2019 (5) BCLR 619. After that a private members Bill was laid but not pursued. See generally *Farao and Another v Regional Land Claims Commissioner and Others* [2020] ZALCC 16 at paras 3 to 6

the *fiscus* has to find the money to pay out a just and equitable compensation or to procure alternative suitable land.³⁷

THE FIRST RESPONDENT GROUP

The application

51. On 24 July 2019 the Metro brought an urgent application, without notice, for the grant of a *rule nisi* to operate with immediate effect. It sought orders against the first respondent or “*any other interested person/s or group/s*”;

- a. interdicting them from “*trespassing, invading, marking the structures and or settling on the complete or incomplete houses, slaps and vacant land*” on the Farm Rietfontein 153 (“*the development*”)
- b. interdicting them from intimidating, harassing, provoking or insulting the third to seventh respondents who are building contractors engaged at the development to construct in total some 5670 houses of which 670 were earmarked for MK Veterans.
- c. directing the removal of their markings on the houses and slaps and requiring them to remove their movable property from the sites, failing which the sheriff would be entitled to do so;

52. The Metro was unaware of the identities of those who were attempting to occupy the development and therefore;

- a. cited them as “*The Unknown Individuals Trespassing and/or Attempting to Invade and/or Settle on the Immoveable Property described as Farm*

In terms of the Restitution of Land Rights Act 22 of 1994 (“*the Restitution Act*”) the cut-off date for lodging land claims was 31 December 1998

³⁷ Section 33 of the Restitution Act obliges the court to have regard to all relevant factors including the market value of the land when determining just and equitable compensation. See generally *Florence v Government of the Republic of South Africa* 2014 (6) SA 456 (CC)

Rietfontein 153 (and also known as Palm Ridge Extensions 10, 18 to 30)".

- b. sought an additional order in line with the procedure identified by the full court in *Mtshali and others v Masawi and others* 2017 (4) SA 632 (GJ) at para 201, requiring those who intended opposing the application to identify themselves by name and physical address;

The applicant also sought an order which would automatically result in the joinder of any person who so identified himself or herself.

53. In addition, the Metro applied for an order directing the South African Police Services at Eden Park and the City of Ekurhuleni Metropolitan Police Department in Germiston (*SAPS* and *EMPD*) to prevent the "*unknown individuals*" cited as the first respondents from trespassing, attempting to invade, settle on, mark or taking occupation of any of the structures or of vacant land on the development.

54. The grounds for granting the order were set out in written reasons provided subsequently and will be repeated to some extent in order to provide context.

The Metro relied on its rights of ownership and contended that it had successfully thwarted all those who had attempted to invade the development.

The facts deposed to in support of the application were straight forward: In fulfilling its constitutional obligation under s 26 to provide adequate housing for those within its jurisdiction, the Metro bought and took transfer of the land on which the development is situated. It then proceeded to establish a township and contractors were appointed for both the civil works and to construct RDP houses.³⁸

55. The Metro had also identified the beneficiaries entitled to qualify for housing in the development. They are members of a group referred to in the papers as the Palm Ridge Community "*and other people who have been identified to qualify for*

³⁸ This refers to housing which forms an essential component of the Reconstruction and Development Programme, an integrated socio-economic upliftment program introduced in 1994 in order to establish a more equal society after the advent of democracy

the government grant and have passed the means test.”

In addition, there were a number of families, up to a maximum of 50, who were entitled to be relocated at the project under a Land Claims Court order granted on 16 April 2018.

56. By 22 July 2019, of the planned 6000 or so homes, some 1900 in varying degrees of completion had been built. As mentioned earlier, agreements had been concluded with the first group of beneficiaries in terms of which they would be given occupation by mid-August 2019.

The Metro avers that on the previous day, 21 July, members of the Palm Ridge Community advised the Metro's senior officials that unknown people were attempting to occupy the area and the structures, marking some of the homes with their names. Photographs attached to the papers show the names of individuals scrawled on the walls of the houses they intended appropriating.

57. The applicant also alleged that Palm Ridge community members intended to counter any attempt to invade the development by guarding homes and making their own marks on the walls.

58. The founding affidavit then described how the contractors were being constantly harassed and unable to carry out their work. It mentioned that criminal charges had been laid. The papers also revealed that the intervention of both SAPS and the EMPD had been sought in order to stabilise the situation and enable constructive engagement between the community and those seeking to invade the land. It is significant that these allegations were already made in the papers that were filed on the morning of 24 July 2019.

The Interim Order

59. Based on the disclosed facts this was a clear case for granting interim relief. The rule was to operate with immediate effect and those who failed to comply with the

order were to show cause on 1 August 2019 why they should not be held in contempt of court. Once again the court was conscious of the rationale for identifying those subject to the order.

60. On the return date the court room and the corridor were filled by people who said they were affected by the order and wished to have attorneys appointed to represent them. The rule was extended from time to time while the court remained concerned that there was still no proper identification of those who were opposing the application. This would obviously frustrate the effectiveness of the existing order because disputes could arise as to who identified themselves as falling into the category of persons cited as the first respondent. It could also prejudice the rights of those who had not come forward but were in fact were affected by the interim order.

61. It was therefore impressed on those wishing to oppose the interim order that they had to identify themselves. In this regard part of the order of 29 July provided that any persons or group who opposed the application were to identify themselves by name and their physical address when their legal representative delivered the written notice of opposition to the applicant's attorney of record.

62. However on the extended return date of 22 August 2019 it became necessary to expand on that part of the order requiring the identification of those who comprised the first respondent group of "*unknown individuals*". The following order was therefore issued:

1. *The rule nisi issued by the Court on 24 July 2019 is extended to 5 September 2019.*

2. *By 27 August 2019 separate lists shall be drawn of:*

2.1 *The identity of those persons who are represented by Mabuza Attorneys- together with their physical address, identity number and signature- and who fall within the description of the first respondent and contend that they should not be subject to the*

relief sought by the applicant. In addition the list must indicate the terms of the mandate given to the attorneys in respect of the relief such persons seek;

2.2 *The identity of any other persons who are represented by Mabuza Attorneys-together with their physical address, identity number and their signature- who do not fall within the description of the first respondent and are not affected by the order sought by the applicant. In addition the list must indicate the terms of the mandate given to the attorneys in respect of the relief they seek;*

2.3 *The lists shall further:*

- (a) *Be organised in such a way that they group together family heads and their dependents if any*
- (b) *In addition be grouped by reference to the community to which the persons belong or come from if they contend that their rights are determined by reference to membership of the community in question;*
- (c) *Identify the rights, if any, the persons seek to assert before the court as the basis for opposing the confirmation of the rule nisi referred to above;*
- (d) *Identify the rights, if any, the persons seek to assert before the court as the basis for any counter-application or extended relief and entitlement to be joined as a party;*

2.4 *The lists will be attached to an affidavit in respect of which the following further details are addressed:*

- (a) *A brief historical account of the relevant issues that affect the persons participating in these proceedings and the basis on which they seek to be joined if they are not among those who fall within the description of the cited first respondent and are not affected by the relief sought*

- by the applicant;*
- (b) *The rights they seek to assert in these proceedings, whether those rights are claimed by assertion or by reference to their infringement;*
 - (c) *Whether any counter-application or extended relief is intended to be sought by any category of persons, and if so which category, by means of a collateral defence, if any, including a brief outline in respect thereof.*
3. *The documents referred to above shall be delivered by no later than 28 August 2019.*
 4. *The parties will attend a hearing before Judge Spilg on 5 September 2019 at which such issues as are capable of being determined will be dealt with or at which the rule will be extended so that further affidavits may be filed, including any supplementary affidavit by the applicant.*
 5. *The costs of 16 August 2019 will be costs in the cause.*

63. It is unnecessary to recount events which resulted in the completion of the list of persons comprising the first respondent group or the filing of affidavits, including a supplementary founding affidavit by the Metro. Of importance are the issues raised in the respective affidavits filed and how this case came to be extended so as to involve a subsequent group of persons who were identified as the eighth respondent.

The first respondent's substantive issues

64. In their answering affidavits the first respondent group contended that;

- c. they were removed from the development after they had taken occupation of houses (whether complete or incomplete) and were therefore incorrectly cited as trespassers;

- d. they were unlawfully evicted because they had not been served with a court order and because they were entitled to protection under PIE;
- e. they had been spoliated and there could be no lawful counter-spoliation since they had been in occupation since 19 July 2019, and in any event the excessive measures applied to effect the counter-spoliation rendered it unlawful
- f. their belongings and goods had not been returned to them

65. Of moment is that the first respondent group contended that they had been on the property since the evening of Thursday 18 July 2019, which was a few days before the order was granted. Save for those who could demonstrate an actual allocation of an RDP house in the development, all the others claimed that they took occupation in order to protect their interests in ensuring a fair allocation of housing in the project and to prevent what they said was an imminent land invasion by others.

In other words, the stated objective of those who claimed to be on the development since the night of 19 July was not to occupy land to live on or because they were homeless; it was to prevent a land invasion by others in order to protect their right to a fair allocation of the houses as and when completed.

THE EIGHTH RESPONDENT GROUP

The litigation

66. On about 28 May 2021 the Metro contended that there had again been an attempted land invasion on the development by another group of people. The Metro requested that this group be joined in the proceedings since the interim order, which was still extant due to the ongoing litigation with the first respondent group, covered any ongoing trespass or attempted occupation of land.

67. I considered that the following order should be made as it was sufficiently open-ended to allow argument as to whether the applicant could effect such a joinder to the original proceedings:

1. *The application is postponed for hearing to 10 June 2021.*
2. *The rule nisi granted by Justice Spilg on 24 July 2019 is hereby extended to 10 June 2021.*
3. *The Applicant is directed to file an affidavit, if any, wherein it shall:*
 - a. *Show cause why any further parties should be joined to these proceedings. In particular:*
 - i. *The Applicant shall set forth explicitly when it became aware of the alleged invasion and/or occupation of Farm Rietfontein, also known as Palm Ridge Extensions 10, 12, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29 and 30 (collectively, "the property") by the alleged new occupiers;*
 - ii. *How it intends to identify these new parties; and*
 - iii. *The manner by which it intends to serve these new parties.*
 - b. *To the extent that the Applicant seeks to consolidate this matter with any new or further matters, it must show cause why such an order should be granted;*
 - c. *Set forth explicitly the circumstances which it alleges render the matter urgent and the reasons why it cannot be afforded substantial redress at a hearing in due course;*
4. *Costs are reserved.*

68. At the resumed hearing on 10 June 2021 the additional group were joined to the original application and the further course of proceedings was directed through several case management meetings.

69. Suffice it that an answering affidavit was filed by the additional parties who the Metro alleged had invaded the development. They came to be cited as the eighth respondent and referred to themselves as the "*Occupiers of the Immoveable Property Described as Farm Rietfontein 153 also known as Palm Ridge Extensions 10, 18 to 30*".

The eighth respondent's substantive issues

70. The persons comprising the eighth respondent group contended that;

- a. they could not be joined in the proceedings since they came onto the site in January 2020 and therefore are not persons cited in the application.

It was argued that the citation could only refer to persons who had trespassed or were about to trespass on the development in July 2019; not to anyone who did so some six months later

- b. even if they could be joined in the proceedings, the group comprising the eighth respondent were in occupation for over a year before then and consequently the provisions of PIE had to be followed before they could be lawfully evicted.

71. The answer to the point taken of mis-joinder because they were not trespassers overlooks that the citation refers to persons who may attempt to invade or settle on the development. The issue of whether an order granted some time earlier can have effect on subsequent groups of land invaders is considered later.

APPLICATION OF PIE TO THE FIRST RESPONDENT GROUP

72. The facts presented in the answering papers of the first respondent group reveal that they were not homeless save for a bald allegation in regard to an unidentified few who were not among those who claimed to have been on the land from the evening of the 18th to the morning of the 24th of July. Most resided in Katlehong or Thokoza and Vosloorus.

73. Of equal importance is that they did not intend to take possession of land in the development nor unlawfully occupy it. They claim to have been on the development only to prevent others who were about to embark on a land invasion from doing so.

Almost all in the first respondent group provided addresses. In the papers those who claimed to be in occupation over the critical period identified themselves as “*backroom shack dwellers*” and did not claim to be homeless- only that they were entitled to RDP housing (which itself would have required them to meet certain threshold requirements).

74. Accordingly at the time they were allegedly removed from the development without a court order no one in the first respondent group occupied in a manner contemplated by PIE and therefore did not enjoy the protection accorded under that Act.³⁹

POSSESSION AND COUNTER-SPOLIATION- GENERALLY

75. That leaves the questions of whether any of the first respondent group could rely on possession for the purposes of their counter-application under the mandament van spolie and also whether they could be lawfully counter-spoliated.

³⁹ Section 1 of PIE defines “*unlawful occupier*” to mean:

“*a person who occupies land without the express or tacit consent of the owner or person in charge, or without any other right in law to occupy such land, excluding a person who is an occupier in terms of the Extension of Security of Tenure Act, 1997, and excluding*”

In *Barnett v Minister of Land Affairs* 2007 (6) SA 313 (SCA) at para 38 the court held that the definition requires “*an element of regular occupation coupled with some degree of permanence.*”

76. While the first group may not have been occupiers for purposes of obtaining protection under PIE, and leaving aside for the moment the terminology they used, the question raised by their counter-application for spoliation is whether they were in possession (they used the term “*occupation*”) for the purposes of obtaining a spoliation order or to frustrate any attempt by the Metro to lawfully counter-spoliate.

77. In order to consider the issue it is necessary to identify the grounds on which parties are entitled to bring a spoliation application when contending that they were on the land, and not just as trespassers who have no intention to remain there.⁴⁰

At this stage equating the incursion of the first respondent group onto the land with acquiring possession rather than occupation and whether there is a distinction between the two begs one of the questions dealt with in the counter-spoliation decision of the Cape Full Court in *SA Human Rights Commission v City of Cape Town 2022 (5) SA 622 (WCC)*⁴¹. I will therefore refrain from doing so.

That case will be referred to as *SAHRC*.

78. It is preferable to first analyse the requirements which must be satisfied for the grant of a spoliation order and then deal with instances where the common law considers counter-spoliation to be lawful.

I will use the term counter-spoliation to refer to the regaining of possession without a court order by an owner, or person who was enjoying possession with the owner’s consent, and which depending on the facts may or may not be lawful.

The starting point is that binding precedent of the highest court to yet pronounce on the subject, which at present is the decision of the Supreme Court of Appeal (“*the SCA*”) in *Fischer and Another v Ramahlele and Others 2014 (4) SA 614*

⁴⁰ Lee & Honore, *The South African Law of Property, Family Relations and Succession* at para 18 refers to trespass as the unlawful *disturbance* of possession whereas spoliation is the unlawful *deprivation* of possession. I do not intend to suggest that trespass always bears this more limited meaning. It is however a convenient distinction for present purposes.

⁴¹ [2022] ZAWCHC 173; [2022] 4 All SA 475 (WCC)

(SCA), expressly recognises that there are circumstances where the common law allows a person to lawfully counter-spoilate⁴². This will be expanded on later.

The mandament van spolie

79. The mandament van spolie is a remedy provided by law to enable a person who had possession of corporeal or incorporeal property to regain possession.

The fundamental consideration is that no one is entitled to take the law into his or her own hands irrespective of the reason for regaining the property⁴³.

Accordingly the remedy is not concerned with the legal entitlement to possession; only that the applicant was deprived of possession without a court order.⁴⁴

80. The enquiry is a factual one not a legal one. This distinction is crucial because the mandament is concerned only with whether the applicant exercised possession as a fact.⁴⁵

A clear distinction is drawn between possession as a fact and the rights of possession which are rights that flow from such fact.⁴⁶

81. The factual enquiry is well settled. The court is required to establish *each* of the following;

⁴² Fischer at para 23

⁴³ In *Nino Bonino v de Lange* 1906 TS 120 at 122 the court said:

"It is a fundamental principle that no man is allowed to take the law into his own hands; no one is permitted to dispossess another forcibly or wrongfully and against his consent of the possession of property whether movable or immovable. If he does so, the Court will summarily restore the status quo ante, and will do that as a preliminary to any inquiry or investigation into the merits of the dispute."

⁴⁴ *Ivanov v North West Gambling Bard and others* 2012 (6) SA 67 (SCA)

⁴⁵ *Yeko v Qana* 1973 (4) SA 735 (A)

⁴⁶ *Smit v Saipem* 1974 (4) SA 918 (A) at 926D-F; LAWSA vol 27 (Things) paras 71, 74 and 75 (authored by Prof. van der Merwe). The then Appellate Division in *Smit* adopted the traditional view expressed in Voet 41.2.2. Voet 41.2.2 (Gane translation) reads:

"Possession is a matter of fact, not law

Finally ownership is matter of law, but possession matter only of fact. ... So on the other hand the form of possession which is in question here is, when regarded in itself, wholly matter of fact, and not of law"

- a. whether the applicant was in *physical control* of the property (*corpus* or *detentio* requirement) at the time of dispossession. This is established where the applicant proves that at the time of dispossession;⁴⁷
- i. he or she was in actual physical possession
- which was*
- ii. peaceful and undisturbed;
- b. whether the applicant has the intention to derive some personal benefit from having physical control and what that means.⁴⁸
- c. whether such dispossession was without the applicant's consent and without a court order.⁴⁹

Peaceful and Undisturbed Possession

82. Throughout the analysis it is necessary to bear in mind that the determination of "*possession*" is a question of fact which includes the factual, as opposed to the legal, circumstances under which possession was gained. Once again a clear distinction must be drawn between the factual circumstances immediately preceding the taking of possession as opposed to the legal rights which had flowed from such circumstances.

The enquiry remains one to establish the nature of the appropriation which is necessary in a given set of circumstances to amount to the acquisition of factual peaceful and undisturbed possession.

83. Where the person is already in possession with the *factual* consent of the owner (i.e. leaving aside whether the rights flowing from such consent constituted a

⁴⁷ See generally *Impala Water Users Association v Lourens* NO 2008 (2) SA 495 (SCA) and *Nienaber v Stuckey* 1946 AD 1049 at 1056

⁴⁸ *Yeko*

⁴⁹ *Silo v Naude* 1929 AD 21

lease or other legal interest in the property) it is self-evident that physical possession has already occurred and the enquiry will focus on the mental element. The corollary is that cases which were concerned with dispossession arising where the applicant had at some stage acquired possession by consent (i.e. derivatively as in the case of holding-over) cannot give guidance as to when original possession is found to be taken away from an owner. Prof J Scott in his article “*The precarious position of a land owner vis-à-vis unlawful occupiers: common-law remedies to the rescue?*” 2018 TSAR 158 at 164 notes that:

“Our law is quite clear that the requirements for establishing sufficient control over property, whether movable or immovable, for the first time are more stringent than in the case where it has to be determined whether someone who established effective control has retained such control (Van der Merwe 101; Sonnekus and Neels 128, referring to Underwater Construction and Salvage Co (Pty) Ltd v Bell 1968 (4) SA 190 (C) and Cape Tex Engineering Works (Pty) Ltd v SAB Lines (Pty) Ltd 1968 (2) SA 528 (C) 1968 (2) SA 528 (C); see further Badenhorst, Pienaar and Mostert 278). In addition, the law generally poses more stringent requirements regarding the corpus requirement of possession (control) when control is established by means of an original method (as in the case under discussion) and not by way of derivative means (Van der Merwe 100; Sonnekus and Neels 128 ff; Badenhorst, Pienaar and Mostert 276).”⁵⁰

84. Being a question of fact a court is compelled to first identify which facts are relevant in order to establish whether an applicant had physical possession which is peaceful and undisturbed.

85. In *Mbangi & Others v Dobsonville City Council* 1991 (2) SA 330 (W)) Flemming J (at the time) held in relation to the distinct issue of whether the applicants had been in possession of part of an open veld on which shacks had been erected

⁵⁰ See also G Muller and EJ Marais “*Reconsidering counter-spoliation as a common-law remedy in the eviction context in view of the single-system-of-law principle*” 2020 TSAR 103 at 107 para 3.2

that:

“The authorities show a certain consistency in requiring not merely ‘possession’ as a prerequisite for the granting of a spoliation order, but ‘peaceful and undisturbed’ possession. It need, though, not be explicitly alleged (cf Burnham v Neumeyer 1917 TPD 630). What the requirement exactly entails is not frequently attended to. In Ness and Another v Greef 1985 (4) SA 641 (C) at 647 a Full Bench decided that it probably meant ‘sufficiently stable or durable possession for the law to take cognisance of it’.⁵¹

...

The applicant for spoliation requires possession which has become ensconced, as was decided in the Ness case. See also Sonnekus 1986 TSAR at 247. It would normally be evidenced (but not necessarily so) by a period of time during which the de facto possession has continued without interference. However, quite apart from evidential considerations, the complainant lacks protectable merit if the best he can prove is a (lawful or unlawful) self-help grab of possession to which there is continued resistance.⁵²

(emphasis added)

Although the court was also concerned with the application of legislation (in fact repealed by PIE) to the demolition of the shacks, this aspect was focused strictly on what constituted possession for purposes of the mandament van spolie.

86. In my respectful view Fleming DJP’s (as he later became) thought provoking analysis for requiring possession to be peaceful and undisturbed deserves attention.

Although the early case of *Nino Bonino*⁵³ was not expressly referred to, it is evident that the starting point of the court’s reasoning was the rationale for the mandament, namely;

⁵¹ At 335H-J. In *Burnham Bristowe* J indicated that it was unnecessary in a spoliation application (then petition) to expressly allege peaceful and undisturbed possession as long as this can be gathered from the context as a whole.

⁵² At 338A-B

⁵³ See footnote 41 *infra*

*The mandament van spolie finds its immediate and only object in the reversal of the consequences of interference with an existing state of affairs otherwise than under authority of the law, so that the status quo ante is restored. Thereafter other remedies can be used to enforce entitlements according to law*⁵⁴

It is this passage which commenced a train of legal and practical reasoning that in my respectful view is difficult to criticise.

Since its objective is to reverse the consequence of persons taking the law into their own hands, it follows that the termination of spoliation under the mandament forms a contrast to the court's ordinary task of enforcing a right or entitlement. It constitutes a contrast because the;

*“ Court interferes even to assist a party who should not have possession and, furthermore, in all cases (except where lawful authority is relied upon by the respondent) without taking any interest at all in what rights do or do not exist.”*⁵⁵

87. It is from this standpoint that Flemming DJP discerned the core element of the mandament and could therefore cogently explain why “*peaceful and undisturbed possession*” is a unitary concept and that possession is to be understood (interpreted) accordingly.

The following extracts present with respect the clearest understanding of “*possession*” for purposes of the mandament and are therefore *repeated in extenso*:

“That inverted approach finds its explanation and justification therein that the Court is not protecting a right called 'possession', but that in the interests of protecting society against self-help, the self-service undertaken by a spoliator

⁵⁴ At 336E-F

⁵⁵ At 336C-D

is stopped as being a justiciable wrong. Cf Van der Walt 1983 THRHR at 238, 239. As Huber Heedendaegse Rechtsgeleertheit 5.10.8 said in reliance upon the Digest:

*'If private persons could right and avenge themselves, the country would not be fit to live in.'*⁵⁶

*It is properly typified as a possessory remedy because it is available with reference to the protection of an existing state of affairs, provided it relates to possession. Cf Sonnekus TSAR at 235. It is therefore understandable even if in its origin (cf Van der Merwe Sakereg 2nd ed at 118) the remedy did not have a wide operation, that in its application to possession a very wide understanding of the idea of 'possession' is necessary. It is available even in cases where it is difficult to recognise any deprivation of true possession. Cf where electricity supply is cut off to premises used by a party, but of which he has no 'possessio'. ...*⁵⁷

Flemming DJP compellingly reasoned:

"Clearly then, if the mandament is not concerned with the 'enforcement' of 'possession' by a particular party, but with the neutralising of behaviour which, if tolerated, will cause that there will be 'no security against villainy' (Van Zyl Judicial Practice 3rd ed at 344), there is yet no logical reason why a spoliation order may be granted only if the possession which is interfered with has any particular quality. There must be an additional factor which caused the authorities repeatedly to refer to possession which is 'peaceful and undisturbed'. It seems sufficiently logical to find the answer therein that it is appropriate to regard it as actionable to disturb possession only if the possession clearly exists, if the possession is sufficiently firm or established to be deserving of protection with such a strong remedy.

As a matter of policy, the object of the remedy, fairness, or desirability, such

⁵⁶ At 336D-E

⁵⁷ At 336F-H

a blindfolded remedy should not be available to someone who is merely in the process of pushing another out of his possession and whose de facto control is not yet an accomplished fact. The remedy does not merit existence in order to give assistance to someone whose attempt to exclude his predecessor pro tanto is still uncompleted.

Much of what Huber said about the consequences of tolerated spoliation will clearly also apply to spoliators like the present applicants. They who for reasons of improving their own position flout the law and invade the rights of others commit the behaviour causing the very risk which Huber and Van Zyl mentioned. The justification for a spoliation order and the fairness is lacking where the complaining party is, as in the present case, still in the process of trying to wrest possession from the respondent. If the Court were to issue a spoliation order in favour of the party who is involved in a resisted process of trying to assert possession, the Court would not stop self-help but assist self-help.⁵⁸

(emphasis added)

88. In the earlier cases of *Mans v Loxton Municipality & Another* 1948 (1) SA 966 (C) at 977 Steyn J had expressed it as follows:

“... if the recovery is instanter in the sense of still being part of the res gestae of the act of spoliation then it is a mere continuation of the breach of the peace which already exists and the law condones the immediate recovery”

(emphasis added)

89. In the case of *Shoprite Checkers Ltd v Pangbourne Properties Ltd* 1994 (1) SA 616 (W) 1994 (1) SA at 620I-621A, Zulman J (at the time), adopting the statement in LAWSA, said that

“As further pointed out in para 57 of Law of South Africa, the objective

⁵⁸ At 336I - 337D

*element of possession consists in effective 'physical control or custody of the thing in a person's possession. The measure of control required is a question of degree and differs according to the circumstances of each case.'*⁵⁹

90. I believe that the following can be safely stated with regard to the mandament van spolie and its requirements:

- a. It is a summary remedy to restore the *status quo ante*, the object of which is to ensure that no one is entitled to take the law into his or her own hands by dispossessing another forcibly or wrongfully of property against that person's consent. (*Nino Bonino, Mans and Yeko*)
- b. By reason of its objective the court does not inquire into the merits of the dispute and does not concern itself with the legality of the possession immediately prior to the spoliation (*Nino Bonino. Mans and Yeko*)
- c. Since its objective is to reverse the consequence of persons taking the law into their own hands the court is not enforcing a right but "*interferes even to assist a party who should not have possession*" (*Mbangi* at 336C-D)
- d. Consequently the mandament is not concerned with the enforcement of a possessory right but solely with neutralising behaviour which undermines the rule of law. (*Mbangi*)⁶⁰
- e. It is beyond cavil that in the case of immovable property the requirements for obtaining a mandament are that the person dispossessed had "*factual control as well as the intention to derive some benefit from the land*" and that the "*possession must be both peaceful and undisturbed* (which

⁵⁹ This was the court's own emphasis

⁶⁰ There is disagreement among academic writers about whether the object of the mandament is also "to preserve legal order through the restoration of the possessory relationship between a person and particular property that has been disturbed by self-help". See Wille's Principles of South African Law (9th ed) p 454 (section authored by Prof CG van der Merwe and A Pope). In *Bisschoff & Others v Welbeplan Boerdery (Pty) Ltd* 2021 (5) SA 54 (SCA); [2021] ZASCA 81 at para 5 the SCA said that:

"The mandament van spolie is rooted in the rule of law and its main purpose is to preserve public order by preventing persons from taking the law into their own hands."

means) *physical possession that was sufficiently stable and durable for the law to take cognisance of it*" (*Fischer and Another v Ramahlele and Others* 2014 (4) SA 614 (SCA) at para 22 citing *Ness* at 647D – F with approval.

It will be recalled that Flemming DJP in *Mbangi* also adopted and applied *Ness*).

In *Bisschoff & Others v Welbeplan Boerdery (Pty) Ltd* 2021 (5) SA 54 (SCA); [2021] ZASCA 81 the SCA confirmed that:

*The requirements for the mandament van spolie are trite: (a) peaceful and undisturbed possession of a thing; and (b) unlawful deprivation of such possession. The mandament van spolie is rooted in the rule of law and its main purpose is to preserve public order by preventing persons from taking the law into their own hands.*⁶¹

Bischoff and, to the extent not covered by it, *Fischer* are the leading authorities on the subject and bind this court. It is therefore unnecessary in this context to go further and consider the cogent reasons advanced by Flemming DJP at 336I-337D of *Mbangi* for these requirements (see the extracts cited earlier)

- f. The enquiry is a factual one not a legal one and insofar as the measure of effective physical control required is concerned, that is a question of degree which differs according to the circumstances of each case (*Yeko* and *Shoprite-Checkers*)

91. In my view the difficulties that appear to have been experienced by some cases in applying these requirements to the facts arose because the debate about the meaning to be given to the word "*possession*" and whether it is to be equated with possession in other legal senses has obscured the fact that the term is

⁶¹ At para 5. The court also referred to its previous decisions in *Tswelopele Non-Profit Organisation and Others v City of Tshwane Metropolitan Municipality and Others* [2007] ZASCA 70; 2007 (6) SA 511 (SCA) at para 22 and; *Ngqokumba v Minister of Safety and Security and Others* [2014] ZACC 14; 2014 (5) SA 112 (CC) at paras 10-12. for the proposition that the mandament is rooted "*in the rule of law and its main purpose is to preserve public order by preventing persons from taking the law into their own hands.*"

qualified and defined in the case of the mandament by the requirement that it be “*peaceful and undisturbed*”.

In other words, being an entirely factual enquiry the court is enjoined to consider all the facts holistically to determine whether the person who claims to be spoliated had “*peaceful and undisturbed possession*”- in short, the one element of the factual enquiry informs the other.

92. Similarly the factual background to how peaceful and undisturbed possession came to be enjoyed (not by reference to its legal attributes but as to its factual circumstances (see earlier)) and whether it is still enjoyed informs the factual enquiry concerning the changed intention with which an applicant in a mandament case holds the property and whether such holding remained peaceful and undisturbed once the changed intention became evident.⁶²

A court must also bear in mind that a mandament is in the form of final relief which means that the applicant for such an order bears the evidentiary burden based on the *Plascon-Evans* rule⁶³. In the present case it is the first respondent.

93. Cases such as *Residents of Setjwetla Informal Settlement v Johannesburg City* 2017 (2) SA 516 (GJ) at 519E mention that granting a mandamus where there is a failure to obtain a court order by a person dispossessed, particular when it is an Organ of State, is “*to prevent self-help; to foster respect for the rule of law; and to encourage the establishment and maintenance of a regulated society*”⁶⁴.

However regard should also be had to the reasons given by Flemming DJP for the need to first establish if peaceful and undisturbed possession has in fact been acquired by the person relying on the mandament. The relevant extracts were set out earlier and include the following:

⁶² By way of illustration: A lease is terminated by effluxion of time and on the day of its expiry the lessee changes the locks so that he can continue occupying and prevent the owner from entering. Compare the facts in *De Beer v Firs Investments Ltd* (1980) (3) SA 1087 (W) where a new occupier unbeknown to the landlord came onto leased premises and installed locks. Coetzee J (at the time determined the case on the basis of lawful counter-spoliation where the landlord, on getting wind of what had occurred replaced the locks with its own.

⁶³ See *Fischer* at para 24

⁶⁴ At para 17

“ It seems sufficiently logical to find the answer therein that it is appropriate to regard it as actionable to disturb possession only if the possession clearly exists, if the possession is sufficiently firm or established to be deserving of protection with such a strong remedy.

As a matter of policy, the object of the remedy, fairness, or desirability, such a blindfolded remedy should not be available to someone who is merely in the process of pushing another out of his possession and whose de facto control is not yet an accomplished fact. The remedy does not merit existence in order to give assistance to someone whose attempt to exclude his predecessor pro tanto is still uncompleted.⁶⁵

94. These passages also appear to address the concerns that the common law mandament van spolie of Roman-Dutch law ought to be further tempered in a Constitutional democracy.

As set out earlier the incursor onto land, the owner of the land and in the present case those entitled to take occupation of the land under s 26 of the Constitution (pursuant to RDP legislation itself initiated in order to give effect to such right and also in respect of those to whom the Land Claims Court judgment applies⁶⁶) all have legitimate claims to protection afforded under the Bill of Rights provisions.

Flemming DJP identified issues of fairness in the application of the mandament by reason of its requirement of peaceful and undisturbed possession and further identified the point of juridical intervention where taking the law into one's own hands (by a person attempting to intrude onto land without lawful cause or a court order) can be met with lawful resistance.

⁶⁵ At 336I-337B

⁶⁶ This is a judgment of that court which is required to be respected and enforced under the provisions of the Constitution. The Land Claims Court judgment was presumably given under the provisions of the Extension of Security of Tenure Act 62 of 1997) which is also legislation born out of s 26 of the Constitution. If not under ESTA then the judgment may have been given pursuant to the provisions of the Restitution of Land Rights Act 22 of 1994 (the “Restitution Act”) which is the legislation introduced to give effect to s 25 of the Constitution, primarily in order to provide restitution of land to those dispossessed as a consequence of past racially discriminatory laws and practices.

95. How the intrusion can be resisted was also considered by Fleming DJP. After stating that

“The question necessarily arises what type and degree of resistance would cause the requirement to be lacking. I doubt whether it is possible to define that in vacuo. The reason why the requirement exists, cognisance of the reason why the remedy exists, and also the lack of authority for a contrary view, point thereto that less than physical resistance is sufficient.”

The judge continued:

It would be a sad state of the law indeed if only he who is able and willing to help himself by physical resistance or by intimidation or other threat is not dealt with as a spoliator, whilst the Court's assistance is given to him who takes possession despite resistance in a form which pays heed to the undesirability of physical encounters and the proprieties of civilised behaviour.

96. It will be recalled that in *Ness* attempts were made to negotiate with those who were intruding on the land. Fleming DJP cited a passage from *Muller v Muller* 1915 TPD 28 at 30 which noted that necessary resistance;

“is not force in the sense of overwhelming force,... all that a man need do is to protest - to object - and there is no necessity for him to use force so as to lead to an affray.”

In other words, possession is not peaceful and undisturbed when a person attempting to invade land is met with officials who require him or her to desist, engage in negotiations to have that person leave peacefully or fence off the area.

97. In *Ness* the person claiming to be spoliated had entered the premises against the owner's explicit prohibition and removed the owner's locks which had been put there three days later to keep him out. This was done after ignored the notice put

up by the respondent earlier that same day and knowing full well the reason for it. The court held that the individual's possession had not become sufficiently ensconced to have completed his spoliation of the premises.⁶⁷

98. The facts in *Mbangi* are relevant.

On 28 June a single shack had been erected on municipal land. The authorities made it known that they would come and demolish it. Those involved on behalf of the person whose shack had been erected and on behalf of others who intended occupying the land in question then met with the town clerk and entered into discussions. In the interim the shack was removed and no further shacks were erected at that stage.

During the morning of 2 July discussions broke down between the group and the town clerk. On reaching a deadlock a "sit in" was staged while at the same time 21 further structures were erected on the land. On 3 July the municipality demolished five of the structures; purporting to do so in terms of then applicable legislation.

While demolishing was in progress some of those on the land requested a 48-hour postponement in order to remove the structures themselves. A 24-hour moratorium was agreed to enable the removal to take place. However during this period none of the existing structures was removed while another 13 had been fully erected and a number of people had commenced occupying the shacks. A spoliation application was brought to prevent the continued demolition.

Flemming DJP noted that between 28 June and 3 July there was no physical tussle for possession but a preparedness to discuss, explain and hopefully persuade those intending to occupy to desist but at no stage did the municipality abandon or qualify its intent to repel those invading the land. After the agreed hiatus ended the intention to demolish was implemented with "*fair promptness*".

The court commented that;

⁶⁷ Ness at 649 D - F

“a response which is firm but is tempered by some reasonableness is the manner in which a public authority with a sense of responsibility and who deals with a matter with some social or even political sensitivity will conduct its immediate retaliation to ward off spoliation of its property. I will quote authority for the proposition that it is not so that only an immediate physical counter-attack of the spoliator is relevant.”⁶⁸

99. The facts established in the present case do not reveal acts by the Metro which are not proportionately commensurate in attempting to stem the invasion of people onto the RDP development nor degrading of any individual, save possibly in an individual instance that cannot inure to the benefit of 880 households.

It therefore is unnecessary to decide whether the manner in which authorities resist those seeking to unlawfully settle on the land vitiates the principle enquiry as to whether there has been *“peaceful and undisturbed possession”* to found the mandament. Any invasion of an enforceable right by a person belonging to the first respondent group can still be separately pursued. As the law relating to mandament van spolie stands, it would not affect the enquiry as to whether, as a fact, *“peaceful and undisturbed possession”* has been established by the first respondent.

100. I return to consider *Setjwetla*. The court found that the applicants enjoyed possession for the purposes of a mandament van spolie but in doing so it only concerned itself with the physical attributes of possession, not whether the applicants had enjoyed peaceful and undisturbed possession nor whether they could have been lawfully counter-spoliated.

The case was decided on an urgent basis and while the applicants contended that they had been in occupation for a number of years this was disputed by the municipality. The municipality contended that it had thwarted a land invasion and that possession had not occurred. It will be recalled that in *Fischer* the court considered that having regard to the issues, it would have been more

⁶⁸ *Mbangi* at 335E

appropriate to hear evidence on whether, and if so by when, the dwellings had been occupied.⁶⁹

101. In my respectful view the outcome of this aspect of the case must be based on *Fischer*, on *Fisher's* approval of an essential aspect of the Cape Full Court decision of *Ness* and on the authority of this court *per* Flemming DJP in *Mbangi* as to the requirements for a mandament van spolie.

This court is bound by the SCA decision in *Fischer*. Furthermore it can only depart from the *ratio* in *Mbangi* if it is clearly or manifestly wrong⁷⁰. For the reason already given I find it to be an eminent exposition of the law and its rationale.

There have been recent decisions in this Division which have not undertaken a full analysis of the mandament van spolie or dealt with the authorities which set binding precedent in this Division unless found to be clearly wrong.

102. This case is concerned therefore with whether, as a fact, the persons who intruded on the land either individually or as a group, gained peaceful and undisturbed possession - which is a unitary enquiry not dependent on isolating the meaning of possession but rather having it understood and qualified by the requirement of being factually peaceful and undisturbed as well as taking into account the nature of the resistance, if any, which prevented that from occurring.

This identification of the issue is drawn from the reasoning in *Mbangi* and the requirement, which either has not been fully considered or analysed on occasion, that the initial spoliator must gain peaceful and undisturbed possession- an event which factually cannot occur in the face of *instanter* resistance, which may include non-physical resistance.

⁶⁹ *Fischer* at para 17. The SCA referred this issue back for the hearing of oral evidence

⁷⁰ By contrast, *SAHRC*, although a Full Court decision is not binding on this court but is of persuasive value because it emanates from another Division

Counter-spoliation

103. Before considering the mental element required for the mandament, it is necessary to also consider whether, and if so when, the owner or person in charge can lawfully counter-spoliate without obtaining a court order.

104. Earlier mention was made of *Bischoff* being the leading case on the subject of the mandament van spolie and to the extent that this judgment does not consider certain applicable principles but the *Fischer* judgment then the latter case is also binding authority.

Fischer at para 23 expressly recognises counter-spoliation as part of our law. The relevant passage reads:

“A land invasion is itself an act of spoliation. The Constitutional Court has recently reaffirmed that the remedy of the mandament van spolie supports the rule of law by preventing self-help. A person whose property is being despoiled is entitled in certain circumstances to resort to counter-spoliation.”

The court cited *Yeko* at 735B-D and *Ness* at 647I-649H in support.

105. It will be recalled that in *Mans* at 977 the court recognised a situation where the true owner is entitled to recover possession without a court order and also identified the stage where that would no longer be lawfully possible. The court said:

“... if the recovery is instanter in the sense of still being part of the res gestae of the act of spoliation then it is a mere continuation of the breach of the peace which already exists and the law condones the immediate recovery, but if the disposition has been completed, as in this case where the spoliator, the plaintiff, had completed his rescue and placed his sheep in his hands, then the effort at recovery is, in my opinion, not done instanter or forthwith but is a new act of spoliation which the law condemns.”

106. Generally the issue concerns whether “*instanter*” is to be construed narrowly or more broadly.

There are at least two important cases in the Gauteng Division which consider that the fundamental issue is whether recovery occurs in the course of the transaction consisting of the intruder taking possession (i.e. while still part of the *res gestae*) and not by reference to a finite time line. While *Mans* left it open, this is certainly the way *De Beer* was prepared to decide the issue.⁷¹

The cases are *De Beer* and *Skosana and another v Otto* 1991 (2) SA 113 (W).

It will be recalled that *Mbangi* did not turn on counter-spoliation but whether the requirements of peaceful and undisturbed possession had been established having regard *inter alia* to the use of non-physical resistance. However the issues raised there would certainly be inconsistent with a narrow concept of *instanter*.

107. *De Beer* was concerned with the appropriation of premises in a shopping mall. Coetzee DJP proceeded to distinguish between penning sheep and locking commercial premises and said:

“When one deals with a flock of sheep, such as in Mans’ case, it is understandable that, once the sheep are on the property of the spoliator and are safely locked up on his own property, any act thereafter by which the owner is deprived of their possession is a fresh spoliation and not, as Steyn J found, a continuance of the original breach of the peace. I think the position must be viewed somewhat differently when one deals with the kind of thing involved in this matter. The respondent can only occupy its own premises by locking it up.

108. Coetzee DJP proceeded to find that the removal of the intruder’s locks by the owner with its own locks occurred during the *res gestae* period. The court did not then correlate that to a time period in order to determine if it was too long. The case is clear authority in this Division that regard is had to whether counter-

⁷¹ *De Beer* at 1092F-G. See *Mans* at 978

spoliation occurred during the *res gestae* period. As stated by the court:

All this seems to me to be part of the res gestae. It is really one transaction consisting of applicant taking occupation by installing locks and shortly thereafter a removal of those locks and installation of other locks on behalf of the owner. No appreciable time elapsed and it does not appear to me to be a case where the applicant was so firmly ensconced in his possession as the plaintiff was in Mans' case (supra) by the time that the spoliation took place. It is difficult to think what else the respondent should or could have done at the time when the first spoliation (i.e. installation of the locks) took place. The possession of space in the respondent's building is involved and the only fact of possession is the control which is exercised through the locks and keys. All that respondent could do was to put in its own locks at a time when it became possible to do so without perhaps getting its maintenance engineer involved in a bout of fisticuffs or an assault which I think was wise to avoid. I think its action qualifies as having been taken instanter. To insist that immediately after the applicant had installed his own locks, the transaction was complete and any further action on the respondent's part to obtain control of its property is a fresh spoliation, is to my mind an unrealistic evaluation of the situation. It smacks of an overly-detached arm-chair view as the occurrence should not be too closely equated to a brawl where the exchange of blows is the essence."

(emphasis added)

In a subsequent passage the court mentioned the need to also consider the situation at hand. This has relevance to metropolitan areas where the relative cost of providing full-time security on all its properties may not be warranted and it therefore may not become immediately aware of a land incursion. This is what was said:

"This is not a simple case of the owner of a single dwelling, in which he lives, being available at all times to repel intruders and to potential

spoliators there and then. I think there is much to be said for the suggestion in Mans' case that a more liberal construction of instanter should be given to a true owner exercising his rights of recovery of his property – particularly in a case like present where the applicant against the clearest expression of the respondent's prohibition, deliberately takes the law in his own hands." ⁷²

Ness was decided by the Cape Full Court after *De Beer* and *inter alia* applied its reasoning .⁷³

109. In *Skosana* there had been a land invasion of property, shacks were already erected and were being occupied. This was around the beginning of August 1990. The municipality proceeded to demolish the shacks on numerous occasions during that month. But on each occasion they were rebuilt or in the process of being rebuilt before they were again demolished by the authorities. The last demolition took place at the beginning of September.

The court dealt with the matter interchangeably by reference to the intruders not having established peaceful and undisturbed occupation and by reference to the owner having acted *instanter* in the circumstances. But, once again, *instanter* was not determined by reference to a time period but by reference to whether the demolitions had occurred during the course of the *res gestae*. The court held that the demolitions were sufficiently close together to constitute *instanter* and said:

"I also agree with Mr Cloete that respondent's conduct constituted prompt, instanter and lawful measures against unlawful spoliation by people who were taking the law into their own hands. At the time their shacks were demolished they were not in peaceful and undisturbed possession of the respondent's ground. The position had not been stabilised and the applicants, as spoliators in the process of committing spoliation, cannot be heard to shout 'spoliation, spoliation'.

⁷² At 1092 F-G

⁷³ At 648F-

Mr Redding submitted that a previous order against the local authority, by which the local authority was restrained from demolishing the shacks, had the result that the situation became stabilised. I do not agree.

*The respondent from the outset, continuously and timeously, took appropriate steps to counter the applicants' illegal conduct. The applicants' occupation did not become peaceful and undisturbed. (See in this connection *Ness and Another v Greef 1985 (4) SA 641 (C)*.)⁷⁴*

110. The Full Court in *SAHRC* held that *Ness* was clearly wrong and that *instanter* must be narrowly construed.

111. If this court is to follow *SAHRC* then it too must find that previous decisions from this Division are clearly wrong; in particular the case of *De Beer* (and its application of *Mans*) which is directly in point as well as *Skosana* and *Mbangi* by reason of its *ratio*. By reason of the urgency of the matter, understandably none of these cases were considered in *Setjwetla*, which therefore cannot constitute binding precedent in this Division.

This court can however deviate from *de Beer* and the other mentioned cases if there is a constitutional value which ought to be taken into account that alters the outcome, bearing in mind that *De Beer* was decided in 1980 and the other cases prior to our Interim Constitution.⁷⁵

112. Firstly, *Mans* (which *De Beer* applied) appears to be clear. *Instanter* has reference to whether the transaction of gaining peaceful and undisturbed possession has been completed and it cannot be completed until the incursor's possession is indeed peaceful and undisturbed. There would be no logic to the requirement of peaceful and undisturbed possession to found the mandament if this was not so.

113. To find otherwise would then require a development of the common law if it did not conform to constitutional values. However *SAHRC* eschews that and finds that the law in fact applies the requirement of *instanter* narrowly.

⁷⁴ At 116G-E

⁷⁵ Act 200 of 1993

This takes one back to the decisions of Coetzee DJP in *De Beer* and Flemming DJP in *Mbangi* which with respect I am unable to fault either in their inner logic, in their understanding of competing interests or their analysis of how the mandament and the application of counter-spoliation produces fairness while fully appreciating that both parties wrestling for possession or resisting it (whether by physical or non-physical conduct) amount to acts of self-help during the existence of the breach of the peace by the initial spoliator (*per Mans* at 977) or where the intruder is still in the process of trying to wrest peaceful and undisturbed possession from the owner (*per Mbangi* at 3361-337B).

114. Earlier I attempted to set out the complexities involved when considering the competing constitutional positions each party in the present case could invoke simply in relation to the rule of law which jurisprudentially has been well understood over a lengthy period by courts in modern democracies with both written and unwritten constitutions (such as England).

No party in the present case raised a constitutional issue and therefore it falls outside the *lis* before me, save to regard *Mbangi* as *prima facie* correctly weighting the rule of law considerations to be taken into account, and therefore finding that even now there does not appear to be a cogent basis to depart from it as binding precedent.

115. The question arises whether peaceful and undisturbed possession can ever be attained where the authorities immediately engage those intruding onto land, call on them to leave under pain of a court application and then hear their representations while insisting that they leave. To suggest that those coming onto the land can acquire peaceful and undisturbed possession while surrounded or otherwise confronted by the authorities who threaten to return is difficult to accept bearing in mind that the enquiry is an entirely factual one.

It is evident that a mere appreciation on the part of those seeking to intrude on land that the authorities might eventually come and remove them will not suffice. However practically, once the number of people trying to come onto the land

swells and the authorities realise that the intruders are not heading requests to desist then there is little that can be done other than to take reasonable steps to resist and in the meanwhile prepare urgent court papers. It is also unrealistic to expect court papers to be finalised and served the instant a few people try and enter property.

116. In *SAHRC* the court drew a distinction between possession for purposes of the mandament and occupation for PIE purposes. So too did van der Linde J in *Setjwetla*. I have already found that the issue requiring determination by a court is not what constitutes possession but what constitutes peaceful and undisturbed possession. It is therefore unnecessary to deal with possession *per se* and its relationship to occupation.

117. However, since the enquiry is concerned with whether peaceful and undisturbed possession has occurred, it is possible that occupation for the purposes of PIE can occur despite the occupier, at least for the purposes of the mandament, not gaining peaceful and undisturbed possession.

And the moment occupation under PIE occurs, its protective umbrella unfolds and will, by reason of its provisions, automatically frustrate a counter-spoliation.⁷⁶

This anomalous situation is a product of the legislation, not the common law. It also instils an understandable apprehension that going to court and obtaining an interdict will do little to stop people erecting structures in the interim, as was attempted in *Mbangi* and *Skosana*, and now by reason of PIE secure for themselves the ability to remain on the land until the authorities provide them with temporary shelter.⁷⁷

⁷⁶ The converse does not apply. In terms of s 4(1) of PIE the Act only applies to a person who falls within the definition of an unlawful occupier. It is for this reason that counter-spoliation against a person attempting to possess but has not yet fallen within the definition of an unlawful occupier is unaffected by the terms of s 4(1). Section 4(1) provides:

(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.*

An *unlawful occupier* means in terms of s 1:

a person who occupies land without the express or tacit consent of the owner or person in charge, or without any other right in law to occupy such land, excluding a person who is an occupier in terms of the Extension of Security of Tenure Act, 1997 ...

⁷⁷ See *SAHRC* at para 73 which indicated that for purposes of PIE occupation may be satisfied by plastic and

There also appears to be no moratorium preserving the *status quo* once an eviction order is served.⁷⁸

118. The SAHRC case initially came before a Full Bench but the two judges could not agree and a Full Court was then constituted. The Full Court reached a unanimous decision.

119. The application was brought principally against the City of Cape Town which, through its officials and without a court order, had forcibly and in the most degrading and deplorable manner removed individuals from municipal land in Khayelitsha and demolished those structures that had been erected.

120. The City contended that it was entitled to avert an orchestrated land grab and prevent structures, which were either in the process of being erected or were completed, from being occupied by stopping those attempting to occupy the land from doing so and to demolish structures before they could be occupied. This was all done without a court order and relying on the common law self-help defence of counter-spoliation.

121. The issues before the Full Court related to the relief claimed in Part B of the application. Two of the significant orders sought were to declare that;

- a. *“the common law principle of counter spoliation is inconsistent with the Constitution, and invalid to the extent that it permits the eviction of persons from, and the demolition of, occupied structures.”*⁷⁹

Initially the order seeking to declare counter-spoliations unconstitutional referred to the eviction of persons from, and the demolition of, both

cardboard structures which could be erected in minutes. This could potentially occur prior to occupiers gaining peaceful and undisturbed possession while negotiations are taking place during the *res gestae* period (as occurred in *Mbangi*) even though this might be pursuant to the application of the SALGA guidelines.

⁷⁸ While there is law which prevents a party from taking steps to frustrate the grant of interdictory relief when papers are served, s 4(1) of PIE which provides that “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*” may be interpreted to override that the moment the intruder becomes an unlawful occupier as defined.

⁷⁹ SAHRC para 17

occupied and unoccupied temporary or permanent dwellings or shelters at the time of such eviction or demolition- not solely occupied structures.⁸⁰

- b. the demolition without a court order of the informal dwellings or structures that had been erected was unlawful, invalid and unconstitutional.⁸¹

122. The Full Court identified a crucial question to be whether officials of the City *“who visibly conducted themselves in such an egregious manner, acted lawfully, in terms of the common law defence of counter spoliation, or whether possession was lost and counter spoliation was no longer available to them and their actions required judicial supervision.”*

The court had earlier expressed its abhorrence of the City’s conduct in the following terms: *“... while the country was in the grip of a lockdown because of the Covid-19 pandemic, the third applicant,, naked and in full glare of the public and social media, was forcefully dragged out of his informal structure in a settlement in Khayelitsha, by officials of the City of Cape Town. They thereafter proceeded to demolish his structure with crowbars. That image has, profoundly, been described as reminiscent of the brutal forced removals under apartheid. That is the face of the common law defence of counter spoliation, as understood and applied, on which the City of Cape Town, the first respondent, relies for the summary demolition of the structure by its officials, who unilaterally determined that the structure was unoccupied. It is this incident, and conduct of a similar nature by the City of Cape Town ... and its officials, that the applicants seek to have declared unlawful and, insofar as such conduct is permitted by the remedy of counter spoliation, that such remedy be struck down as being unlawful and unconstitutional.”*⁸²

123. The issues before the court were whether, and if so in what circumstances

⁸⁰ It initially read: *“the common law principle of counter spoliation is, insofar as it permits or authorises the eviction of persons from, and the demolition of, any informal dwelling, hut, shack, tent, or similar structure or any other form of temporary or permanent dwelling or shelter, whether occupied or unoccupied at the time of such eviction or demolition, is inconsistent with the Constitution, and invalid”*. See SAHRC at para 9 and also the original terms of the order at para 8

⁸¹ SAHRC at para 17.

⁸² SAHR at para 1

can, an unlawful dispossession (i.e. a spoliation) be lawfully repelled by means of counter-spoliation.

124. The Full Court had received an ambivalent reply from the applicants as to whether they were arguing for a development of the common law in regard to counter-spoliation. The court however found that its application of *Yeko* would be consistent with the Constitution and consequently found it unnecessary to develop the common law.⁸³

125. Many of the findings of law in *SAHRC* are not substantially dissimilar to those expressed earlier. The Full Court found that:

- a. Counter-spoliation is a continuation or part of the *res gestae* in regard to the despoiler's appropriation of possession and for that reason must be *instanter*;⁸⁴
- b. Counter spoliation can only be brought against someone who has not yet gained peaceful and undisturbed possession of property;⁸⁵
- c. The requirement of possession to enable a person to bring a mandament van spolie does not necessarily require actual physical occupation of a structure;
- d. Nonetheless if the intruder does not yet exercise effective physical control then counter-spoliation will be lawful.⁸⁶
- e. The mere entry onto land with the intention to occupy was insufficient to constitute peaceful and undisturbed possession;

126. However *SAHRC* held that counter-spoliation cannot be brought against a person who was *de facto* in possession with the intention of securing some

⁸³ *Id* at paras 29 and 67. See also para 16

⁸⁴ *SAHRC* at para 29 citing *Yeko v Qana* 1973 (4) SA 735 (A) at 739. See also at para 25 of *SAHRC* where in summarising *Yeko* the court said: "However, in limited circumstances, a party may take the law into his/her own hands by using the defence of counter spoliation against the wrongful disturbance of his/her peaceful and undisturbed possession. In these circumstances counter spoliation would be a continuation or part of the *res gestae* and is *instanter* to the despoiler's unlawful appropriation of possession."

⁸⁵ *SAHRC* at para 38 relying on *Ness and another v Greef* 1985 (5) SA 641 (C) at 647CE

⁸⁶ *Id* at para 66

personal benefit⁸⁷. It therefore found that counter-spoliation cannot be invoked once structures have been erected even though occupation has not occurred⁸⁸, and an erected structure “*need not be completed nor occupied*”⁸⁹ since “*incomplete structures*” will suffice⁹⁰.

127. There are a number of fundamental difficulties in applying SAHRC.

One that immediately comes to mind is how the *ratio* is to be applied in cases such as the present where structures have already been erected, not by the intruders, but by the authorities and are waiting to be handed over for occupation at the time the intruders attempt to appropriate these homes for themselves. Does the bringing in of some personal possessions suffice, even if they include a bed or cooking utensils?

In my respectful view no general principle can be formulated which accounts for all the diverse factual permutations that may arise in spoliation cases. It is precisely for this reason that the enquiry is entirely factual and case sensitive as to when peaceful and undisturbed possession occurs in any given situation.

128. Another difficulty relates to the Full Court’s finding that:

“The structure need not be completed nor occupied for the possessory element of spoliation, as defined in Yeko, to be perfected”

is based on a particular passage in *Yeko* which the court held to be an unequivocal statement that the “*possession element in spoliation is not possession in the juridical sense but is constituted by the mere holding with the intent to derive some benefit*”⁹¹

129. The passage relied on from *Yeko* reads:

⁸⁷ Id at para 29 citing *Yeko* at para 739

⁸⁸ Id at para 32

⁸⁹ Id at para 84:

“The structure need not be completed nor occupied for the possessory element of spoliation, as defined in Yeko, to be perfected.”

⁹⁰ Id at para 66

⁹¹ SAHRC at para 54.

“The very essence of the remedy against spoliation is that the possession enjoyed by the party who asks for spoliation is that the possession enjoyed by the party who asks for possession must be established. As has so often been stated by our Courts the possession which must be proved is not possession in the juridical sense; it may be enough if the holding by the applicant was with the intention of securing some benefit for himself”⁹²

(emphasis added)

I regret not being able to reach a similar conclusion with regard to its meaning. My reasons are set out in the following paragraphs.

130. Firstly the court in *Yeko* also said that:

“All that the spoliatus has to prove, is possession of a kind which warrants the protection accorded by the remedy, and that he was unlawfully ousted”⁹³

(emphasis added)

After making this statement the SCA immediately embarked on factual enquiries both in respect of whether the respondent had acquired peaceful and undisturbed possession at the time he was spoliated and also whether he had the intention to possess for his own benefit. This would suggest that the earlier passage in *Yeko* relied on in *SAHRC* for its fundamental conceptions of the case may have been taken out of context.

These fundamental conceptions include the statement that only the fact of possession and not its basis is relevant and that broadening the scope of *instante* to beyond an immediate time determined response relative to the initial act of spoliation would amount to an impermissible *legal* enquiry into the

⁹² Id at para 56 citing *Yeko* at 739E

⁹³ *Yeko* at 739G

merits of possession by the original spoliator.

On an analysis of *Yeko* this however does not appear to be the case.

131. The issue before the court in *Yeko* concerned whether the respondent was, at the time of spoliation, in peaceful and undisturbed possession in order to gain a benefit for himself. It found that the respondent already had peaceful and undisturbed possession of the premises, not just by reason of being in effective physical control at the time of spoliation but because:

*“On the evidence of the appellant’s own witnesses the respondent was on 7th August trading in the shop. His stock was on the shelves and two of his employees were behind the counter serving customers. These positive facts standing alone clearly demonstrate possession.”*⁹⁴

132. That was the easy part of the factual enquiry, the court noting that the nature of the respondent’s possession therefore was not of a kind which might have been subject to counter-spoliation.⁹⁵

More difficult was determining *factually* the basis on which the respondent held possession of the shop, since the appellant claimed that the former was holding as his employee. This was the predominant focus of the appeal court’s enquiry as demonstrated by the following passage:

“Considerable reliance was, however, placed on the respondent’s failure to prove the lease alleged by him. But it was not necessary for him to have proved the lease. The proof of such an agreement of lease would, of course, have assisted the respondent in proving the animus retentionis for his own benefit and that he did not merely have control over the building as a cleaner in the employ of the appellant. But, apart from the failure to prove the lease, the evidence, in addition to the fact of his actual trading in the building, does show that as a result of negotiations between the parties the respondent had

⁹⁴ *Yeko* at 739H

⁹⁵ *Id* at 739C-D

reason to believe that he was entitled to occupy the building and therefore intended to remain in occupation thereof for his own benefit. In regard to the nature of the agreement entered into by the parties the evidence of the appellant is unacceptable in view of the second letter written by him to the respondent. This letter, although difficult to interpret, reveals conduct on the part of the appellant which is inconsistent with an agreement of employer and employee. It states that the appellant had agreed with the respondent that the latter could occupy the shop. This statement affords corroboration of the respondent's story that there was an agreement between the parties by virtue of which he was entitled to occupation. It follows that respondent in entering into occupation had the intention to remain in possession in order to secure a benefit for himself.⁹⁶

133. In my respectful view, Yeko's disinterest in legal considerations of lawfulness means no more than that. It does not mean that the facts to establish peaceful and undisturbed possession for personal benefit are ignored; quite the contrary as the above extracts cited from Yeko illustrate (from 739H-740B). They also reveal that the *factual* basis for all the elements of possession required under the mandament were scrutinised by the court. This included that the respondent was found as a fact, not as a matter of law, to be in peaceful and undisturbed possession.⁹⁷

134. Yeko discounted the possibility of lawful counter-spoliation because it was conceded that the respondent had enjoyed peaceful and undisturbed possession.

One would have expected that if the court intended to determine that a more liberal application of *instanter* could not be accepted then it would have pertinently dealt with *Mans'* suggestion to that effect. It should also be noted that Yeko was determined on an appeal brought by the landlord with no appearance by the party despoiled. Furthermore cases such as *Mans* were neither mentioned in the judgment nor cited in counsel's heads of argument.

135. In my respectful view Yeko was concerned with a straight forward and limited

⁹⁶ *Id* at 740A-B

⁹⁷

issue which did not require the court to consider *Mans* or the issues SAHRC seek to extract from the judgment.

This conclusion appears to be reinforced by *Fischer*, where the SCA pertinently pointed out that (in the case before it) the court *a quo* had been bound by the Full Court finding in *Ness* and actually cited passages from *Ness* that possession, on which the mandament is founded, “*meant physical possession that was sufficiently stable and durable for the law to take cognizance of it*”.

Fischer also recognised that a “*person whose property is being despoiled is entitled in certain circumstances to resort to counter spoliation*” and unqualifiedly provided *Ness* as an illustration⁹⁸. The SCA actually referred to *Ness* in the same footnote as *Yeko* without raising any distinction between the two either as to reasoning or application.⁹⁹

136. At its core, SAHRC considers that giving *instanter* a more liberal construction in cases where the true owner attempts to exercise a right of recovery offends the principle that a court is not concerned with the legality of possession.

It however seems that in *Ness* Steyn J was concerned with the actual manner of response which may or may not occur before possession has become solidified *factually*, a factual situation which depended *inter alia* on whether the person remains in possession derivatively after an entitlement to do so (say by consent) has terminated or whether such person attempts to gain original possession (i.e. without having any prior consent to do so).

In my view such an enquiry is not concerned with the lawfulness of possession. Rather it has to do with the facts under which the person came onto the land because that informs a court as to whether factually the resistance by the owner has prevented peaceful and undisturbed possession from being solidified.

SAHCR accepts that each case depends on its own facts. In my respectful view this is one of the facts that a court must consider, not as demonstrating whether

⁹⁸ *Fischer* at paras 22 and 23 against ftns 14 and 16

⁹⁹ *Id* at para 23 against ftn 16

the person trying to gain possession was lawfully entitled to, but because the presence or absence of prior consent affects whether the owners response did or did not occur during the *res gestae* period.

Furthermore, on analysis it appears that all the cases actually have regard to whether the owner had given consent to prior occupation. But in each case it is purely part of a factual enquiry concerned with the owner's reaction to the initial attempt to dispossess. In *Ness Steyn* J did no more than consider whether the manner of response may differ in cases where someone already enjoyed possession derivatively as opposed to trying to come onto the property for the first time.

As indicated earlier, this does not determine the lawfulness of the possession, only the relative response of the owner which would satisfy the requirement of *instante* in cases of derivative dispossession and in instances of direct dispossession. It remains an enquiry into the facts irrespective of whether the outcome yields a legal entitlement; since that is irrelevant.

137. Some of the other concerns in following *SAHRC* are;

- a. Still in relation to *Yeko*. If *Yeko* intended to lay down that only the fact of possession was relevant and the only enquiry concerned the intention of the possession, then its first set of findings would have been unnecessary.

Indeed the passage from *Yeko* that is relied on said that the applicant must prove peaceful and undisturbed possession as a fact and that "*it may be enough*" if the holding is with the intention of securing a benefit for himself; not that it always will be so. In cases of derivative possession, as was *Yeko's*, it was accepted that possession had been peaceful and undisturbed because it had been by consent.

- b. *SAHRC* also concluded that counter-spoliation and the rule of law are diametrically opposite constructs.¹⁰⁰

¹⁰⁰ See *SAHRC* at para 60

in my respectful view that is not necessarily the case. Lawful counter-spoliation occurs during a hiatus of the rule of law where the initial spoliator attempts to wrestle possession from the owner (see the cited extracts from *Mans* and *Mbangi*) or because it is competent to apply non-physical resistance which prevents the acquisition of peaceful and undisturbed possession during the *res gestae* period (see the 1915 TPD case of *Muller* and its adoption and application in *Mbangi*, as well as *De Beer*).¹⁰¹

- c. SAHRC found that the act of counter-spoliation must take place immediately in response to the act of spoliation¹⁰². In my respectful view that begs the question of whether the initial act of spoliation has in fact been completed and whether non-physical resistance frustrated it from so occurring- bearing in mind that non-physical resistance should not inure to the benefit of a person who is attempting to invade land, more especially because the former does not take the law into his or her own hands nor abrogates the rule of law- only the land invader does.
- d. As already alluded to in its various applications, SAHRC did not take into consideration non-physical resistance, as recognised in *Muller* and explained in *Mbangi*, to the question of whether peaceful and undisturbed possession could have occurred

138. Finally on this aspect, the reasoning in *Mbangi* and its conclusion that non-physical resistance precludes the spoliator from claiming peaceful and undisturbed possession also satisfactorily addresses the difficulty of an owner having to be everywhere at once in trying to stop an orchestrated land invasion. It also meets the responsibility borne by State bodies to first attempt negotiating with intruders without jeopardising the *status quo*, at least in regard to issues of

¹⁰¹ Although SAHCR considered that the City was required to engage in peaceful negotiations with occupants under SAGA guidelines (at para 63), the general principles which the case identified as entitling a party to obtain a mandament or for a lawful counter-spoliation do not appear to recognise this form of resistance as disrupting any attempt to gain peaceful and undisturbed possession during the *res gestae* period.

¹⁰² SAHRC at para 44

possession for the purposes of the mandament.

Intention to Possess

139. It is unnecessary to traverse this requirement of possession for the purposes of the mandament save in the one aspect relevant to the first respondent's case.

In *S v R* 1971 (3) SA 798 (T) at 801B to F Joubert AJ (at the time) went into some detail with regard to the intention to possess. After identifying the mental element to comprise the *animus possidendi* the judge referred to case law and the old authorities in support of the proposition that the *animus possidendi* refers to the "intention to hold an object for oneself and not for another" and concludes: "It is clear therefore from our common law authorities that the *animus possidendi* consists of the intention of keeping a corporeal thing for oneself. *Welgemoed v Coetzer and Another*, *supra* at p. 712; *S. v Nader*, 1963 (1) SA 843 (O) at p. 847.¹⁰³

FINDING IN RESPECT OF THE FIRST RESPONDENT GROUP

140. On the first respondent's version, they were disaffected when it appeared that persons from distant areas were to be allocated RDP houses. They had understood that the houses would be allocated to those who were living in the vicinity and who had registered their names for housing since as far back as 1996. A group from ward 61 then planned to invade the development but the leadership in the first respondent group sought to discourage them and said they would be protecting some of the houses if there was an attempt to invade. This appears to have taken place on the night of 17 July 2019

¹⁰³ At 801B-F. The court also pointed out at 801F-G that:

"There is obviously a fundamental difference (in scope) between the mental elements of natural possession and civil possession. The affectus or animus tenendi of natural possession is directed towards the exercise of the physical control over a corporeal thing for the possessor as his own (animus rem sibi habendi). The mandament is concerned exclusively with natural possession. See Voet 41.2.3(Gane translation) ftns 2 and (b) and 41.2.5"

141. On 17 July¹⁰⁴, being the official date of the pre-allocation of houses by the Provincial Department, members of the first respondent group sought assurances from the officials that those in the area who had been on the lists for a lengthy period would be allocated houses on the development. The officials refused to do so.

142. Frustrated by what they contended was a lack of transparency and evidence of corruption in the allocation process, some in the first respondent group entered the development on the night of 18 July to occupy some completed and semi-completed houses for the sole purpose of;

*“ensuring that the houses were protected and that the applicant and the Provincial Department did not proceed to allocate the RDP houses in circumstances where there was a live dispute as to the allocation process and the lack of transparency”.*¹⁰⁵

143. They claim that only “on or about 20 July” and after partial occupation had occurred, the Metro’s Human Settlement MMC came on the site and asked about the reasons for occupation. In other words only one full day had elapsed since some of the first respondent group claim to have entered the development.

In answer to the MMC, they replied that they had been ignored as “shack backroom dwellers and also stated that the applicant was not transparent on the allocation of houses since there was corrupt behaviour (by its officials and) that the applicant has failed to allocate and /or assure the first respondent who are on the waiting list.”¹⁰⁶

I continue to quote from the answering affidavit (at paras 40 to 41):

“Mr Mpya (the MMC) indicated that the applicant will not tolerate the invasion and that in consequence the applicant will make sure that the first respondent

¹⁰⁴ In the AA at para 35 the first respondent group allege that this occurred “On or about 18 July”. In context it appears that the date would have been the day before.

¹⁰⁵ AA para 35

¹⁰⁶ AA para 39

is removed from the houses

On or about 23 July the first respondent heard rumours that the applicant intended to ambush them on 24 July at 3:00 am. The purpose of the ambush was to evict them.”¹⁰⁷

144. The first respondent alleges that EMPD’s vehicles started to surround the RDP development at about 04h00 on 24 July.

The informal leadership of the first respondent group then approached the EMPD and asked what was happening, and in particular if they had any eviction order or court documents. The officer said that they were waiting for their commander but produced no court order.

At about 09:00 the “*anti-invasion unit*” of the Metro arrived and surrounded the RDP houses. Those of the first respondent group who were present (and not identified) then gathered around to hear the police. An officer started addressing them through the loud hailer and then gave them to the count of two to disperse failing which rubber bullets would be fired. It is evident that despite being addressed, not dispersing and then being given to the count of two to then do so they still did not. Rubber bullets were fired and the group dispersed. It is claimed by the first respondent group that one of them was seriously injured by a rubber bullet, but despite the denial on the part of the Metro, no extrinsic evidence was produced.

The first respondent group claimed that they had left behind furniture, groceries, and gas stoves including beds, blankets and other valuable items belonging to some of the members who had used them in the RDP houses.¹⁰⁸

Factual finding

145. None of those who were attempting to occupy the development could have been under any misapprehension that Metro officials were bent on not allowing

¹⁰⁷ The affidavit did not embellish on what was meant by ambush

¹⁰⁸ AA para 47

entry onto the land and would take steps to resist such attempts.

Already on 17 July, the day before they sought to take possession of RDP houses, it was evident to the first respondent group that the Metro would resist attempts to frustrate the allocation of RDP houses in the development to anyone other than those on the lists and that listening to their grievances did not diminish such resolve.

This was the commencement of the non-physical resistance to claims by those in the first respondent group who considered that they were entitled to take the houses. It is also evident that by marking RDP houses with a name and not by reference to a number indicates the precarious nature of any alleged possession. It is unlikely to have been peaceful and undisturbed if it still required the allocation of a name to the house rather than a number.

146. On the facts I am satisfied that on 17 July the Metro engaged with the representatives of the first respondent and there is no suggestion that the Metro could then have anticipated a land invasion. Immediately representatives of the Metro became aware of the incursions onto the development they then approached those responsible and engaged them to desist.

The number of land invaders escalated and the Metro then took two significant steps. The one was to prepare papers and launch the urgent application. The other was in the meanwhile to remove those persons who were attempting to establish a foothold.

147. Furthermore, the first respondent group claimed that some of them (who save for one or two are not specifically identified) took possession, not to keep a site for themselves but in order to protect it for the category of persons lawfully entitled to RDP houses.

Accordingly, even if they were in peaceful and undisturbed possession which is disputed by the Metro, their intention to possess factually (since that is the enquiry) amounts to no more than securing control for the benefit of a category of

persons irrespective of whether or not they personally were beneficiaries. They therefore did not seek to possess with the *animus possidendi* required for natural possession.

148. It is unnecessary to decide whether the first respondent group may have had another form of relief open to them. Their case was framed on the basis of PIE (which has been dealt with earlier) and the mandament; no other ground was raised or pursued.

149. In the premises, and accepting the first respondent's allegations for present purposes, albeit that they bear the burden in respect of the counter-application for a mandament van spolie, the first respondent group neither had gained peaceful and undisturbed possession nor was such possession with the required *animus possidendi*.

It was therefore lawful for the Metro to counter-spoliate and consequently unnecessary to have actually served a court order on all or any of those who either came on the land on the night of 18 July or at the time the counter-spoliation was in progress on 24 July even though a court order was obtained that morning.

THE EIGHTH RESPONDENT

150. The eighth respondent group expressly alleged that they were already on the land by January 2020. This was stated in a number of passages in the answering affidavit.¹⁰⁹

The Metro only brought an application to have them joined in May 2021.

151. The allegation that they were on the development since January 2020 is not disputed. In its replying affidavit the Metro contends that the initial rule granted in July 2019 preceded their occupation and in its terms covers the subsequent land invasion by this group and binds them.

¹⁰⁹ AA para

152. The difficulty I have with the Metro's argument is that there is no allegation that the eighth respondent group were aware of an order made some six months earlier or that they were part of that group, and if the interim order was binding on all subsequent incursors who did not form part of the original July 2019 land invasion then at the very least they should have been given notice of that immediately they attempted to occupy or the Metro should have then counter-spoliated before peaceful and undisturbed possession was acquired. .

153. A further difficulty with the Metro's argument having regard to the facts of this case is that, if the matter had been finalised before the 2020 January land invasion, the persons identified as the first respondent would have been limited to those whose names were contained on the list. That being so, a final order would have been either granted or refused and the interim order on which the Metro relies to bring the eighth respondent within its purview would not have existed.

154. I appreciate the difficulty faced by municipalities which have to contend with repetitive land invasions on the same property and who cannot be expected to maintain the expense of security guards on all its properties round the clock.

However, I have not heard argument on the effect of an order which expressly states that it is intended to apply to all future attempts at land invasion by persons other than those against whom the order sought was then directed. The interim order granted by this court did not do so nor did the founding affidavit expressly indicate that the order sought was intended to cover all future land invasions by the same persons or others, not just the one then alleged to be in progress.

155. It however appears to me that the surest way of giving notice to the world is through legislation. It is for laws of general application to exclude from the purview of PIE land which is earmarked for development of housing as contemplated by s 26(1) and (2) of the Constitution.

That will then leave for consideration whether the protection from eviction under PIE should trump the provision of housing to a person who, in terms of laws

passed to give effect to s 26, is entitled immediate occupation of a house then being occupied unlawfully by another person.

156. In the present case the Metro waited for more than a year before attempting to notify the persons who took occupation in January 2020 that they were in breach of a court order made in July 2019 and, despite believing that the order was binding on this group, took no immediate steps in January 2020 to either prevent them from occupying or to have them evicted.

157. I indicated to the parties that it was necessary to revise part of this judgment. I am taking the opportunity to also add some further observations to this aspect of the case.

158. Those who may be subject to the reach of an application brought to protect the present and future rights of a land owner against an indeterminate number of persons who have infringed those rights, or in the future may do so, is determined by a number of generally inter-related considerations. They are:

- a. The manner of citing persons who are intended to be made subject to the application;
- b. The case made out in the applicant's papers for the relief sought and whether limited to present transgressors or extended to those who may subsequently infringe the owner's rights;
- c. The method of serving both the application and any interim or final court order on alleged transgressors and those who may only transgress sometime in the future;
- d. The requirement of notice to those whose present conduct is complained of and those who in the future may conduct themselves in the same way;
- e. The right afforded of a hearing to both currently affected parties and those who in the future may be affected by an interim or final order granted in favour of the landowner;

- f. The requirement that court orders must be effective;

In this context, once a competent order is made then all those to whom it is directed are subject not only to its terms but also subject to contempt of court proceedings provided its requirements are met.

159. By way of illustration, if the terms of an interim order prevent not only those presently attempting to trespass on land from doing so but also anyone who in the future may try and do so, then;

- a. will the order bar any future trespass on the land by others and entitle the owner to promptly have the sheriff remove them from the land without returning to court?
- b. will the owner be entitled to bring contempt of court proceedings against anyone who comes onto the land after the order is granted even if they were not part of the original group against whom the order was made?

Citation

160. Earlier, reference was made to *Mtshali*. The case acknowledged that the citation of the occupiers as an unknown group occupying a particular property had become standard as evidenced by the citation of parties in cases coming before the Constitutional Court and the SCA.

The court also considered that, absent prejudice, the failure to first ask condonation for citing parties in such a manner was competent where it was not reasonably possible to ascertain the identities of individuals to whom the application relates.

161. In researching for this case a number of recent English cases which have grappled with similar issues came up. These cases have ranged from trespass and nuisance injunctions brought against unlawful encampments by Romani communities to environmentalists who came onto open land in order to protest

against its development, but whose individual identities in each case are unknown.

Furthermore the injunctions have been directed not only at those who are already on the land or are threatening to, but also those who after the grant of an interim or even final injunction may fall within the same category of persons to whom the original order applied. This would obviate the necessity for the landowner to bring a fresh application¹¹⁰ for the invasion of land rights based on the same grounds, albeit by subsequent waves of people from the same or a similar group or even individuals who trespass (or create a nuisance) with the same prohibited objective as identified in the injunction that was granted.

162. The English courts accept, as we do, that interim injunctions can be granted against groups of unknown persons. While its use may be traced to landlords seeking to obtain injunctions against squatters and trespassers, more recently it has been applied to cases involving online fraud and internet-defamation.

The common denominator is that despite the unlawful act being readily discernible, many of the perpetrators, for one reason or another, are not readily identifiable. The situation in respect of nuisance is little different and therefore the discussion will only refer to trespass.

163. In order to prevent a trespass, the respondents must at least be described with reasonable precision by reference to the act complained of so that a person will know if his or her conduct is sought to be precluded and will also know to which land the prohibition relates. In this way a respondent may be cited as:

“PERSONS UNKNOWN (being persons other than those listed in the Schedule to the Claim Form dated 14 July 2004 therein) causing or permitting

Hardcore to be deposited other than for agricultural purposes on land known as plots 1-11, Victoria View Caravans, ...

¹¹⁰ The protection would also be afforded to a person who holds a superior right of possession to that claimed by the trespasser

Mobile homes or other forms of residential accommodation to be stationed other than for agricultural purposes on the said land; or

Existing caravans, mobile homes or other forms of residential accommodation on the said land to be occupied other than for agricultural purposes.”¹¹¹

The claim (application) may also identify different categories of unknown persons, one of whom was described as:

“ PERSONS UNKNOWN entering or remaining without the consent of the claimants on, in or under land acquired or held by the claimants in connection with the high speed two railway scheme shown coloured pink, and green on the HS2 land plans at <https://www.gov.uk/government/publications/hs2-route-wideinjunctionproceedings> (“the HS2 land”) with the effect of damaging and/or delaying and/or hindering the claimants, their agents, servants, contractors, sub-contractors, group companies, licensees, invitees and/or employees”¹¹²

Service and notice

164. Although the citation of unknown persons who are sufficiently identified by reference to the conduct complained of is competent, it remains necessary to;

- a. effect service of an order on a group in a manner that would result in it coming to the attention of any affected persons who did not deliberately shut their eyes and ears (I will refer to this as constructive notice, albeit in this more circumscribed sense);
- b. individually identify as soon as practicable all those against whom the application was directed with sufficient detail by reference to ID number or other form of official identification, address, contact number, signature and

¹¹¹ *South Cambridgeshire District Council v Gammell And Others; The Mayor And Burgesses Of The London Borough Of Bromley v Winnie Maughan And Others* [2005] EWCA Civ 1429 at paras 21 and 32 to 33

¹¹² *High Speed Two (Hs2) Limited and another v Four Categories Of Persons Unknown -and others* [2022] EWHC 2360 (KB) at paras 61 to 63.

the household of which the person is a member.

165. In *Mtshali* the court also explained the need to identify at the earliest opportunity those to whom the application was directed.¹¹³

If it was not reasonable possible for the applicant to identify each person against whom the application was directed, then that could be done by the Sheriff in the return of service or by requiring those opposing the order to do so in the form of a signed list to ensure certainty.

However in the past there have been occasions where a number of persons who, for whatever reason, still decline to provide any of their details despite being affected by the terms of an interim order.

This is one of the reasons why courts would wish to ensure that orders are effective in respect of all those who had trespassed, occupied or were about to and who had been served at least in terms of an order of substituted service or, possibly, were aware of the order. The latter possibility will be dealt with when considering those who subsequently attempt to trespass or occupy land in respect of which an order has already been made.

166. This however raises the interrelated issues of service and notice.

Where it is not reasonably practicable to serve on each person who is trespassing or about to trespass in cases where all the requirements for an interim interdict are present, our practice allows for substituted service.

Instances where this has arisen include mass land invasions or a refusal to receive any notices by a group of persons who have occupied land or where there is a reasonable apprehension of harm to those affecting service (where for example there is evidence of assault, harassment or intimidation).

167. While substituted service in respect of unlawful land occupation or attempted

¹¹³ See *Mtshali* at paras 190 to 201 for more comprehensive details of the cases and the manner of securing service as well the individual details of those affected by the order

trespass generally requires;

- a. the terms of the order being announced over loudhailers in the proximity of those gathered on the perimeter of the land, or who have already entered the land;
- b. copies of the order being displayed, together with other necessary information regarding the application or where a copy may be obtained, in prominent positions along the perimeter, within the boundaries or on each structure depending on the circumstances.

168. While this may be effective service on those affected persons present at the time of service, the difficulty arises where subsequently another wave of land invaders attempts to occupy the very same land.

Two considerations arise.

The first is that a court has already granted an interim order based on acknowledging, at least *prima facie* though open to some doubt, the superior right of the owner to his or her land and that those who are seeking to occupy it would be doing so unlawfully.

The other consideration is that PIE only protects an unlawful occupier once the act of "*occupation*" occurs. Until then, those seeking to occupy as part of a mass land invasion or otherwise have no rights which can defeat the landowners right to approach the court to stop their trespass.

169. The tension is therefore clear: Owners, who have already obtained an interim order or even a final order, have established their right to vacant possession against any attempt at unlawful trespass while those who wish to occupy land out of desperation or as part of a mobilisation would need to establish a sufficient foothold on the land so as to acquire a right to remain on it through PIE and thereby defeat the landowners right- at least for as long as a court holds that they are homeless and there is no suitable temporary shelter available.

Nonetheless, these tensions should be seen against the intent of a court order

that was originally granted, if valid, to bring within its ambit not only those who were attempting to trespass and occupy at the time but also, at the least, those who were about to join the land invasion and had knowledge of the essential terms of the court order (which would be to prevent occupation or trespass on the land in question by unauthorised persons).

170. It is in this regard that recent developments in English case law illustrate the legal issues which need to be addressed, at least in their jurisdiction. As I intend to demonstrate they are not identical to ours nor is their resolution likely to be the same.

However the underlying jurisprudential considerations are not that dissimilar and warrant consideration in the context that under our jurisprudence the desirability of affording protection will come down to the fundamental rule in our common law that where a right has been infringed the law will provide an effective remedy¹¹⁴ provided the other party has an opportunity to be heard and that there is no other prejudice (as reinforced in the Bill of Rights provisions of s 34 and the application of s 9(1) and if applicable in a given circumstance, s 26(3)¹¹⁵).

171. There are four Court of Appeal cases and a further Supreme Court case¹¹⁶ to which I will refer that directly concerned the reach of an order granted against persons unknown in circumstances where the infringement occurred after the order was granted.

¹¹⁴ Where the need arises courts will fashion a remedy where a right has been infringed. See *Minister of the Interior and another v Harris* 1952(4) SA 769 (AD) at p781A-B. It is also implicit from the authorities there cited that a party is entitled to a remedy that is effective in order to redress the right infringed.

¹¹⁵ S 34 is concerned with access to the courts and the right to a fair hearing; s 9(1) deals with the right of every person to equality before the law and to equal protection and benefit of the law; s 26(3) provides that no one may be evicted from their house or have their home demolished without an order of court made after considering the relevant circumstances (see fn 29 which sets out the wording of s 26(3))

¹¹⁶ Chronologically the five cases are:

South Cambridgeshire District Council v Gammell and Others; The Mayor And Burgesses Of The London Borough Of Bromley v Maughan and Others [2006] WLR 658; [2005] EWCA Civ 1429
Cameron v Liverpool Victoria Insurance Co Ltd [2019] UKSC 6
Canada Goose UK Retail Ltd. v. Persons Unknown and another [2020] EWCA Civ 303, [2020] 1 WLR 2802
Cuciurean v The Secretary of State for Transport and High Speed Two (HS2) Limited [2021] EWCA Civ 357
London Borough of Barking and Dagenham and others v Persons Unknown [2022] EWCA Civ 13

The earliest one is *South Cambridgeshire District Council v Gammell and Others; The Mayor And Burgesses Of The London Borough Of Bromley v Maughan and Others* [2006] WLR 658; [2005] EWCA Civ 1429. Here the Court of Appeal held that a person who subsequently conducts himself or herself in a manner which is prohibited by an injunction will be caught in the net. It also dealt with the procedure that a person who wished to come onto the land with knowledge of an existing injunction should follow if wishing to challenge its terms.

172. Each of the appellants in the case became an occupier of a plot on the farm in question after an interim injunction had been granted preventing those who were on the land or came onto it from contravening the provisions of the Town and Country Planning Act *inter alia* by stationing their caravans on the land save in certain defined circumstances.

In *Maughan's* case the injunction was granted in early July 2004 while the appellant only came onto the farm some two months later¹¹⁷. In *Gammell's* case the original injunction was granted in May 2004 whereas the appellant only came onto the land close to a year later in April 2005.¹¹⁸

The Court of Appeal held at para 33 that;

- a. an injunction against "*persons unknown*" should only be granted where it is not possible for the applicant to identify those concerned or likely to be concerned;
- b. a person who learns that he or she is enjoined by the terms of an injunction and who wishes to take a step which "*would be in breach of the injunction, and thus in contempt of court*", cannot take such a step but, as soon as that person becomes aware of the order, he or she must apply to court for an order varying or setting it aside;
- c. a person who with knowledge of the order acts in breach of the injunction

¹¹⁷ *Gammell* at paras 15, 16

¹¹⁸ *Gammell* at paras 21 and 24

may apply to court to vary its terms for the future;

However an affected person should acknowledge the infraction and explain why he or she acted in breach of the injunction. The court would then consider all the circumstances of the case,” *including the reasons for the injunction, the reasons for the breach and the applicant's personal circumstances, in deciding whether to vary the injunction for the future and in deciding what, if any, penalty the court should impose for a contempt committed when he took the action in breach of the injunction.*”

- d. where a defendant “*has acted in breach of the injunction in knowledge of its existence before the setting aside, he remains in breach of the injunction for the past and in contempt of court even if the injunction is subsequently set aside or varied.*”

173. This case therefore became authority for the proposition that if a person only came onto the land subsequent to the grant of an interim injunction against “*persons unknown*” and acted in breach of that order while it was still in force then he or she;

- a. became a party to the proceedings without more.

In other words, by perpetrating an act which brought a person within the defined category of “*Person unknown*” against whom the injunction was obtained, that person was rendered a party to the proceedings without the need to be separately served or cited; and

- b. also became a party to whom the injunction applied and was consequently subject to contempt proceedings provided he or she had knowledge of the injunction.¹¹⁹

¹¹⁹ Gammell at para 32:

In my opinion that submission cannot be accepted. In each of these appeals the appellant became a party to the proceedings when she did an act which brought her within the definition of defendant in the particular case. Thus in the case of WM she became a person to whom the injunction was addressed and a defendant when she caused her three caravans to be stationed on the land on 20 September 2004. In the case of KG, she became both a person to whom the injunction was addressed and the defendant when she caused or permitted her caravans to occupy the site. In neither case was it necessary to make her a defendant to the proceedings later.

174. The impact of this decision, which concerned an interim injunction, on an order considered to be of final effect was considered in two later Court of Appeal decisions which will be considered later.

175. In the case of *Cameron v Liverpool Victoria Insurance Co Ltd* [2019] UKSC 6 the Supreme Court traced the evolution of citing a respondent as a person unknown from legislation which specifically sanctioned it to a somewhat broader civil law adoption¹²⁰. The common denominator remained “*anonymous defendants who are identifiable but whose names are unknown*”.¹²¹

It was also noted that in each of these cases “*the defendant is described in a way that makes it possible in principle to locate or communicate with him and to know without further inquiry whether he is the same as the person described in the claim form*”.¹²²

The court however made it clear that a person cannot be subject to the court’s jurisdiction “*without having such notice of the proceedings as will enable him to be heard*”¹²³.

Our Constitution makes this clear in s 34.¹²⁴

176. The court also explained that under the rules regarding alternative service (our substituted service rule) it is possible to serve on an identifiable but anonymous person because it is “*possible to locate or communicate with the defendant and to identify him as the person described in the claim form*.”¹²⁵

¹²⁰ *Cameron* at paras 8 to 15

¹²¹ *Id* at para 13

¹²² *Id*

¹²³ *id* at para 17

¹²⁴ Section 34 provides:

Access to courts

Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.

The right cannot be effective without notice and an opportunity to be heard

¹²⁵ *Cameron* at para 15

177. However, as in our jurisdiction, an order for substituted service in such cases is granted where the manner of service can reasonably be expected to bring the proceedings to the attention of the affected persons.¹²⁶
178. The Supreme Court therefore confirmed the broader use of proceedings against “*persons unknown*” subject to their description being adequate to enable their ready identification by reference to locality and the conduct complained of. It also held that service was required but, because the decision turned on another aspect, did not identify the form it needed to take in order to be effective.
179. A subsequent judgment delivered on 5 March 2020 by the Court of Appeal in *Canada Goose UK Retail Ltd. v Persons Unknown and another* [2020] EWCA Civ 303, [2020] 1 WLR 2802 is significant for two reasons: It summarised the requirements for proceedings which may lawfully be taken against persons unknown and held that the decision in *Gammell* was restricted to interim injunction proceedings which had not been finalised and could not be extended to cases where the injunction had been made final.
- It will be recalled that *Gammell* decided that a person who came onto land subsequent to the grant of such an interim injunction and acted in breach of its terms became a party to the proceedings without more, became a party subject to the injunction and was consequently liable for contempt of court if he or she had knowledge of the injunction.
180. As to the requirements for proceedings which may lawfully be taken against persons unknown *Canada Goose* said the following:

“(1) The “persons unknown” defendants in the claim form are, by definition, people who have not been identified at the time of the commencement of the proceedings. If they are known and have been identified, they must be joined as individual defendants to the proceedings. The “persons unknown” defendants must be people who have not been identified but are capable of being identified and served with the proceedings, if necessary by alternative service such as can reasonably be expected to bring the proceedings to their

¹²⁶ *Id* at para 21.

attention. In principle, such persons include both anonymous defendants who are identifiable at the time the proceedings commence but whose names are unknown and also Newcomers, that is to say people who in the future will join the protest and fall within the description of the “persons unknown”.

(2) The “persons unknown” must be defined in the originating process by reference to their conduct which is alleged to be unlawful.

(3) Interim injunctive relief may only be granted if there is a sufficiently real and imminent risk of a tort being committed to justify [precautionary] relief.

(4) As in the case of the originating process itself, the defendants subject to the interim injunction must be individually named if known and identified or, if not and described as “persons unknown”, must be capable of being identified and served with the order, if necessary by alternative service, the method of which must be set out in the order.

(5) The prohibited acts must correspond to the threatened tort. They may include lawful conduct if, and only to the extent that, there is no other proportionate means of protecting the claimant’s rights.

(6) The terms of the injunction must be sufficiently clear and precise as to enable persons potentially affected to know what they must not do. The prohibited acts must not, therefore, be described in terms of a legal cause of action, such as trespass or harassment or nuisance. They may be defined by reference to the defendant’s intention if that is strictly necessary to correspond to the threatened tort and done in non-technical language which a defendant is capable of understanding and the intention is capable of proof without undue complexity. It is better practice, however, to formulate the injunction without reference to intention if the prohibited tortious act can be described in ordinary language without doing so.

(7) The interim injunction should have clear geographical and temporal limits. It must be time limited because it is an interim and not a final injunction.”¹²⁷

¹²⁷ Canada Goose at para 82. This was repeated with approval in London Borough of Barking and Dagenham

181. In the case before it the Court of Appeal held that the injunction should not have been granted because, among other things, the description of the “*persons unknown*” was too wide, could include those who had never been at the site and that the specified prohibited acts were not confined to unlawful acts.

182. The part of the decision in *Canada Goose*, which found that *Gammell* applied only while an interim injunction was still pending and could not apply once a final injunction had been granted, was in turn held in the subsequent Court of Appeal case of *London Borough of Barking and Dagenham and others v Persons Unknown* [2022] EWCA Civ 13 to be wrongly decided and to be against the precedent set in *Cameron and Gammell* itself.¹²⁸

However, before considering *Borough of Barking* it is necessary to have regard to the Court of Appeal case which preceded it.

183. *Cuciurean v The Secretary of State for Transport and High Speed Two (HS2) Limited* [2021] EWCA Civ 357 dealt with a contempt of court order which had been granted against the appellant for breaching the terms of an injunction where he had not been named but which had been brought against “*Persons Unknown*”.

The main issue for consideration was whether the requirement of receipt of the order had been satisfied so as to hold the appellant in contempt for breaching the injunction.¹²⁹

184. The court *a quo* had been satisfied that the requirements of *Canada Goose*

and others v Persons Unknown [2022] EWCA Civ 13 at para 56. This despite *Borough of Barking* finding that the outcome of *Canada Goose* was incorrectly decided

¹²⁸ *Borough of Barking* at paras 99 to 100. At paras 92 of the judgment the court said:

It was illogical for the court at [92] in Canada Goose to suggest, in the face of Gammell, that the parties to the action could only include persons unknown “who have breached the interim injunction and are identifiable albeit anonymous”. There is, as I have said, almost never a trial in a persons unknown case, whether one involving protesters or unauthorised encampments. It was wrong to suggest in this context that “[o]nce the trial has taken place and the rights of the parties have been determined, the litigation is at an end”. In these cases, the case is not at end until the injunction has been discharged.

¹²⁹ *Cuciurean* at para 13

were complied with; namely that the defendants' identities were unknown, that they were not identifiable, that there was enough evidence to demonstrate a real risk of further trespasses by persons opposed to the railway development project ("*the HS2*"), and that the claimants were likely to obtain final relief.

The injunction had defined the relevant defendant (the second defendant) as:

"Persons Unknown entering or remaining without the consent of the Claimants on Land at Crackley Wood, Birches Wood and Broadwells Wood, Kenilworth, Warwickshire shown coloured green, blue and pink and edged red on Plan B annexed to the Particulars of Claim"

The court *a quo* had then directed substituted service in terms of the Rules by requiring inter alia:

8.1

The Claimants shall affix sealed copies of this Order in transparent envelopes to posts, gates, fences and hedges at conspicuous locations around...the Crackley Land.

8.2

The Claimants shall position signs, no smaller than A3 in size, advertising the existence of this Order and providing the Claimants' solicitors contact details in case of requests for a copy of the Order or further information in relation to it.

...

9.

The taking of the steps set out in paragraph 8 shall be good and sufficient service of this Order on the...Second Defendants and each of them. This Order shall be deemed served on those Defendants the date that the last of the above steps is taken, and shall be verified by a certificate of service.

10.

The Claimants shall from time-to-time (and no less frequently than every 28 days) confirm that copies of the orders and signs referred to at

paragraphs [8.1] and [8.2] remain in place and legible, and, if not, shall replace them as soon as practicable.”

(Paragraphs 8.3 and 8.4 provided for notice to be given by email to a specified address and by advertisement on an HS2 website and a government website.

...

15.

The defendants or any person affected by the injunction could apply to the Court at any time to vary or discharge it.

185. The High Court was satisfied that there had been service of the injunction in terms of the order. It was also satisfied that the appellant had been aware of the order and its most essential term- not to enter on the land. ¹³⁰

Of significance in the court a *quo's* reasoning was its finding that it “ *was not necessary for the claimants to establish that there had been “continuing compliance” with the requirements of paragraph 10 of the March Order, nor was it relevant that compliance with those requirements had not been established to the criminal standard”*.¹³¹

186. As I understand the judgment of the Court of Appeal in *Cuciurean*, it held that;

- a. giving notice and effecting service of the injunction by way of substituted service are synonymous;¹³²
- b. the terms of an order for substituted service should be such “*as can reasonably be expected to bring the proceedings to the attention of the defendant*”;¹³³
- c. once an order for substituted service is granted the standard adopted by the trial judge in directing the form of notice applies prospectively; ¹³⁴

¹³⁰ *Cuciurean* at para 35

¹³¹ *Id* para 35 (6)

¹³² *Id* para 58

¹³³ *Id* para 60

¹³⁴ *Id* para 60

- d. since the order applies prospectively a court cannot revisit it retrospectively;¹³⁵
- e. however, it remains open for a defendant who is joined as a person unknown to *“set aside or vary an order for service by alternative means, on the grounds that the Court was misinformed or otherwise erred in its assessment of what would be reasonable. But that is not this case. It is accepted that the relevant criteria were correctly identified and faithfully applied by Andrews J. None of the cases cited supports the further proposition advanced by Ms Williams, that on a committal application such as this the applicant and the Court must revisit the position retrospectively.”*¹³⁶

187. Nonetheless, in the context of a requirement existing that a defendant had sufficient notice of the March Order to justify a finding that any such encroachment amounted to contempt, the Court of Appeal said that even though it may not be shown that the appellant had actual knowledge of the order or its material terms such situations do *“not seem likely to occur often. And if it does then, as this Court indicated in Cuadrilla, no penalty would be imposed. I do not see that as problematic in principle, especially as this is a civil not a criminal jurisdiction.”*¹³⁷

188. In relation to the question of whether the appellant had sufficient knowledge or notice of the injunction, and in particular its penal content, the Court of Appeal considered that it sufficed for the affected person: *“(a) to know that there was a Court order in existence, prohibiting him from entering certain land; and (b) to enter on land in the knowledge that it fell within the scope of the prohibition”.*¹³⁸

189. The most recent case before the Court of Appeal is *Borough of Barking*, a judgment delivered on 13 January 2022.

In this case the issue was whether the High Court had correctly found that it

¹³⁵ Id para 60

¹³⁶ Id para 60

¹³⁷ Id para 62

¹³⁸ Id para 67

could not grant final injunctions which “*prevent persons, who are unknown and unidentified at the date of the order (i.e. newcomers), from occupying and trespassing on local authority land*”.¹³⁹

190. The court *a quo* accepted that interim injunctions could be granted against persons unknown but held that a final injunction could only be made against parties who had been identified and who had the opportunity, if they wished, to contest the final order sought.

191. The Court of Appeal however upheld the appeal and considered that a court is competent to grant final injunctions which prevent persons, who are unknown and unidentified at the date of the order, from occupying or trespassing on land.

192. It held that the purpose of interim relief was not intended to “*enable the claimant to identify wrongdoers, either by name or as anonymous persons ...*”. Such reasoning, it said, would ignore the finding in *Gammell and Canada Goose* itself that “*an unknown and unidentified person knowingly violating an injunction makes themselves parties to the action. Where an injunction is granted, whether on an interim or a final basis for a fixed period, the court retains the right to supervise and enforce it, including bringing before it parties violating it and thereby making themselves parties to the action.*”¹⁴⁰

The Court of Appeal pertinently referred to point 7 of the guidelines in *Canada Goose* which provides that a “*persons unknown*” injunction should have “*clear geographical and temporal limits*”.¹⁴¹

193. Unlike our law, injunctions are provided for in terms of original legislation, more particularly s 37 of the Senior Courts Act of 1981. The section provides that:

“*the High Court may by order (whether interlocutory or final) grant an injunction ... in all cases in which it appears to the court to be just and convenient to do so*”.

¹³⁹ *London Borough of Barking* at para 2

¹⁴⁰ *Id* para 91

¹⁴¹ *Borough of Barking* at paras 91 and 92

In *Borough of Barking* the Court of Appeal noted that s 37 was “ a broad provision” and that “ courts should not cut down the breadth of that provision by imposing limitations which may tie a future court’s hands in types of case that cannot now be predicted.”¹⁴²

194. The court also accepted that a final injunction ordinarily operates only between the parties to the proceedings because a person cannot be made subject to the jurisdiction of the court unless he or she first has notice of it so as to enable the individual to be heard.¹⁴³

Nonetheless it maintained that:

“Whilst it is the court’s proper function to give procedural guidelines, the court cannot and should not limit in advance the types of injunction that may in future cases be held appropriate to make under section 37 against the world.”
(emphasis added)

On these foundations the court held that a final injunction can be granted in a protester case against “*persons unknown*” even though;

- a. they were not parties at the date of the final order (referred to as “*newcomers*”);
- b. they only committed the prohibited acts after the final order was granted;

195. The Court of Appeal therefore found that there remains a category of persons falling within the citation of “*persons unknown*” who had breached the interim injunction and, although not joined as named persons, remain “*identifiable albeit anonymous*”. They furthermore remain persons to whom the final order relates.

Accordingly “*once the trial has taken place and the rights of the parties have been determined, the litigation is at an end*”.¹⁴⁴

¹⁴² *Id* at para 7

¹⁴³ *Id* at para 89

¹⁴⁴ London Borough of B at para 92

196. In cases involving persons who are unknown and unidentified at the date of the final injunction, and who after such order occupy or trespass on local authority land, the Court of Appeal held that they will nonetheless be subject to the injunction and subject to contempt of court proceedings provided they had knowledge. The premise is that this falls within the category of exceptional cases where a court order can be effective against the whole world.¹⁴⁵

197. In amplification the court explained, by reference to existing English case law that:

“[u]ntil an act infringing the order is committed, no-one is party to the proceedings. It is the act of infringing the order that makes the infringer a party”. Any person affected by the order could apply to set it aside under CPR 40.9.”¹⁴⁶

In this context therefore “*persons unknown*” were “*served*” and, provided they had knowledge of the order, automatically became parties when they violated the injunction. This was based on the ratio in *Gammell*.¹⁴⁷

198. Furthermore, because they had knowledge and became parties, *Borough of Barking* found that the newcomers had been entitled to contest the order before it was sought to be enforced against them¹⁴⁸.

This however required reliance on the Civil Procedure Rules (CPR) 70.4 and 40.9 which provide respectively that a judgment or order against a person who is not a party to proceedings may be enforced “*against that person by the same methods as if he were a party*” and that “*a person who is not a party but who is directly affected by a judgment or order may apply to have ... (it) ... set aside or varied*”.¹⁴⁹

¹⁴⁵ Id at paras 75, 80 to 82

¹⁴⁶ Id at para 83

¹⁴⁷ Id at para 85

¹⁴⁸ Id at para 85

¹⁴⁹ Id at paras 11 and 89

The *caveat* seems to be that the final injunction itself must be stated to be for a fixed period. This then affords the court oversight powers. In other words, the final injunction in its terms prevents trespass or occupation to a fixed future date of say a year.¹⁵⁰

199. The Court of Appeal in *Borough of Barking* concluded that:

*“The applicant must describe any persons unknown in the claim form by reference to photographs, things belonging to them or any other evidence, and that description must be sufficiently clear to enable persons unknown to be served with the proceedings, whilst acknowledging that the court retains the power in appropriate cases to dispense with service or to permit service by an alternative method or at an alternative place. These safeguards and those referred to with approval earlier in this judgment are as much applicable to an injunction sought in an unauthorised encampment cases under section 187B as they are to one sought in such a case to restrain apprehended trespass or nuisance. Indeed, CPR 8APD.20 seems to me to have been drafted with the objective of providing, so far as possible, procedural coherence and consistency rather than separate procedures for different kinds of cases.”*¹⁵¹

Moreover it said that a court “cannot and should not limit in advance the types of injunction that may in future cases be held appropriate to make under section 37 against the world” and that a final injunction against persons unknown, “being a species of injunction against all the world”, can be granted in unauthorised encampment cases. The court added that while such cases are exceptional, it does not mean that other categories cannot be added where the relief is shown to be proportionate and justified and that “the court cannot and should not limit in advance the types of injunction that may in

¹⁵⁰ Id at paras 91, 92 and 107

¹⁵¹ Id at para 117. CPR 8 deals with cases where there is unlikely to be a substantial dispute of fact (our motion proceedings) while ADP20 is a Practice Direction which supplements CPR 8 and deals with counterclaims and other additional claims

future cases be held appropriate".¹⁵²

200. Despite holding that *Canada Goose* was incorrect to restrict the application of *Gammell* to interim injunctions which were still pending, *Borough of Barking* noted that subject to certain limitations the guidelines set in *Canada Goose* had to be followed.¹⁵³

201. This case has settled the difficulty created by earlier Court of Appeal decisions which appeared to hold that, once there was what we would term constructive service in terms of a substituted service order, it is unnecessary to show knowledge for a successful contempt of court application¹⁵⁴

Observations

202. The following observations may be made at least in relation to cases involving land invasions.

203. Our procedures recognise the citation of persons who cannot be identified by name (in the present matter referred to as "*Unknown Individuals*") provided;

- a. the conduct which is sought to be prevented and alleged to be unlawful is identified with sufficient precision, together with;
 - i. the precise physical, geographical or topographical location to which it applies (whether by reference to street boundaries, development or other physically identifiable features aside from the erf number if not actually displayed at the locality); and
 - ii. the return dates or period of effectiveness¹⁵⁵,

¹⁵² Id para 120 to 121

¹⁵³ Id para 91

¹⁵⁴ See for instance *MBR Acres Limited & Ors v Gillian Frances McGivern* [2022] EWHC 2072 (QB). See also *High Speed Two (Hs2) Limited and another v Four Categories Of Persons Unknown and others* [2022] EWHC 2360 (KB) which is another more recent English High Court decision

¹⁵⁵ If only a return date is provided then it may be necessary to obtain an order for substituted re-service, in at

so that persons who may be subject to its terms know without further enquiry that they are the ones described in the served notice;

- b. the terms of the interim interdict sought;
 - i. are sufficiently precise and its terms readily understood by those potentially affected by it (i.e. by using non-technical terms unless those terms are then adequately explained)
 - ii. explain the steps to be taken should a person wish to oppose
 - c. Service is effected in a way which will reasonably ensure that notice of the interdict proceedings (or its essential details and where a full set may be obtained taking into account accessibility considerations) and the order obtained come to the attention of those who are or will be subject to its terms and that they in turn are able to identify themselves by reference to the prohibited conduct should they engage or intend to engage in it, so that they may exercise their right to oppose and be heard if they so wish;
 - d. Where the interim order is sought and obtained to interdict those who may still attempt to come onto the land after the interim order is granted (the English Courts conveniently identify them as “*newcomers*”) then the order sought should require the applicant to regularly confirm that copies of the orders remain in place and legible or otherwise replace them and provide proof by way of photographs with automated date stamping.¹⁵⁶
204. At least prior to the confirmation of any interim order and subject to the form of service requiring the continued placing of the notice of service (and this part of the order being complied with), any person who;

least the same manner as before, of every extended return date if the interdict is to have continued efficacy on those who attempt to come onto the land in question after the initial return date

¹⁵⁶ The order for substituted service granted in *Cuciurean* and reproduced earlier, insofar as it refers to the continued display of notices at the locality (as the extract does not deal with notification to those present at time of service through loud hailer) may provide some useful guidance, obviously adapted to the prevailing exigencies so as to achieve the same objective

a. intends to act in a manner which breaches the terms of the order must, prior to taking any such steps, oppose the application or apply to have the order varied or set aside (and by so doing either becomes an individually identified respondent or is individually identified as part of the cited respondent);¹⁵⁷

acts in a manner which is in breach of the order without first taking the steps mentioned in (a);

- i. will automatically become a party to the proceedings without being specifically added to the list of those already identified or who have identified themselves as being part of the cited respondent *and* will be bound by the interim order and the order eventually made unless he or she takes steps within a reasonable time to oppose the application (or vary its terms for the future) *and* provides an explain why he or she breached the terms of the interim order;
- ii. will be subject to contempt of court proceedings provided that he or she had knowledge of the essential terms of the interdict prohibiting the conduct complained of within the defined locality.

205. The issue which obviously is unique in our jurisdiction concerns the protective provisions that apply to unlawful occupiers under PIE. This impacts both the reach of an interim interdict against newcomers and the possible use of contempt proceedings to achieve an ulterior objective.

206. While there may be no quarrel with granting orders which are also directed at newcomers (on which I express no final view as I did not hear adequate argument in this regard), once a trespasser gains a foothold which brings him or her within the definition of an occupier for purposes of PIE the protective right not to be evicted has now to be weighed against s 165 (5) of the Constitution which

¹⁵⁷ The realities of individually citing household heads let alone every adult and the guardian of or responsible person for a minor child makes it a formidable task where large groups of families or individuals are concerned and where they may be reluctant to identify themselves as falling within the category of persons identified in the citation. Let alone that by their signature they are instructing an attorney to act on their behalf and oppose the application or seek other redress.

expressly provides that a court order is binding on all persons to whom it applies.¹⁵⁸

It reads:

“An order or decision issued by a court binds all persons to whom and organs of State to which it applies”.

207. On the assumption that interim orders against newcomers subject them to the proceedings and any adverse order ultimately made (if they do not oppose), there may be no impediment to pursuing contempt proceedings in respect of those who had prior knowledge of the interdict even if they can subsequently claim protection under PIE.

The principle would remain sound and the courts presumably would consider the individual's plight, frustrations and all other relevant circumstances with humanity and compassion while mindful that such proceedings brought against such persons, other than instigators or those who have made financial gain, may be motivated *in terrorem*.

208. The question of whether newcomers may be subject to an interdict once made final does not arise for present consideration. There are however some obvious difficulties that would need to be considered and which do not appear to arise under English substantive or adjectival law. They would include:

- a. Generally a court order is only effective against persons to whom it applies and not against the whole world unless authorised under law¹⁵⁹
Although the protection of a real right is available against the whole world and the development in English law cases of a trespass order being effective against the whole world is understandable in cases where the right to undisturbed possession of land is unassailable and there is a continuing trespass onto it by those who fall within an identified category of

¹⁵⁸ Sections 34 read with s 7 of the Bill of Rights may also impact on the weight to be given to a claim under such circumstances of protection from eviction under PIE, as might

¹⁵⁹ Such as under insolvency laws or provided there is compliance with certain forms of notice or publication in a Government Gazette

persons committing the specified unlawful act, I am not sure there is a sufficient foundation based on precedent to extend it in the way as the English Courts have. Furthermore the protective right against eviction afforded to an unlawful occupier under PIE pending the provision of temporary emergency shelter would also have to be judicially weighed.

- b. It is difficult to comprehend an order, even if directed at a class of person, being enforceable against anyone other than those who became a party to the proceedings before it was made final. Even in the case of beneficiaries under a will, their existence by definition predates the grant of an order.

209. However the possibility remains that a final order can be couched in a way that expires only once a certain discernible event occurs, such as the completion of a development including the handing over of occupation to those lawfully entitled to it. Again I make no decision on this possibility which seems to find favour with the English Courts.¹⁶⁰

FINDING IN RESPECT OF EIGHTH RESPONDENT GROUP

210. In an application for a final interdict the facts averred by the eighth respondent group are accepted as the evidence before the court unless one of the exceptions mentioned in *Plascon-Evans* is present. The answering affidavit does not amount to a bald denial and in my view their contents are not clearly untenable.¹⁶¹

211. On the facts, the Metro accepted that seven persons mentioned earlier had in fact been allocated RDP houses in the development although they were listed among the respondent group. The effect is that they do not fall within the category of cited respondent to which the application relates since they were neither trespassing nor attempting to invade or settle in the development.

212. The eighth respondent group claim to have been on the land since at least

¹⁶⁰ *London Borough of Barking* at paras 91, 92 and 107. Compare *Mankowitz v Loewenthal* 1982 3 SA 758 (A) at 767F to H (although not directly in point)

¹⁶¹ *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634H – I

January 2020. On the papers the attempt to remove them only occurred in May 2021 at the time when the Metro brought its joinder application. There is no allegation that any non-physical resistance was put up by the Metro when this group initially came onto the land. They therefore were in peaceful and undisturbed possession at the time the Metro brought its application to join them as parties to the original application.

213. Moreover without evidence to show that they are not homeless and would not be rendered homeless if evicted, they all claim to reside on the development and are subject to the protection afforded to unlawful occupiers under the provisions of PIE.

The Metro elected not to engage that issue in the present proceedings but confined itself to relying on the original interim order being effective against all subsequent persons who attempted to invade the development.

214. It is evident from the earlier detailed consideration of the way in which an applicant ought to bring newcomers into a trespass or eviction application while it is still pending, that the relief sought cannot be granted against them since;

- a. No allegation was made in the papers that the interim order granted in July 2019 or any of the court papers for that matter were still being displayed at the development by the time any of those comprising the eighth respondent group subsequently came onto the land;
- b. No other allegation was made that those comprising the group were aware, or ought to have been aware, of the existence of the interim order and that it was still extant;
- c. Insufficient allegations were made in the founding affidavit to indicate that the interim order sought was to apply to newcomers. Furthermore the interim order itself was couched in the present and past tense without reference to persons who in the future might attempt to trespass or invade the development;
- d. No allegation was made that, at the time the eighth respondent group

alleged that they came onto the development, the Metro had approached them, threatened to remove them whether under the interim order or otherwise, or that by the time they were approached they had not acquired peaceful and undisturbed possession let alone that they were not unlawful occupiers for the purposes of PIE.

215. Before concluding this aspect, it is necessary to say something about the eighth respondent's contention that once the first respondent group provided a list of persons falling within the category of those to whom the citation related the list of persons who could be joined or could participate as part of the first respondent group became closed.

This is incorrect. The identification of individual respondents who fall within the category of persons to whom the citation of the first respondent relates does not mean that the description of the first respondent is altered to the persons named on the list supplied. The first respondent and the category of affected persons identified by its citation does not change and more persons may fall within its ambit should they have attempted to trespass or invade the land at the time the order was granted.

In other words, the provision of a list of those claiming to fall within the category of persons cited as the first respondent did not create a *numerus clausus*. Anyone who acts in a manner which falls within the cited category of persons identified as the first respondent can be added on to the same proceedings either as part of those falling within the group and individually identified as such or by way of joinder.

216. In light of the findings made the eighth respondent group cannot be evicted under the order sought in the present application. The irony is that they in fact laid no claim to an entitlement to housing but came onto the project in order to get the status of an unlawful occupier which, by reason of PIE, immunises them against eviction until temporary emergency shelter is provided, unless of course they would not be rendered homeless if evicted.

217. Once again this is not as a consequence of the common law but as a result of the way PIE is drafted without any exception being made where State land is set aside for projects undertaken to give effect to s 26 of the Constitution despite the beneficiaries of such projects being obliged to put their names on waiting lists and being subject to allocation criteria before being eventually allocated a home unlike the PIE unlawful occupiers who now frustrate this from being realised any time soon.

218. Without an amendment to the legislation, these situations will continue to arise unless a court were to find on an application by a metropolitan authority that PIE is unconstitutional in its application to unlawful occupiers where land has already been allocated in furtherance of s 26 constitutional objectives and subject of course to the possible effect of the majority decision in *Thubakgale* that s 26 only imposes a negative obligation not to interfere with the enjoyment of the right to housing

REMOVAL OR DESTRUCTION OF POSSESSIONS (only first respondent group)

219. Some of those comprising the first respondent group claim that their personal possessions were removed or destroyed by the Metro or its agents.

220. There is insufficient information to determine the items removed and from whom.

It is therefore necessary to afford the first respondent group an opportunity to properly identify and quantify the possessions which are claimed to have been removed.

221. It will then be necessary to hear argument on the basis of the claim.

COSTS

222. The development is self-evidently for the establishment of RDP housing. The eighth respondent group presently before the court profess no basis for being entitled to jump the allocation list and do not offer to ensure that they will leave the area of the development they occupy in the same condition as it was found.

223. I am therefore inclined to only give them the costs of an unopposed application so as not to stifle litigation. There can be little doubt on the facts that the mass invasion required advance planning and co-ordination, was organised and executed with allocations being made in advance by those behind the invasion. It is therefore probable that money passed hands and it is those organising the land invasion who should be looked to for covering costs above the unopposed costs that the court is awarding.

ORDER

82, The following order was made:

IN RESPECT OF THE FIRST RESPONDENT

- 1. The rule nisi issued by the Court on 24 July 2019 is confirmed in respect of those persons identified in the consolidated list attached to the first respondent's answering affidavit of October 2019 as "AA1", save for those persons who have produced a valid document of allocation of a house in the RDP project at Farm Rietfontein 153 (also known as Palm Ridge Extensions 10 and 18 to 30).*
- 2. The first respondent shall be entitled to deliver an affidavit by no later than Friday 9 September 2022 identifying such goods and possessions as each person, identified separately, claims he or she was dispossessed of by the applicant on 24 July 2019 and, if such affidavit is delivered by then, the*

applicant shall deliver an affidavit by Friday 7 October 2022 stating whether it has any of the identified goods or possessions and, if so, where they will be made available for collection by the identified person of the first respondent at the applicant's expense.

3. *A virtual case management meeting will be held on Wednesday 12 October at 15.30 on MS-Teams to deal with the issues arising from para 2 hereof*
4. *Save as set out in para 2, the first respondents' counterapplication is dismissed*
5. *There will be no order as to costs as between the applicant and the first respondents in respect of either the application or the counterapplication.*

IN RESPECT OF THE EIGHTH RESPONDENT

6. *The rule nisi issued by the Court on 24 July 2019 as read with the joinder of the eighth respondent on 10 June 2021 is discharged in respect of those persons identified in the list attached to the eighth respondent's answering affidavit of July 2021 as TM1.*
7. *The applicant will pay the costs of the eighth respondent on the unopposed scale.*

SPILG, J

DATE OF JUDGMENT:	22 February 2023
REVISED:	22 March 20223
For the Applicant:	Adv. E Sithole Jose and Associates

For 1st Respondents:

Adv. T Raogale

Mabuza Attorneys

For 8th Respondents:

Niyko Mhlongo

Maluleke Inc. Attorneys (for Dion Ledonka)