REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: **0014030/2017**

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED: NO

Date: 31 July 2023

In the matter between:

EKURHULENI METROPOLITAN MUNICIPALITY Applicant

and

WILLEM PETRUS HARMSE Respondent

(as trustee of the Harley Trust)

VICTOR MBONANI First Intervening Respondent

PHAKAMANI BOANJOVIE DLAMINI Second Intervening Respondent

PRICHARD NGIRAZI Third Intervening Respondent

Summary – Interdict sought by the Municipality to ensure compliance with the Ekurhuleni Town Planning Scheme amounts to an eviction order if it prohibits tenants from occupying their homes – An interdict compelling the owner of property to institute eviction proceedings at odds with Constitutional Court authority in *Abahlali Basemjondolo Movement SA and*

Another v Premier of the Province of Kwazulu-Natal and Others ("Abahlali") 2010 (2) BCLR 99 (CC).

JUDGMENT

DE VOS AJ

[1] In this case, the central question is whether the applicant ("the Municipality") can compel a property owner to institute eviction proceedings against its tenants.

[2] The property, 65 North Rand Road Kempton Park, is zoned residential. It has 51 rooms providing housing to several tenants.[1] The Municipality contends that the owner utilises the property as a boarding house. In terms of the Ekurhuleni Town Planning Scheme ("Scheme")[2] a boarding house is a business and cannot lawfully operate from a property zoned as residential. The Municipality asks this Court to interdict the respondent from using the property as a boarding house. The Municipality locates the case within zoning law.

[3] The respondent does not live on the property, but is cited as a trustee of the Harley Trust. The property is registered in the name of the Harley Trust. The respondent pleads that the property is used to provide affordable housing to tenants close to economic opportunities. The respondent objects to the Municipality's characterisation of the case. The respondent refers to the Municipality's goal - removing the tenants from their homes - to contend that the case is about housing rights. Three of the tenants were granted leave to intervene. The property has been their home since 2014.[3] The tenants' position is that they will have nowhere else to go if forced to leave.[4] They also frame the case as one that concerns the right to housing.

[4] Essentially, the parties differ on whether section 26 of the Constitution is engaged.

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[1] The number of tenants is unknown.

[2] On 25 September 2019, a new Spatial Planning and Land Use Management Act was adopted.

[3] Intervening Respondents' Affidavit at para 14 (CL18-9).

[4] Intervening Respondents' Affidavit para 34 (CL053 - 237).

[5] The case evolved during the hearing of the matter. The Municipality's notice of motion prays for an interdict combined with enforcement prayers.[5] The interdict is to restrain the respondent from using or permitting the use of the property as a boarding house. The enforcement prayers,[6] if granted, would authorise the Sheriff to remove the tenants' goods from the property and order the respondent to "rehabilitate" the property. The enforcement orders would, in concrete terms, mean the Sheriff arrives

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[5] The Notice of Motion reads -

> "1. Ordering the Respondent to forthwith cease to use Erf 32 Kempton Park, IR Gauteng, for purposes which are not permitted under the zoning of "Residential 1", such as, for example, inter alia, using the property for boarding house and rooms purposes."
>
> 2. Restraining and interdicting the respondent from permitting the use of the property, through or by another person or persons, for the purposes which are not permitted under the zoning of "Residential 1", for inter alia, boarding house and rooms business which is being operated in the property for as long as such use is prohibited on the property.....
>
> 3. Restraining and interdicting the respondent from using or permitting the use of the property for any other purpose than the use as permitted and prescribed in terms of the zoning "Residential 1" in terms of the Scheme.
>
> 4. Ordering the Respondent to forthwith remove from the property all items which relate to the use of the property for the purpose of boarding house and rooms business or similar activities for so long as the property remains zoned as "Residential 1".
>
> 5. Ordering the Respondent to stop using the property as a boarding house and rooms business for so long as the property remains zoned "Residential 1".
>
> 6. Ordering the Respondent to forthwith rehabilitate the property to conform to the zoning "Residential 1" in terms of the Scheme.
>
> 7. That should the respondent fail to comply with orders 1 to 6 above within 30 days after the date of service of this order, property and then, in such event:
>
> 7.1 The Sheriff of the above honourable Court is authorised and directed to take all necessary steps for purposes for giving effect to 4, 5 and 6 above; in particular, the Sheriff is authorised to seize and take into custody all movables found at the property which are used in relation to the use of the property for purposes other than permitted under the zoning "Residential 1" such as inter alia of using the property for boarding house and rooms business, and to keep such movables in his possession pending compliance with 7.2 hereunder; and
>
> 7.2 The respondent shall be liable for payment of the Sheriff's reasonable fees and disbursements, including storage costs, incurred for purposes of 7. above, which sums shall become due, owing and payable on demand, supported, in so far as necessary, by vouchers
>
> 8. Ordering the respondent to pay the applicant's costs of this application."

[6] The enforcement prayers required -

a) the respondent to remove from the property "all items which relate to the use of the property for the purpose of boarding house and rooms business".

b) The respondent to rehabilitate the property from a boarding house to a residential house.

c) If the respondent did not remove the items and rehabilitate the property, then the Sheriff was authorised to remove all movables found at the property "which are used in relation to the use of the property for purposes other than permitted under the zoning 'Residential 1'" such as "using the property for boarding house and rooms business, and to keep such movables in his possession".

at the property and removes the tenants' beds, pillows and clothes so that the tenants can no longer live in the rooms.

[6] I consider the relief initially sought by the Municipality, an interdict combined with these enforcement orders, through the lens of the Constitutional Court judgments of *Zulu and Others v eThekwini Municipality and Others* ("*Zulu")*[7] and *Motswagae v Rustenburg Local Municipality ("Motswagae").*[8]

[7] In *Zulu*, the eThekwini Municipality obtained an interdict ostensibly aimed at preventing land invasions. The eThekwini Municipality contended that the interdict was intended only to prevent invasions and not to prevent the existing occupiers of the land from occupying their homes. The essence of the Court's finding is that even if crafted as an interdict, if the effect of the interdict is to prevent people from occupying their homes, then it is an eviction order. [9]

[8] In *Motswagae*[10] a Municipality engaged in construction works next to the Motswagae family's home. The construction exposed the foundations of their home. The Constitutional Court held that the construction works attenuated an incident of occupation and, therefore, amounted to an eviction. The Court affirmed that an eviction does not consist solely of the expulsion of someone from their home.

[9] These two Constitutional Court judgments conclude that orders and actions which effectively infringe on the incidents of occupation amount to evictions, regardless of the garb in which they are dressed.

[10] These principles in *Zulu* and *Motswagae* have been applied in the context of zoning disputes. In *City of Johannesburg Metropolitan Municipality v K2016498847 (Pty) Ltd* ("*K2016")*[11] the Court faced a similar application to what served before this Court. The

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[7] 2014 (4) SA 590 (CC); 2014 (8) BCLR 971 (CC).

[8] 2013 (2) SA 613 (CC).

[9] Zulu (above) para 26.

[10] Motswagae (above) para 12.

[11] 2022 (3) SA 497 (GJ).

Court in *K2016* concluded that although the relief sought does not explicitly authorise eviction, "the conduct it does authorise amounts to the same thing".[12]

[11] In *Ekurhuleni Metropolitan Municipality v Sibanda* ("*Sibanda")*[13] the notice of motion was identical to the one I have to consider.[14] The Court adopted the approach in *K2016* and held that the order sought was, in effect, an eviction order and would "obviously" impact the tenants' right to housing under section 26(3) of the Constitution.[15] The Court also held that an order to "rehabilitate" the property impacts section 26(3) of the Constitution.[16]

[12] Counsel for the Municipality has favoured the Court with two judgments that follow different reasoning. In *Ekurhuleni Metropolitan Municipality v Nkosi*[17] and *Ekurhuleni Metropolitan Municipality v Erasmus*[18] the Court did not find that enforcing similar zoning provisions would result in an eviction. I have considered these judgments. In neither of these cases was the Court favoured with the relevant case law of *Zulu* or *Motswagae*. Consequently, the Courts did not consider the impact of the principles in these judgments. I distinguish the case before me, where these cases and principles have been placed front and centre, from these two judgments.

[13] Bound by the principles in *Zulu* and *Motswagae* and convinced of the accurate application of these principles in *K2016* and *Sibanda,* the inescapable conclusion is that the relief, as set out in the notice of motion, amounts to an eviction order. It is

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[12] K2016 (above) at paras 14 and 16. The Court weighed that the relief sought would restrain the landlord from letting out the property and directed to comply with the Scheme prohibiting the occupiers from making their homes at the property. The Sheriff was empowered to "take all necessary steps" to enforce these orders in the event of non-compliance. In doing so, the Sheriff could seize the occupiers' possessions if the order is not complied with within 15 days. The Court concluded that there could accordingly "be little real doubt about what the order sought is meant to achieve". The Court held that the structure of the relief the City sought was the same as that sought in *Zulu*, although the words used and the individuals involved differed. The Court considered that the City sought relief restraining the landlord from using the property as an 'accommodation establishment' and directing the Sheriff to do what was necessary to achieve that result. The Court held this "plainly encompasses the eviction of the occupiers."

[13] (26108/17) [2022] ZAGPJHC 286 (3 May 2022).

[14] Sibanda (above) para 28.

[15] Id at para 27.

[16] Id at para 27.

[17] (13191/17) [2019]ZAGPJHC 238 (4 June 2019 per Bokaba AJ).

[18] (2017/6617) [2017] ZAGPJHC 393 (12 December 2017).

impermissible to grant an eviction order in these circumstances, least of all, as the tenants have not all been cited.[19]

[14] At the hearing of the matter, after being presented with the judgments in *Sibanda* and *K2016*, Mr Mtembu for the Municipality abandoned the enforcement prayers[20] and persisted only with prayers 1 - 3 (being the interdict). The abandonment of the enforcement prayers permitted Mr Mtembu to make the nuanced argument that the case before the Court was not an eviction application but purely an interdict against the respondent. The Municipality contends the "compliance of the order is a different process" and the Court need not concern itself with the compliance of its order. The core of the submission is that the Court need only consider granting an interdict; after that, if the tenants refuse to vacate upon instructions by the respondent, it is only then that a respondent must bring an eviction application. The Municipality contends that if the respondent does not comply, he can be held in contempt of Court.[21]

[15] Mr Mtembu distinguishes this case from *K2016* and *Sibanda* because both these judgments weighed and considered the enforcement of the interdict to be central to the finding of an eviction. Mr Mtembu is correct that in *K2016* and *Sibanda*, the courts attached weight to the fact that the Sheriff was empowered to take all necessary steps to give effect to the order.[22]

[16] Counsel for the respondent, Mr Kruger, contends that even with the abandonment of the enforcement parts of the relief, the relief sought remains an eviction order. Mr Kruger contended that the remaining relief seeks to compel and interdict the respondent from permitting the property's use contrary to its residential zoning, and to stop the respondent from using the property as a boarding house. The effect of these orders, argues Mr Kruger, is to place a duty on the respondent to prevent the use of the property as a boarding house. It requires the respondent to take action against the tenants by preventing them from living in their homes. The respondent would be obliged to prevent the occupiers from continued residence in their homes.

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[19] One of the orders sought was for the Sheriff to seize the tenant's property. Such an order would amount to an arbitrary deprivation of property. See K2016 (above) at paras 11 - 12.

[20] The Municipality persisted only with prayers 1 - 3.

[21] Municipality's supplementary heads of argument para 16 (CL020-100).

[22] Sibanda (above) para 31; D2016 (above) para 14.

Mr Kruger argues that, at the very least, such orders will attenuate and obliterate the occupiers' incidents of occupation.

[17] The respondent argues that the intention is not only to enforce the Scheme but also to cause the eviction of the occupiers. Contending that the order remains an eviction, the respondent relies on settled eviction law which requires a court to consider all relevant circumstances[23] and contends the Court does not have this information and therefore cannot grant the relief as granting an eviction without considering all relevant circumstances would be an arbitrary eviction.[24]

[18] Whilst the abandonment of the "enforcement" aspect of the relief impacts on its practical implementation, it does not change the ultimate goal of the relief. The order which this Court grants will force the respondent to evict the tenants. The Municipality states expressly that this is what they intend the order to set in motion. The Municipality's abandonment of the enforcement parts of the relief does not leave a benign order in place. Even without the teeth of the enforcement elements, the impact of the relief sought is that the tenancy of an unknown number of people will be changed from secure to unlawful. It seems artificial to separate an order from its enforcement. However, to address the matter at a principled level, I will assume this distinction is sound and consider Mr Mtembu's argument that the relief persisted with on the day of the hearing is not for an eviction order but rather for an order to compel an eviction.

[19] Compelling a landlord to evict occupiers has received the attention of the Constitutional Court in *Abahlali Basemjondolo Movement SA and Another v Premier of the Province of Kwazulu-Natal and Others ("Abahlali")*.[25] In *Abahlali*, the occupiers of informal settlements challenged the constitutionality of section 16 of the Slums Act.[26] The Slums Act's aim was to eliminate slums and prevent their re-emergence.[27] The occupiers challenged section 16 of the Slums Act as it made it compulsory for municipalities to institute proceedings for eviction of unlawful occupiers where the

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[23] Berea (above) 46.

[24] Berea (above).

[25] 2010 (2) BCLR 99 (CC).

[26] Abahlali (above) para 91.

[27] Id at para 99.

owner or person in charge of the land fails to do so within the period prescribed by the MEC through a notice.

[20] In *Abahlali*, the Constitutional Court held that compelling a landlord to evict occupiers breaches section 26(2) of the Constitution. The Court declared the Slums Act at odds with section 26(2) of the Constitution because it requires an owner or municipality to evict unlawful occupiers even when they cannot comply with the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 19 of 1998 ("PIE Act")[28]

[21] The Court held that to the extent that section 16 of the Slums Act eliminates discretion on the part of the owner or municipality, it erodes and considerably undermines the protections against the arbitrary institution of eviction proceedings.[29] Aside from the issue of discretion, the Court found the Slums Act in dissonance with the existing housing framework, which requires that an eviction should only be a matter of last resort. Provisions of the National Housing Act[30] and of the National Housing Code[31] stipulate that unlawful occupiers must be ejected from their homes only as a last resort. On this basis, the Court held that the Slums Act conflicts with the National Housing Act and the National Housing Code.[32] The Court also held that the Slums Act was problematic as it ignored the requirement of meaningful engagement before eviction.

[22] The Court acknowledged that the aim of the Slums Act is salutary.[33] However, the Court held that the compulsory nature of the Slums Act disturbs the carefully

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[28] Id at para 111.

[29] Abahlali (above) para 112.

[30] 107 of 1997. Section 2(1)(b) of the Housing Act provides:

> "National, provincial and local spheres of government must—
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> . . .
>
> (b) consult meaningfully with individuals and communities affected by housing development".

[31] Chapter 13 of the National Housing Code provides that municipalities "must demonstrate that effective interactive community participation has taken place in the planning, implementation and evaluation of the project" at 9. It also provides that "[w]here possible, relocations should be undertaken in a voluntary and negotiated manner. Mechanisms to ensure that the land is not re-occupied must be identified during this process. Legal processes should only be initiated as a last resort, and all eviction-based relocations must be undertaken under the authority of a court order" at 20.

[32] Abahlali (above) para 113.

[33] Id at para 121.

established legal framework by introducing the coercive institution of eviction proceedings in disregard the protections in the housing framework.[34] The Court's main criticism of the section was that it obliges owners and municipalities to ask a court to eject unlawful occupiers even if they are certain that it may not be just and equitable or in the public interest to do so.[35] I find the relief the Municipality asks me to grant in this matter, for similar reasons, breaches section 26(2) of the Constitution.

[23] The Municipality is asking this Court to compel an eviction application. Coercing an eviction application in these circumstances suffers from the same constitutional defects as section 16 of the Slums Act. An order to compel an owner to evict tenants would mean eviction is no longer a matter of last resort. Such an order would undermine the National Housing Code and Act. The carefully crafted protections in the housing jurisprudence and its framework would be eroded and the owner would be compelled to institute eviction proceedings, regardless of whether it would be just and equitable.

[24] The mechanism the Municipality asks this Court to set in motion is irrational, overbroad and invasive of the protections against arbitrary evictions to be found in section 26(2) of the Constitution.[36]

[25] The Court acknowledges that the Municipality is seeking to ensure coordinated and harmonious township development.[37] The aim is to be saluted. However, the Constitutional Court, whilst similarly applauding the aim of the Slums Act, still concluded that compelling an eviction was not constitutionally compliant.

[26] The principled reasoning of the Constitutional Court finds practical application in this matter. It is common cause, on the facts before me, that an eviction is not sought as a matter of last resort. To the contrary, there is currently a pending application to rezone the property. There appears to be a hold-up in finalising the application. Regardless, at present, such an application is pending. The tenants' eviction is not considered a matter of last resort; it is sought to be compelled by the Court where

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[34] Id at para 122.

[35] Id at para 109.

[36] See reasoning in Abahlali (above) para 118.

[37] Johannesburg City Council v Bernard Lewis Construction (Pty) Ltd and Another [1991] 3 All SA 334 (W) at p 338.

there is another avenue currently available to the parties to prevent the unlawful use of the property.

[27] I have considered that *Abahlali* dealt with a statutory provision, and in this case, the Municipality relies on the common law of interdict to give effect to a statutory provision. However, I cannot conclude that the principles enunciated by the Constitutional Court apply only in relation to the Slums Act and not the Municipality's reliance on its Scheme. Such a distinction would be artificial. Here, the Municipality seeks to use its statutory powers under the Scheme to force an owner to launch eviction proceedings. In *Abahlali*, similarly, a statutory scheme in the form of the Slums Act was employed to compel eviction proceedings. It is the compulsory nature of the Slums Act which the Constitutional Court found constitutionally offensive. The reasons provided by the Constitutional Court for concluding that compelling an owner to evict occupiers applies equally in this case. This Court cannot grant relief which the Constitutional Court has found to be at odds with the housing jurisprudence.

[28] The Municipality asserts that it has a clear right. Premised on the reasoning of the Constitutional Court in *Abahlali*, I find that the Municipality does not have such a clear right.

Meaningful engagement

[29] The Municipality needs to meaningfully engage with the tenants. The Municipality has outright rejected the obligation. It has not even cited, let alone notified the tenants of these proceedings. The Municipality's position is at odds with long-standing housing jurisprudence, commencing in 2008 with *Occupiers Olivia Road.*[38]

[30] The Constitutional Court, in *Occupiers Olivia Road*, dealt with the City of Johannesburg issuing a notice to vacate to occupiers of a dangerous building. The clear right was the City's right to take action against unsafe buildings in terms of the National Building Regulations. It was not an eviction application; the relief sought was an interdict.

[31] The Constitutional Court, even in the context of an interdict, required the City to meaningfully engage with the occupiers. The Court located the source of the duty to

[38] Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg 2008 (3) SA 208 (CC).

meaningfully engage directly from the right to human dignity.[39] The Court finds that an interdict that ejects people from their homes without first meaningfully engaging with them acts in a manner that is broadly at odds with the spirit and purpose of the Municipality's constitutional obligations.[40]

[32] In *Occupiers Olivia Road* the Supreme Court of Appeal held that section 26 (3) meant no more than that a court was bound to give effect to such a notice by means of an interdict restraining the occupation of the property. The "relevant circumstances" to be considered were whether the building in question was deemed dangerous, a notice to vacate had been issued, and the notice had not been complied with.[41]

[33] I note the similarities between the contention by Mr Mthembu for the Municipality before me and the reasoning of the Supreme Court of Appeal. They both contend for a narrow consideration of the requirements of the statutory provision at play, in *Occupiers Olivia Road* that was the Building Regulations and in this case it is the Scheme. However, the Constitutional Court disagreed[42] with the approach of the Supreme Court of Appeal.

[34] The Constitutional Court held that, at the very least, it was relevant to the application that the local authority had not considered whether the enforcement of the notice declaring a property to be a dangerous building might render those living on the property homeless. If the enforcement of the notice would lead to homelessness, the local authority had a duty to engage with the occupiers to consider whether and what form of alternative accommodation might be appropriate to provide. Only once the local authority had made a real effort to engage meaningfully with those affected by its decision to enforce the notice to vacate could it ask a court to issue an order giving effect to the notice. In its application, the local authority would have to provide a complete and accurate account of its efforts to engage with the affected individuals,

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[39] Olivia Road (above) para 16.

[40] Olivia Road (above) para 18. In Olivia Road, the Court also acknowledged that the City had a duty to engage people who may be rendered homeless after an ejectment. The duty is grounded in section 26(2) of the Constitution. Section 26(2) mandates that the response from any municipality to potentially homeless people with whom it engages must also be reasonable (see para 17).

[41] City of Johannesburg v Rand Properties 2007 (6) SA 417 (SCA) para 41.

[42] K2016 (above) at para 23.

set out what alternative accommodation, if any, it would provide to them, and justify both its engagement strategy and its decisions on how to respond to any expressed need for alternative accommodation.[43]

[35] In *K2016* the Court emphasised the basis on which the Constitutional Court overturned the Supreme Court of Appeal. The Court concluded that a clear right to an interdict could only be shown if there are facts indicative of the City having meaningfully engaged with the occupiers and having offered alternative accommodation where reasonably needed.[44] In *K2016,* the Court held -

> "I see no principled reason why the requirements the Constitutional Court has imposed on local authorities seeking to evacuate dangerous buildings in terms of the Building Standards Act should not be extended to local authorities who seek to enforce compliance with a Land Use Scheme through an interdict that is to be implemented through an eviction. It follows that in seeking relief to give effect to its Land Use Scheme by removing people who reside on the property in breach of that Scheme from their homes, the City is required to demonstrate that it has engaged meaningfully with each of the affected individuals and that it will provide alternative accommodation to those individuals where it is reasonable to do so. In my view, it is reasonable to provide alternative accommodation where an occupier would be left homeless without it.
>
> To put it another way, I hold that the City cannot demonstrate a clear right to an interdict which enforces its Land Use Scheme through an eviction unless it has shown that it has meaningfully engaged the occupiers of the property in question and offered to provide alternative accommodation where it is reasonably needed.[45]

[36] I am persuaded by the reasoning in *K2016* and bound by the principles enunciated by the Constitutional Court in *Occupiers Olivia Road*.

[37] The Municipality, before this Court, argued that *Occupiers Olivia Road* is distinguishable as it was "not an interdict application but a plain eviction application against the unlawful occupiers of the dangerous building".[46] *Occupiers Olivia Road* was not launched as an eviction application but was, similar to this case: a Municipality seeking to enforce a statutory right regarding the use of buildings. The basis on which

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[43] Olivia Road (above) paras 9 to 22.

[44] K2016 (above) at paras 23 and 325. This was followed in Sibanda (above) at paras 34 and 35.

[45] D2016 (above) paras 22 - 24.

[46] Municipality's supplementary heads of argument para 24.7 (CL020-104).

the Municipality seeks to distinguish the matter, before this Court, is not borne out by the authority.

[38] Before me, the Municipality further contended that it need not meaningfully engage as the obligation only arises when the occupiers are poor[47] and as this is not a "case of destitution", the Municipality's obligations are not triggered.[48] In this case, it is common cause that the three intervening respondents will be rendered homeless if evicted. The intervening respondents have told the Court in no uncertain terms that if evicted, they will be rendered homeless and have no alternative accommodation.[49] Similarly, the respondent stated that the tenants -

> "will have to be ejected. They have no other place to stay than the property, and the authorities will no doubt not be able to provide alternative accommodation."[50]

[39] The Municipality has not disputed that if evicted, the intervening applicants face homelessness. In addition, the respondent has alleged that the relevant authorities have made no provision for any alternative housing for the tenants of the property.[51] Again, the Municipality has not disputed this allegation. It is common cause, before the Court that three of the tenants - and possibly many more - face homelessness if evicted.

[40] The Municipality is blinded by the allegation that the tenants are paying rent. This means they are in a lawful occupation. It does not mean they are not poor or destitute, and it certainly does not absolve the Municipality of its obligations. One of the tenants is unemployed, and one is a porter. They cannot be typified as pecunious. All say they will be homeless if they cannot live on the property.

[41] The duty to meaningfully engage applies regardless of whether PIE[52] applies or not. As can be seen from the reasoning in *Occupiers Olivia Road* above, the duty is

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[47] Reliance was placed on Premier Eastern Cape v Mtshelakana 2011 (5) SA 640 (ECM).

[48] Municipality's supplementary heads of argument para 25 (CL020-105).

[49] CL20-34 para 5.6.

[50] CL 10-26 para 17.1.

[51] Answering affidavit para 3.1.

[52] Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 19 of 1998 (“PIE Act”). The Court in *D2016* left open the question of whether PIE applies in these circumstances. The Court remarked obiter

sourced from the right to dignity and section 26 of the Constitution. The Municipality's duty to meaningfully engage in this context must be seen through what the Constitution has called its "higher duty to respect the law".[53] The Municipality, as an organ of state, is the Constitution's primary agent, it must do right, and it must do it properly.[54] It remains open to the Municipality to bring a fresh application, having made out a case for meaningful engagement and for the joinder of the remaining tenants.

[42] The issue of costs requires consideration. It weighs with the Court that the Municipality approached the Court seeking to enforce a statutory right, with two judgments in its favour, *Nkosi* and *Erasmus*. I also consider that the Municipality has raised a different argument to that which served before the courts in *Sibanda* and *K2016*. However, the respondents have asserted a constitutional right to housing. This, on its own, would be sufficient for them to be entitled to their costs in the absence of any allegations of their defence being frivolous or vexatious. The position is strengthened when the Court considers that not only are the respondents asserting fundamental rights, but they have done so in a manner in which they have been largely successful. Added to this is that the Municipality abandoned most of its prayers on the day of the hearing after the respondents had spent costs defending against these prayers. All of these considerations indicate that the respondents, inclusive of the intervening respondents, are entitled to their costs.

Order

[43] As a result, the following order is granted:

a) The application is dismissed.

b) The applicant is to pay the respondents' costs, including the costs of the intervening respondents.

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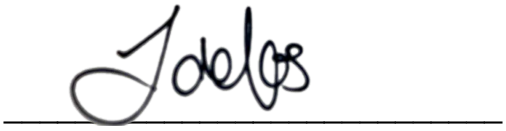
that PIE might not apply as PIE requires occupation without the owner's consent. In this case, the tenants live on the property with the owner's consent. The Municipality, therefore, argued that PIE would not apply. However, such consent would be illegal and unlawful as it offends against statutory prescriptions. In such circumstances, illegal consent is no consent. The Municipality's contention of not having standing in terms of the PIE Act based on consent is rejected.

[53] Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd 2019 (4) SA 331 (CC) at para 60.

[54] Id.



I de Vos
Acting Judge of the High Court

Delivered: This judgment is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be sent to the parties/their legal representatives by email.

Counsel for the applicant:	**MA Mtembu**
Instructed by:	Mabunda Inc
Counsel for the Respondent:	**NS Kruger**
Instructed by:	Schoeman, Van der Heever & Slabbert Inc
Counsel for the Intervening Respondents	**JC Viljoen**
Date of the hearing:	9 May 2023
	(final submissions on 23 June 2023)
Date of judgment:	31 July 2023