IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 8631/2020

In the matter between:

SOUTH AFRICAN HUMAN RIGHTS COMMISSION	First Applicant
THE HOUSING ASSEMBLY	Second Applicant
BULELANI QOLANI	Third Applicant
ECONOMIC FREEDOM FIGHTERS	Fourth **Intervening** Applicant
THE PERSONS WHO CURRENTLY OCCUPY ERF 544 PORTION, 1 MFULENI	Fifth **Intervening** Applicant

and

THE CITY OF CAPE TOWN	First Respondent
THE MINISTER OF HUMAN SETTLEMENTS	Second Respondent
THE MINISTER OF CO-OPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS	Third Respondent
NATIONAL COMMISSIONER: SOUTH AFRICAN POLICE	Fourth Respondent

MINISTER OF POLICE Fifth Respondent

WESTERN CAPE PROVINCIAL COMMISSIONER:

SOUTH AFRICAN POLICE SERVICE Sixth Respondent

THE PREMIER OF THE WESTERN CAPE PROVINCIAL

GOVERNMENT Seventh Respondent

ABAHLALI BASEMJONDOLO MOVEMENT SOUTH AFRICA Amicus Curiae

JUDGMENT DELIVERED ELECTRONICALLY: 15 JULY 2022

THE COURT: SALDANHA J, DOLAMO J and SLINGERS J:

[1] On 1 July 2020, while the country was in the grip of a lockdown because of the Covid-19 pandemic, the third applicant, Mr Bulelani Qolani, 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 **("the City")** 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. That egregious incident sparked this application, and brought to the fore in this court the question as to what the permissible circumstances are in which unlawful dispossession, spoliation, may lawfully be repelled through asserting the defence of counter spoliation without judicial oversight. Inasmuch as the City also sought to contend that it acted under the authority of a court order, neither such court order, nor any issued by any court in a constitutional democracy, would countenance such brutal and inhumane conduct perpetrated on an unarmed person.

A crucial question that arises in this matter is whether the officials employed by 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.

[2] The City's conduct, and understanding of the defence of counter spoliation, is set out in an opposing affidavit deposed to by a Mr Jason Clive Buchener **("Mr Buchener")**, a Senior Field Officer in the City's Anti-Land Invasion Unit **("ALIU")**, in support of the City's opposition to relief sought by a Ms Nkuthazo Habile, and others, in an urgent application brought in this Division of the High Court on 17 April 2020, under case number 5576/20, in respect of Erf 18332, Khayelitsha. In that matter, informal dwellings were demolished by members of the ALIU during the period 9 to 11 April 2020, and building materials were removed. Mr Buchener stated under oath that:

'. . . the members of the ALIU were present from the moment the demolition of structures began. Each structure was personally inspected by us before it was demolished. Not a single structure

was occupied. None of the unlawful structures including the applicants have the protection of Section 26 (3) of the Constitution of the Republic of South Africa 1996 Act No. 108 of 1996 (the Constitution) and the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, No, 19 of 1998 ("the PIE Act") in so far as the property is concerned. Some of the structures which were taken down by the contractor were complete and others were still in the process of being erected. Some just had frames while others lacked roofs, doors and/or windows. All of the structures which were taken down at the property by the contractor were either partially built or complete, but none were occupied. One could see that nobody occupied the structures or that it constituted a home. We also saw people carrying items of furniture and placing it in structures while we were present at the property…

The attempts to erect structures at the property on 8, 9, 11 and 12 April 2020 were part of an orchestrated land grab. The City was able to counter spoliate and this was the only means at its disposal to save the property from being unlawfully occupied. Any undertaking in the form requested by the applicants will result in the City not being able to counter spoliate. This is tantamount to giving the applicants free rein to unlawfully occupy the property while the City's hands are tied. Had the City not counter spoliated more land would have been lost to the City in addition to those properties described in the affidavit of Pretorius.

The structures demolished at the property did not constitute a home within the meaning of the PIE Act or section 26 (3) of the Constitution.

Paragraph 6 of this letter (a reference to a letter by the applicants' attorneys in that matter) makes the sweeping averment that "a demolition amounts to an eviction". The statement is not only nonsensical but not borne out by the facts of this matter. Several of the structures demolished by the City at the property were partially built, unfit for habitation and none of the structures were occupied. Self-evidently, no eviction took place. The deponent appears to conflate a demolition

with an eviction. I reiterate that no evictions occurred at the property. The structures that were demolished were unoccupied and did not constitute anyone's home.

I have explained the presence of furniture or personal possessions at the property and these averments are denied. The fact that a structure may contain an item of furniture or personal possessions does not mean that it constitutes a home. It bears emphasis that land grabs occur very quickly. Unlawful occupiers often go to great lengths in an attempt to establish that a structure is occupied when in truth and in fact this is not the case. We saw furniture and other possessions being placed into structures while we were busy with the demolition of unoccupied structures on the above dates. These goods were later removed by the unlawful occupiers and appear on some of the pictures. This was clearly orchestrated to in an attempt to make out a case that an eviction had occurred.

It is denied that the structures demolished by the City at the property constituted homes. The City was entitled to counter spoliate when the property was unlawfully invaded on the said dates in April. It did not require an eviction order to do so.'

[3] In the removal of Mr Qolani from his informal structure, and by demolishing it, the City relied on the order of Hack AJ in the *Habile* matter, in particular paragraph 5, which states: *'This order does not affect the Respondent's right to counter-spoliate should anyone else erect or try to erect structures at the property.'*[1]

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[1] *Habile and Others v The City of Cape Town* (Case nr 5576/2020) (WCC) (Unreported). The full order reads as follows:

'1. The Respondent is ordered to return all the building materials in its possession that were removed from the ERF 18332, Khayelitsha, Cape Town (the Property), between 9 April 2020 and 11 April 2020 to the following people who will be present at the Property during 10:00 and 12:00 on 20 April 2020, and they shall have proof of their identity:
   1.1 Zukiswa Bhadela
   1.2 Mr Zandilwe
   1.3 Nkuthazo Habile; and
   1.4. Ntembeko Moyeni

[4] It is the very understanding and application of the defence of counter spoliation, as espoused by Mr Buchener, that is central to the determination of the relief sought by the applicants, inasmuch as it was embraced and relied upon by the deponent to the City's answering affidavit(s) in this matter, the Director - Informal Settlements and Backyarders, Ms Riana Pretorius, and assiduously contended for in the heads of argument filed on behalf of the City, and in argument by its counsel before this court.

THE WINDING ROAD OF THE LITIGATION IN THIS MATTER

[5] The application was initially issued out of court on 8 July 2020, and the relief was sought in two parts. Urgent interdictory relief was sought in Part A, pending the final determination of the relief sought in Part B, which is before this court. In respect of the relief sought under Part A, the fourth and fifth applicants applied to intervene **("the**

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2. The Applicants will indemnify the lawful owners of any material which were delivered to the property.
3. Subject to paragraph 4 below, the people listed in Annexure A may:
   3.1. Erect in total 49 structures, using the material returned in terms of paragraph 1, and only to the extent necessary alternative material, on the portion of the Property marked in red on the map attached as Annexure B; and
   3.2. Occupy those structures for the period described in paragraph 7.
4. No other person may occupy the Property or erect any structure on the Property and the Applicants shall use their best endeavours to ensure that the number of structures do not increase.
5. This order does not affect the Respondent's right to counter-spoliate should anyone else erect or try to erect structures at the property.
6. The Applicants, including all major persons listed in Annexure A, will take all reasonable and effective measures to prevent any other person occupying the Property or erecting a structure on the Property. If any person not listed in Annexure A occupies or attempts to occupy the Property, or erects or attempts to erect a structure on the Property, the Applicants will immediately notify the City.
7. Paragraphs 2, 3, 4, 5 and 6 will apply for as long as the restriction compelling every person to remain in their residence, except for obtaining or performing essential services, contained in regulation 11B(1)(a)(i) of the Regulations Issued in terms of Section 27(2) of the Disaster Management Act 57 of 2002, published in GN 318 in GG 43107 of 18 March 2002 (sic), as amended by GN R398 in GG 43148 of 25 March 2020, GN R419 in GG 43168 of 26 March 2020, and on 16 April 2020 (the Lockdown Regulation) remains in force.
8. Once the Lockdown Regulation is no longer in force, either party may enrol the matter on reasonable notice, on papers duly supplemented.
9. The rights, in relation to the Property, of all parties to these proceedings, as they existed on 8 April 2020, shall not be affected by this order.
10. Costs will stand over for later determination.'

intervening applicants") and sought the same relief as the first three applicants **("the applicants")** in paragraph 2 of the urgent interdictory relief, and further sought:

'4.1 In the alternative to paragraph 2.1 of the prayer sought in Part A, it is ordered that the first respondent, its Anti-Land Invasion Unit ("ALIU") and any private contractors appointed by the first respondent to do the same or similar work or to perform the same or similar functions as the ALIU, are interdicted and restrained from evicting any person and demolishing any informal dwelling, hut, shack, tent or similar structures or any other form of temporary or permanent dwelling or shelter, whether occupied or unoccupied, throughout the City Metropole, while the state of disaster promulgated by the third respondent in terms of section 23 (1) of the Disaster Management Act 57 of 2002, as amended, remains in place unless the first respondent provides temporary emergency accommodation or in terms of an order of court duly obtained.

The first respondent is directed to return all building materials and personal possessions seized by its Anti-Land Invasion Unit from the Second Applicant between the period 1 May 2020 to date.'

The applicants also joined, without objection from any of the other parties, the fifth and sixth respondents in the application.

[6] The interim relief under Part A was heard by Meer and Allie JJ. Meer J, as agreed to by Allie J, granted the relief in the following terms:

'1.1. The First Respondent, its Anti-Land Invasion Unit ("ALIU"), and any private contractors appointed by the First Respondent to do the same or similar work or to perform the same or similar functions as the ALIU, are interdicted and restrained from evicting persons from, and demolishing, any informal dwelling, hut, shack, tent or similar structure or any other form of temporary or permanent dwelling or shelter, whether occupied or unoccupied, throughout the City Metropole, while the state of disaster promulgated by the Third Respondent in terms of section 23(1)(b) of

the Disaster Management Act 57 of 2002, as amended, remains in place, except in terms of an order of court duly obtained;

1.2. To the extent that the First Respondent and its authorised agents (such as the ALIU and the private contractors aforementioned) evict and/or demolish any informal dwelling, hut, shack, tent or similar structure or any other form of temporary or permanent dwelling or shelter, whether occupied or unoccupied, in terms of a court order, that they do so in a manner that is lawful and respects and upholds the dignity of the evicted persons, and that they are expressly prohibited from using excessive force, and/or from destroying and/or confiscating the materials which is the property of the evictees;

1.3. To the extent that any evictions and/or demolitions are authorised by court order, that the South African Police Service, when its members are present during an eviction or demolition is directed to ensure that the said evictions and/or demolitions are done lawfully and in conformity with the Constitution, in accordance with the SAPS' Constitutional duty to protect the dignity of the persons evicted.

1.4. The First Respondent is interdicted and restrained from considering, adjudicating and awarding any bids or tenders received in response to Tender 308S/2019/20 "Demolition of illegal and informal structures in the City of Cape Town".

2. The First Respondent is directed to return within a week of the date of this order all building materials and personal possessions seized by its Anti-Land Invasion Unit from the Second Applicant between the period 1 May 2020 to date.

2.1. The Attorney for the Second Intervening Party is directed to furnish the First Respondent with a list of names of those persons claiming compensation in the sum of R2000 each in lieu of loss of personal belongings.

2.2. The First Respondent is ordered to pay the sum of R2000 to each person whose entitlement to compensation is agreed upon. In the event of any disagreement by the First Respondent as to entitlement to compensation once the list is presented, the parties may approach the Court for relief.

3. The First Respondent shall pay the cost of the application save for the costs occasioned by the postponement of the hearing on 25 July 2020. Each party shall bear their own costs in respect of 25 July 2020. The Fourth, Fifth and Sixth Respondents shall bear the costs occasioned by their opposition to the relief sought at prayer 2.3 of the Notice of Motion.'

[7] Leave to appeal against the interim relief was refused by Meer and Allie JJ, but granted on special application to the Supreme Court of Appeal which, in December 2021, upheld the relief in paragraphs 1, 1.2, 1.3, 1.4 and 3 of the interim order, and upheld the appeal in respect of paragraph 2 of the interim order.

[8] In Part B of in its initial Notice of Motion (there were several iterations of the relief sought by the applicants) the following relief was sought:

'1. The conduct of the first respondent in demolishing informal dwellings and/or structures erected on Erf 18332 Khayelitsha, Erf 5144 Ocean View, Erf 18322, Ethembeni in Khayelitsha, and Erf 5144, Kommetjie Township, Ocean View, and throughout the City Metropole, without a valid and lawful Court Order, is declared to be unlawful and invalid, and inconsistent with the Constitution.

2. To the extent that any evictions and/or demolitions are effected by the first respondent in terms of a valid and lawful Court Order, that such evictions and/or demolitions take place in accordance with the law, and the Constitution, and in the presence of the South African

Police Service who are directed to ensure that the dignity of the evictees is respected and protected.

3. *The decision or decisions of the City to mandate its ALIU and/or its agents to demolish structures determined by City officials and/or the ALIU and/or its agents, to be unoccupied with court orders, are declared to be unlawful and unconstitutional, and they are accordingly reviewed and set aside.*

4. *The conduct and procedure adopted by the City and/or its officials and/or the ALIU and/or its agents, to decide, based on a visual assessment, whether and when a structure or informal dwelling is "occupied" as a "home" and consequently whether and when persons are to be evicted from their structures and that those structures be demolished, without a court order, alternatively the decision of the City to approve or condone such conduct and procedure by its officials and/or agents, and/or ALIU, is declared to be unlawful and unconstitutional, and is reviewed and set aside.*

5. *It is declared that the common law principle of counter spoliation, 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.*

6. *The decision of the first respondent to issue, adjudicate, and award, Tender 308S/2019/20 "Demolition of Illegal and formal and informal structures in the City of Cape Town" is declared to be unlawful and unconstitutional and is reviewed and set aside.*

7. *The first respondent and/or any of the other respondents opposing this application, are ordered to pay the costs of this application, including the costs of two counsel on the attorney and client scale.*

8. *Further and/or alternative relief.'*

The intervening applicants sought, in addition to the relief sought by the applicants, the following relief:

'2. It is declared that the first respondent's demolition of the second applicant's (in the intervening application) structures was unlawful and unconstitutional.

3. It is declared that the second applicant may only be evicted through an order of court in terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998;

4. It is declared that the establishment, composition, formulation and functioning of the first respondent's Anti-Land Invasion Unit is unlawful, and it is reviewed and set aside.

5. The first respondent (and any other respondent that opposes this application) is to pay the costs of this application on an attorney and client scale, including the costs of two counsel.

6. Further and/or alternative relief.'

[9] It appeared that during August 2020 the applicants sought an amendment of their Notice of Motion, in the following terms:

'1. The conduct of the first respondent in demolishing informal dwellings and/or structures erected on Erf 18332 Khayelitsha, Erf 5144 Ocean View, Erf 18322, Ethembeni in Khayelitsha, and Erf 5144, Kommetjie Township, Ocean View, and throughout the City

Metropole, without a valid and lawful Court Order, is declared to be unlawful and invalid, and inconsistent with the Constitution.

2. *To the extent that any evictions and/or demolitions are effected by the first respondent in terms of a valid and lawful Court Order, that such evictions and/or demolitions take place in accordance with the law, and the Constitution, and in the presence of the South African Police Service who are directed to ensure that the dignity of the evictees is respected and protected.*

3. *The decision or decisions of the City to mandate its Anti Land Invasion Unit ("ALIU") and/or its agents to demolish structures determined by City officials and/or the ALIU and/or its agents, to be unoccupied with court orders, are declared to be unlawful and unconstitutional, and they are accordingly reviewed and set aside.*

4. *The conduct and procedure adopted by the City and/or its officials and/or the ALIU and/or its agents, to decide, based on a visual assessment, whether and when a structure or informal dwelling is "occupied" as a "home" and consequently whether and when persons are to be evicted from their structures and that those structures be demolished, without a court order, alternatively the decision of the City to approve or condone such conduct and procedure by its officials and/or agents, and/or ALIU, is declared to be unlawful and unconstitutional, and is reviewed and set aside.*

5. *The decision(s) and/or conduct of the City in establishing, mandating and operating the ALIU is declared to be unlawful, unconstitutional and is reviewed and set aside.*

6. *It is declared that the common law principle of counter spoliation, 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.

7. *The decision of the first respondent to issue, adjudicate, and award, Tender 308S/2019/20 "Demolition of Illegal and formal and informal structures in the City of Cape Town" is declared to be unlawful and unconstitutional and is reviewed and set aside.*

8. *The first respondent and/or any of the other respondents opposing this application, are ordered to pay the costs of this application, including the costs of two counsel on the attorney and client scale.*

9. *Further and/or alternative relief.'*

The applicants further sought the filing of the record, in terms of Rule 53, of the decisions taken in respect of prayers 2 and 5 which were sought to be reviewed and set aside. The applicants also sought any such reasons that the first respondent desired to give and that it notify the applicants' attorneys that it had done so.

Prior to the hearing of Part B, which was also heard by Meer and Allie JJ, the Premier of the Western Cape Provincial Government **("the Province")** applied to intervene as a respondent in Part B of the application. That application was not opposed by any of the parties and was granted. Likewise, the social movement Abahlali Basemjondolo Movement of SA applied with the consent of all of the parties to assist the court as amicus curiae **("the amicus").** That application was likewise granted.

An application by Afriforum to assist the court as an amicus curiae was opposed by the applicants, and refused by Meer and Allie JJ at the inception of the hearing of Part B.

[10] Part B was initially heard on 20 and 21 August 2020. It appeared that on the postponed date of 27 November 2020, and during the hearing, the applicants handed up a proposed Draft Order, in the following terms:

*'**KINDLY TAKE NOTICE** that the First to Third Applicants propose the following draft order, with additions and ~~deletions~~ to the Amended Notice of Motion marked.*

1. *The conduct of the first respondent in demolishing informal dwellings and/or structures erected on Erf 18332 Khayelitsha, Erf 5144 Ocean View, ~~Erf 18322, Ethembeni in Khayelitsha, and Erf 5144, Kommetjie Township,~~ ~~Ocean View~~, and throughout the City Metropole, without a valid and lawful Court Order, is declared to be unlawful and invalid, and inconsistent with the Constitution.*

2. *To the extent that any evictions and/or demolitions are effected by the first respondent in terms of a valid and lawful Court Order, that such evictions and/or demolitions take place in accordance with the law, and the Constitution, and in the presence of the South African Police Service who are directed to ensure that the dignity of the evictees is respected and protected.*

3. *The decision or decisions of the City to mandate its Anti Land Invasion Unit ('ALIU') and/or its agents to demolish structures determined by City officials and/or the ALIU and/or its agents, to be unoccupied with court orders, are declared to be unlawful and unconstitutional, and they are accordingly reviewed and set aside.*

4. *The conduct and procedure adopted by the City and/or its officials and/or the ALIU and/or its agents, to decide, based on a visual assessment, whether and when a structure or informal dwelling is "occupied" as a "home" and consequently whether and when persons are to be evicted from their structures and that those structures be demolished, without a*

court order, alternatively the decision of the City to approve or condone such conduct and procedure by its officials and/or agents, and/or ALIU, is declared to be unlawful and unconstitutional, and is reviewed and set aside.

5. *The decision(s) and/or conduct of the City in establishing, mandating and operating the ALIU is declared to be unlawful, unconstitutional and is reviewed and set aside.*

6. *It is declared that the common law principle of counter spoliation, 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 consistent with the Constitution, and invalid:*

6.1 With immediate effect; or

6.2 In the alternative, the order of invalidity in paragraph 6 is suspended for 24 months.

7. *The decision of the first respondent to issue, adjudicate, and award, Tender 308S/2019/20 'Demolition of Illegal and formal and informal structures in the City of Cape Town' is declared to be unlawful and unconstitutional and is reviewed and set aside.*

8. *The first respondent and/or any of the other respondents opposing this application, are ordered to pay the costs of this application, including the costs of two counsel on the attorney and client scale.*

6A In the alternative to immediate invalidity in terms of paragraph 6, the order of invalidity in paragraph 6 is suspended for 24 months.

TAKE NOTICE FURTHER *that unless written objection to the proposed amendment is delivered within 10 days of delivery of this notice, the amendment will be effected.'*

[11] It appeared that after the hearing of the matter, Meer and Allie JJ were unable to agree on the outcome, and reported their deadlock to the Judge President of the Division. This bench was thereupon constituted.

[12] A preparatory meeting was held virtually by the court with the parties, with regard to dates for the hearing of the matter and the logistics for its hearing virtually. The parties were also requested by the court to meet amongst themselves and to file a Joint Practice Note.

[13] A Joint Practice Note was filed by the parties on 9 February 2021, which set out the following:

*'**BRIEF DESCRIPTION OF THE MATTER AND RELIEF SOUGHT***

1. *This case is about the legality of the City's demolition of erected structures within its jurisdiction and whether the common law on counter spoliation, which the City relies on in defence of its actions, passes constitutional muster, and if not, whether it requires development.*

2. *The applicants contend that the City has acted unlawfully in evicting occupiers and demolishing structures (both occupied and unoccupied) without a valid court order. The applicants further contend that the City has unlawfully created and mandated the Anti-Land Invasion Unit ("ALIU") to carry out these demolitions on its behalf. The City has also issued a tender seeking the services of private contractors to assist in these operations, and the applicants contend that the issue of the tender falls to be reviewed and set aside.*

This application was brought in two parts. In Part A the applicants sought (and were granted) urgent interim interdictory relief pending the finalisation of Part B. The Supreme Court of Appeal has granted the City leave to appeal in respect of the Part A order.

3. In Part B, the applicants seek the following review and declaratory relief:

3.1. *a declaration that the City's conduct in demolishing informal dwellings and/or structures erected on Erf 18332 Khayelitsha and Erf 5144 Ocean View, Cape Town and throughout the City Metropole, without a valid and lawful court order, to be unlawful and unconstitutional;*

3.2. *a declaration that, to the extent that any evictions and/or demolitions are effected by the City in terms of a valid and lawful Court Order, that such evictions and/or demolitions take place in accordance with the law, and the Constitution, and in the presence of the SAPS which is directed to ensure that the dignity of the evictees is respected and protected;*

3.3. *reviewing and setting aside: (a) the City's decision to instruct the ALIU to demolish structures without a court order if its officials deem they are unoccupied; alternatively (b) the process the ALIU uses to determine whether a structure is occupied or not;*

3.4. *to the extent necessary, an order developing the common law so that the defence of counter spoliation does not permit 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;*

3.5. *an order declaring the establishment of the City's ALIU, alternatively the powers granted to the ALIU, to be unlawful, unconstitutional and invalid and an order setting*

aside the establishment of the ALIU;

3.6. *an order reviewing and setting aside the decision to issue or adjudicate or award Tender 308S/2019/20 "Demolition of Illegal Formal and Informal Structures in the City of Cape Town".*

3.7. *an order directing the respondents opposing this application to pay the costs of the application including the costs of two counsel on the attorney and client scale.*

4. In Part B, intervening applicants seek the following relief:

4.1 the same relief as Part B of the main application;

4.2 an order declaring that the City's demolition of the fifth applicant's structures was unlawful and unconstitutional;

4.3 an order declaring that the fifth applicant may only be evicted through an order of court in terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 ("the PIE Act");

4.4 an order declaring that the establishment, composition, formulation and functioning of the City's ALIU is unconstitutional and unlawful, alternatively, declaring that the establishment, composition, formulation and functioning of the City's ALIU is unlawful, and it is reviewed and set aside;

4.5 the City (and any other respondent opposing the application) to pay the intervening applicants' costs on an attorney and client scale, including the costs of two counsel.

THE ISSUES TO BE DETERMINED

5. The following issues must be determined:

5.1. *First, the meaning and scope of the PIE Act. The applicants contend that on a purposive interpretation, the PIE Act applies when persons have commenced or are in the process of taking occupation of land, or have the intention of taking occupation. The City and Province contend that the PIE Act applies only to occupiers of a home – i.e., it applies only when a home has been established on the land and is being occupied as such. The issues to be determined are:*

5.1.1. *the proper interpretation of the PIE Act; and*

5.1.2. *the appropriate course for an organ of state to follow where there is doubt about whether a person is an unlawful occupier protected under the PIE Act.*

5.2. *Second, the scope and application of the common-law defence of counter spoliation. The City and Province contend that they are entitled to rely on counter spoliation to seize and demolish structures without a court order when the PIE Act does not apply (i.e., where a home has not been established and occupied as such) and where the requirements for counter spoliation are met. The following issues require determination:*

5.2.1. *the scope and application of the defence of counter spoliation under the common law and whether the defence allows for the demolition and seizure of a structure (whether occupied or unoccupied) as the respondents contend but the applicants dispute;*

5.2.2. *whether the defence of counter spoliation limits the rights in ss 10,12, 25, 26 and/or 34 of the Constitution;*

5.2.3. *if it does, whether those limitations are justifiable under s 36(1) of the Constitution;*

5.2.4. *if not, how the defence of counter spoliation should be developed; and*

5.2.5. *whether any further or alternative relief is just and equitable, including –*

5.2.5.1. *an order directing the publication of guidelines (by municipalities or the national minister responsible for local government) on the exercise of lawful counter spoliation measures, as the WCG has proposed is the appropriate remedy; or*

5.2.5.2. *a suspension of any declaration of invalidity of the defence of counter spoliation.*

5.3. *Third, the legality of the ALIU. The applicants argue that the decision to establish the ALIU and to mandate it to summarily seize and demolish structures determined by the ALIU and/or City officials to be unoccupied, is unlawful. The City defends the legality of the establishment of the ALIU. The issues to be determined are:*

5.3.1. *whether the ALIU unlawfully exercises policing powers;*

5.3.2. *whether the mandate conferred on the ALIU by the City and the ALIU's conduct in summarily seizing and demolishing structures deemed to be unoccupied, is consistent with s 25(1) of the Constitution;*

5.3.3. *whether the establishment and continued operation of the ALIU in the absence of legislation or guidelines limiting the exercise of its discretionary powers is lawful and consistent with the Constitution.*

5.4. *Fourth, the role of the SAPS. The applicants ask for an order that evictions can only occur when SAPS is present, and that when it is present, it must uphold the dignity*

of occupiers. SAPS claims it has no such obligation. The issues to be determined are:

5.4.1. *the nature of SAPS' statutory and constitutional obligations, if any, when the City conducts evictions;*

5.4.2. *whether the evidence justifies relief declaring the nature of those obligations; and*

5.4.3. *whether the City can be interdicted from conducting evictions in the absence of SAPS.*

5.5. *Fifth, whether the City's tender for private security firms to assist the ALIU is unlawful and falls to be reviewed and set aside;*

5.6. *Finally, the issue of costs.'*

It was apparent to the court that instead of a narrowing of the issues and scope of the matters for determination in the Joint Practice Note, the parties unnecessarily and prolifically expanded on the issues that needed to be determined by this court. Much of the issues raised for deliberation by the court in the Joint Practice Note extended way beyond the relief pleaded (even in its various iterations) on the papers.

THE HEARING OF THE MATTER AND THE FINAL RELIEF SOUGHT

[14] In its preparation for the hearing of the matter, the court noted that the second respondent, the Minister of Human Settlements, had no more than filed a Notice to Abide the outcome of the matter. The court was of the view that the matter was of particular significance, and that the court should request of the second respondent to provide an

explanatory affidavit in respect of the position adopted by its Ministry in respect of the issues raised. None of the parties objected to the request by the court.

[15] In response thereto, the State Attorney filed an explanatory affidavit deposed to by the then National Minister of Human Settlements, the Honourable Ms Lindiwe Sisulu. Heads of argument was also filed on her behalf by counsel. At the initial hearing of the matter on 25 March 2021, the court raised with counsel for the second respondent that certain factual matters had been raised in the heads of argument that were not supported by the content of the explanatory affidavit, and requested of counsel to obtain a further affidavit from the second respondent, lest the factual issues be the subject of a dispute by any of the parties. In response thereto, an affidavit was filed by the State Attorney in which she pointed out that the factual issues referred to in the heads of argument were no more than notorious facts, and that the court could readily take judicial notice thereof. None of the parties sought to challenge the facts and observations raised in the heads of argument by the second respondent, and the court was at liberty to take judicial notice thereof. The content of that affidavit and the submissions by counsel for the second respondent will be dealt with later in the judgment.

[16] The hearing of the matter commenced on 25 and 26 March 2021, and was adjourned to 11, 12, 13, and 14 October 2021. During the presentation of argument on behalf of the applicants, on 25 March 2021, it appeared to the court that the applicants had abandoned any claim for the development of the common law in respect of the defence of counter spoliation. When pointedly asked by the court, counsel for the applicants conceded that the applicants' position was that it no longer sought a development of the common law. At the resumption of the hearing on the following day

(26 March 2021), mindful that counsel for the applicant may have been under pressure by the court with regard to the concession on the development of the common law, the court extended an invitation to the applicants to provide the court with a note on the concession, and whether the applicants were minded to reconsider their position on it. None of the other parties objected to the proposal by the court, as long as the applicants timeously filed the note for any of them to respond to it. At the request of counsel for the intervening applicants, they were also afforded the opportunity to provide a further written note on their oral argument. In a note filed by the legal team on behalf of the applicants on the concession, they contended that their clients had never sought the development of the common law on counter spoliation in the proceedings, and had therefore not conceded disavowing any such relief. The applicants reiterated in their note that the primary relief was based on a direct challenge to the constitutionality of the City`s conduct in its reliance on the defence of counter spoliation, and that they sought a declaration of invalidity in terms of Section 172 (1)(a) of the Constitution. If necessary, they contended, the court itself was bound to develop the defence of counter spoliation in terms of section 39(2) of the Constitution. Needless to say, the position adopted by the applicants in their note was in stark contrast to the content of their various affidavits filed in the matter, and the heads of argument filed on their behalf by their legal team, in which they repeatedly sought the development of the common law defence of counter spoliation. In respect of the intervening applicants, no further written submissions were made, and none were received from any of the other parties in response to the note filed by the applicants. In any event, in its judgment this court has not found it necessary to develop the common law defence of counter spoliation

[17] At the resumption of the hearing on 11 October 2021, the applicants and the intervening applicants applied for the recusal of Slingers J. After hearing submissions from the parties' legal representative, Slingers J refused the application. Saldanha and Dolamo JJ recorded their agreement with the order by Slingers J. (The reasons for the refusal of the application for the recusal of Slingers J is filed at the end of this judgment on the merits of the main application in Part B.) The matter thereafter proceeded and was adjourned on 14 October 2021 to 5 November 2021, for further argument, where after judgment was reserved. On 12 November 2021 the applicants submitted a new Draft Order, which elicited a Notice of Objection by the fourth, fifth and sixth respondents. Written notes on the proposed Draft Order were submitted by the first and seventh respondents. The court thereupon put the parties to terms with regard to the closure of pleadings on 4 December 2021. No further notes or responses were filed.

The final Draft Order proposed by the applicants read as follows:

*'**KINDLY TAKE NOTICE** that the first to third applicants propose the following draft order:*

1. *The conduct of the first respondent in demolishing informal dwellings and/or structures erected on Erf 18332 Khayelitsha, Erf 5144 Ocean View, without a valid and lawful Court Order, is declared to be unlawful and invalid, and inconsistent with the Constitution.*

2. *To the extent that any evictions and/or demolitions are authorised by Court Order, that the South African Police Service, when its members are present during an eviction or demolition, is directed to ensure that the said evictions and/or demolitions are done lawfully and in conformity with the Constitution, in accordance with the SAPS' constitutional duty to protect the dignity of the persons evicted.*

3. *The decision or decisions of the City to mandate its Anti Land Invasion Unit ("ALIU") and/or its agents to demolish structures determined by City officials and/or the ALIU and/or its agents, to be unoccupied, without court orders and/or lawful and constitutionally compliant guidelines, are declared to be unlawful and unconstitutional.*

4. *The conduct and procedure adopted by the City and/or its officials and/or the ALIU and/or its agents, to decide based on a visual assessment, whether and when a structure or informal dwelling is "occupied" as a "home" and consequently whether and when persons are to be evicted from their structures and that those structures be demolished, without a court order and/or lawful and constitutionally compliant guidelines, alternatively the decision of the City to approve or condone such conduct and procedure by its officials and/or agents, and/or ALIU, is declared to be unlawful and unconstitutional.*

5. *The decisions and/or conduct of the City in establishing, mandating and operating the ALIU is declared to be unlawful and unconstitutional.*

6.1 *It is declared that 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.**

***NOTE:**

The City makes a distinction between "occupation" and "possession" such that it maintains that an "occupied" structure might not be "possessed" by the person who lives in it. We submit that if the City is right, then the doctrine of counter spoliation is unconstitutional.

6.2 *The order of invalidity in paragraph 6.1 is suspended for twenty-four (24) months.*

7. The decision of the first respondent to issue, adjudicate, and award, Tender 308S/2019/20 "Demolition of Illegal and formal and informal structures in the City of Cape Town" is declared to be unlawful and unconstitutional.

8. The first respondent and the seventh respondent (the Premier of the Western Cape Government), jointly and severally, are ordered to pay the costs of this application, including the costs of three (3) counsel.'

THE NATURE OF THE RELIEF SOUGHT

[18] The central issue for determination in this matter, besides that of the legality of the City's demolition of erected structures referred to in paragraph 1 of the applicants' Notice of Motion, and the structures referred to in the relief sought by the second intervening applicants, is the meaning of, the requirements for, and application of the common law defence of counter spoliation, whether such defence or its exercise in relation to the invasion of vacant land is constitutional, and whether the particular understanding and application of the defence relied upon by both the City and the Province is both lawful and constitutional. At the outset, we point out that the relief sought by applicants, and that of the intervening applicants, appear largely to have been fashioned on the conduct of the City and, in particular, its understanding of what is meant by the defence of counter spoliation, its requirements and application. The relief sought by the applicants, as well as that of the intervening applicants, has, in our view, unfortunately conflated the common law defence of counter spoliation and its requirements, with the scope and application of the provisions of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 **("PIE")**. The conflation of the remedy under the common law with that of

the statute, PIE and section 26 (3) of the Constitution,[2] in our view, arises pertinently from the responses on affidavit by both Mr Buchener in the Habile matter (above), and that of Ms. Pretorius in the answering affidavit filed on behalf of the City and embraced to a large measure by the Province in their papers and argument before this court. Central to the contention by the City and Province is that the City's officials were entitled to summarily demolish structures *'if deemed unoccupied and/or did not constitute a home'* as envisaged under PIE and section 26 (3) of the Constitution. Counsel for the Province did, however, seek to point out in argument that, as she put it, counter spoliation occupies *'one lane'* while PIE occupies a *'different lane',* yet contended that the requirement of possession under the defence included, inter alia, the actual physical occupation of a structure. The relief, as formulated by the applicants with regard to the constitutionality or otherwise of the common law defence of counter spoliation, was severely criticized by all of the counsel for the respondents as not only poorly formulated, wholly unnecessary in part (in particular with regard to the scope of PIE) and was conceptually ill-conceived. These criticisms were in our view, and in part, not without merit. The applicants literally tailored their relief as the matter progressed. That was evident from the various permutations in the amendments to the notice of motion, the proposed draft orders, affidavits (such as claims in relation to the development of the common law and an inexplicable expanded application of PIE to include incomplete and unoccupied structures,) so too in their heads of argument, notes to the court and all of which was compounded in oral argument. This modus operandi was not confined to the relief

[2] '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.'

relating to the City`s and Province`s understanding and application of the defence of counter spoliation but included the relief related to most of the other prayers and also that in respect to the relief sought against the 4th, 5th and 6th respondents (the police respondents.) The applicants also eventually resorted to mere declaratory relief as proposed in their final draft order. The case presented by the intervening applicants to a lesser extent suffered from the same afflictions. For example, in oral argument, they uncritically sought to latch onto the applicants ill-considered contention that the City should instead of invoking the defence of counter spoliation, engage the South African Police Services with the laying of criminal charges of trespass against persons who invade vacant land. That would in our view exacerbate already volatile situations with the attended risk of violence in attempts at mass arrests. It is in this context, that the expanded scope and elaborate issues for determination in the Joint Practice Note appears to have been conceived by the parties.

[19] In respect of the lawfulness the City's demolition of erected structures with regard to the relief sought in paragraph 1 of the Notice of Motion, Part B, and that in respect of the relief sought by the intervening applicants in respect of erf 544 Portion 1 Mfuleni, the City contended that there were serious disputes of fact on the papers, with regard to when and how occupation of such structures occurred, and contended that this court could not resolve such disputes on the papers before it and relied on the principles as set out in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A), to the effect that the version of the City was to be accepted. The question that arises is whether there were in fact genuine disputes of fact, that even on the version proffered by the City, and based on the undisputed evidence depicted in video footage in respect of the removal

and handling of Mr Bulelani Qolani, and the demolition of the structure that he was found in by the officials of the City, whether this court is on the evidence before it, able to make a determination of the lawfulness or otherwise of the City's conduct. This applies equally to the summary demolition of other structures that the city claimed were in the process of being constructed, or fully erected but unoccupied, and which could not reasonably be construed as homes, as envisaged in PIE and Section 26 (2) of the Constitution; that the City claimed it's officials summarily demolished in exercise of the common law remedy of counter spoliation at erf 18332, Khayelitsha (Empolweni / Enthembeni)and at erf 5144 Hangberg referred to in prayer 1 of the proposed draft relief (final) by the applicants, and also to the relief claimed by the intervening applicants in respect of the demolition of structures on erf 544 Portion 1 Mfuleni (Delft.)

[20] It will appear more fully from our consideration of the relief sought by the applicants under prayer 6, and as agreed to by the parties in the Joint Practice Note regarding the determination of the meaning and requirements of the defence of counter spoliation, that the interpretation contended for by the amicus is to be preferred over that of the wider scope and requirements contended for by the City and the Province which, if correct, would implicate its constitutionality. In our view, distilled from all of the competing contentions, the existing law, and authorities relied upon and referred to by the parties, the nature and scope of the requirement of possession under counter spoliation and the pre-eminent requirement of 'instanter' in the defence, is central to the determination of the lawfulness of the conduct of the City's officials, and the correctness or otherwise of both the City's and the Province's understanding of the common law defence of counter spoliation. As with the requirements and scope of the requirement of possession, the City

and the Province contend for a broader approach to the requirement of 'instanter' which, in our view, is contrary to that implied by the very limited nature and scope of the remedy.

[21] At the outset, it is necessary to place on record the court's mindfulness about, and appreciation of, the profound levels of homelessness, not only in the province of the Western Cape, but nationally as well. There are immense challenges faced by government in all spheres to comply with their constitutional obligations to progressively achieve access not only to housing, as contemplated in section 26(2) of the Constitution, but in respect of all the other desperate and immediate socio- economic needs provided for in the Constitution, within limited budgetary capacity and complex logistical constraints faced at this time by government. The court is, moreover, acutely mindful not only of ever-increasing incidents of unlawful invasions of vacant land (both state and private,) by predominantly poor and desperate people, but also of orchestrated attempts at land grabs for political and/or other nefarious reasons, that crudely exploits the vulnerability of desperate and homeless people. Neither the applicants, nor the intervening applicants, challenge the attempts made by the City and Province, and that of the National Government, to progressively and reasonable meet its obligations under section 26 (2) of the Constitution.[3] What the applicants, the intervening applicants, and the amicus seek to point out and emphasize, is that the admittedly dire circumstances of poor and homeless people forces them, in utter desperation, to resort to the invasion of vacant land, and to the construction of what can be no more than fragile and, more often than not, overcrowded structures that exist at the mercy, and subject to the ravages of,

[3] 'The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.'

perennial fires and floods that bring with it wide scale destruction and at times death, structures that are meant to provide no more than desperate and rudimentary shelter to otherwise homeless families.

COUNTER SPOLIATION- IS IT UNCONSTITUTIONAL AND INVALID?

[22] As stated earlier, it is the City's very understanding and application of the defence of counter spoliation, as expressed by Mr Buchener, that is central to the determination of the relief sought by the applicants. We, therefore, firstly address the common law defence of counter spoliation, its requirements and application as this would largely be determinative of the relief sought by the applicants.

[23] In their amended Notice of Motion, the applicants seek a declaratory order that the common law principle of counter spoliation, insofar as it permits or authorizes 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. (In this regard we are also mindful of the final Draft Order proposed by the applicants, in particular paragraphs 3 and 6 thereof)

[24] In addressing this relief, we examine the remedy of counter spoliation and how each party understands and applies it within the factual context of land incursions.

[25] The *mandament van spolie* is a common law possessory remedy used to restore possession that was unlawfully lost[4]. It is a robust, speedy remedy[5] and has as its main

[4] *Eskom Holdings SOC Ltd v Masinda* 2019 (5) SA 386 (SCA).
[5] *Blendrite (Pty) Ltd and Another v Moonisami and Another* 2021 (5) SA 61 (SCA).

objective the preservation of public order by preventing persons from taking the law into their own hands and is rooted in the rule of law.[6] Self-help by way of taking the law into your own hands is inconsistent with and undermines the Rule of Law which is one of the founding principles of our democracy.[7] 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.[8]

[26] It is clear that counter spoliation is not a stand-alone remedy or defence and does not exist independently of the *mandament van spolie*.[9]

[27] The applicants do not take issue with the requirements of and application of counter spoliation generally. Their challenge to counter spoliation is limited to its application in circumstances where it is used to demolish and/or evict persons from informal structures that appear to officials of the City as unoccupied or do not constitute a home.

[28] In their papers filed on record, the applicants accepted that counter spoliation affords the City a small window within which it could utilize counter spoliation. On applying

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[6] *Bisschoff and Others v Welbeplan Boerdery (Pty) Ltd* 2021 (5) SA 54 (SCA); Voet 41.2.16.; See also *The Selective Voet*, being the Commentary on the Pandects, Translated by Percival Gane, Butterworths Paris Edition, Book 6 Section 7(d) 442 , 485-488 and 499. Very interestingly the remedy was applied in Roman Law in response to the 'dispossession' of human slaves who under that law were regarded as no more than the possessions and chattels of others!

[7] *Bon Quelle (Edms) Bpk v Munisipaliteit van Otavi* 1989 (1) SA 508 (A); Section 1(c) of the Constitution which reads that:
'The Republic of South Africa is one, sovereign, democratic state founded on the following values:
. . .
(c) Supremacy of the constitution and the rule of law.'

[8] *Yeko v Qana* 1973 (4) SA 735 (A).

[9] *Ngqukumba v Minister of Safety and Security and Others* 2014 (5) SA 112 (CC).

this to the factual circumstances of this case, the applicants accepted that the City could use counter spoliation before any structure is erected. However, during the hearing of the matter, they amended their position to argue that there would be no stage at which the City would be entitled to rely upon counter spoliation as there would be no window within which it could lawfully use counter spoliation.

[29] The amicus argued that the defence of counter spoliation was a lawful remedy and that it was not unconstitutional, and that if it was applied strictly in accordance with the requirements set out in *Yeko v Qana*, there would be no need to either develop the common law or to declare it unconstitutional. *Yeko v Qana* held that self-help in the form of '*contra spoliation which is instanter resorted to, thus forming part of the res gestae in regard to the despoiler's appropriation of possession, as would be the immediate dispossession of a thief of stolen goods when he was caught flagrante delicto'* would be justified. It went on to hold that *'[t]he very essence of the remedy against spoliation is that the possession enjoyed by the party who asks for the spoliation order must be established. As has so often been said 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.'*[10]

[30] On applying the theoretical requirements of counter spoliation to the factual context of land incursions, the amicus submits that when persons come onto the land and commence construction of informal structures and counter spoliation is not resorted to immediately or instanter, it would not meet the requirements as set out in *Yeko v Qana* as endorsed by the court in *Residents of Setjwetla Informal Settlement v Johannesburg*

[10] Footnote 8 above, at 739.

City[11]. By bringing building materials onto the land and commencing construction of the informal structures, the land occupiers physically manifested their peaceful and undisturbed possession of the land and the original breach of the peace would have been completed and the *instanter* requirement of counter spoliation would have lapsed. In other words, if the City or the despoiled failed to act instanter, they could not thereafter invoke counter spoliation as a defence. Consequently, any act of dispossession from that stage would not be a defence to spoliation but would itself amount to an act of spoliation.

[31] The intervening applicants associated themselves with the submissions made by the applicants and with those made by the amicus. Furthermore, they argued that counter spoliation may only be resorted to *'there and then'* following immediately upon the original act of spoliation, thus forming part of the *res gestae* of the original breach of peace. On a practical application of the defence of counter spoliation, the intervening applicants initially argued that the act of entering onto the land with the intention of occupying it was sufficient to render the possession peaceful and undisturbed, making the defence of counter spoliation unavailable. In their heads of argument, and during their initial address, the intervening applicants argued that factual possession did not require actual possession and that a mere intention to possess was sufficient.[12] However, in reply, the

[11]2017 (2) SA 516 (GJ). In this matter the City of Johannesburg began to demolish the informal structures 3 days after the occupiers took possession of the land and commenced construction thereof. The court found that the unlawful occupiers had acquired possession of the shack sites on the respondent's version and that this possession was perfected. Therefore, the City of Johannesburg could not invoke counter spoliation as a defence. The court reasoned that the occupiers had commenced constructing shacks on the respondent's land, which implied that they had driven poles into the ground; perhaps wrapped corrugated-iron around some of those and perhaps fixed roofing material on top of those. This implied further that the occupiers moved around on the land while they were constructing their structures and that their own movable assets were affixed with a measure of permanence so that it could afford them effective protection against the elements.

[12] This argument was based on the decision of *G & D Refrigeration CC v Mulder* (HCA05/2016) [2016] ZALMPPHC 16 (28 October 2016).

intervening applicants accepted that this was not the correct position and associated themselves with the interpretation proffered by the amicus.

[32] The City relies upon the common law remedy of counter spoliation to summarily demolish and remove structures before they are occupied as homes. The City, in its heads of argument, states that *'counter spoliation … is a well-established defence to the mandament van spolie that seeks to restore lawful possession immediately where the possessor is unlawfully deprived of such possession'* and goes on to state that it is a self-help remedy which requires the lawful possessor to respond to a spoliator's unlawful spoliation immediately *(instanter)* and correctly concedes that a delay by the lawful possessor in restoring his/her possession may result in the dispossessed not being able to rely upon counter spoliation. Furthermore, the City acknowledges that the remedy of counter spoliation is only available in circumstances where an act of spoliation is in the process of taking place and that it must be utilized while it constitutes a continuation of the existing act of dispossession. It acknowledges that there is a very small window within which it can do so effectively and lawfully invoke counter spoliation. The City alleges that this window of opportunity to use the counter spoliation is available to it at any stage before a fully constructed informal structure becomes occupied as a *'home'*. The City claims it may invoke the defense of counter spoliation in circumstance where:

(i) persons are in the process of seeking to unlawfully occupy land and it takes action to prevent them from gaining access to the targeted land;

(ii) persons have gained access to the land unlawfully and are in the process of erecting or completing structures on the land and it takes action to prevent structures being erected or completed on the land; and

(iii) completed structures have been erected on the land and it is clear that such structures are unoccupied, and it takes steps to prevent the structures from being occupied.

[33] In those circumstances where completed structures have been erected on the land and it is doubtful whether the structures are occupied, the City's position is that it errs on the side of caution and that it takes no action to remove the structures.

[34] The City accepts that where structures have been erected on the land and have been occupied as homes, then it would have to approach the court in accordance with the provisions of PIE.

[35] The applicants argue that counter spoliation is unconstitutional because it allows the City to circumvent the provisions of the Constitution and of PIE and seek the declaratory relief on the basis that it is complementary to their arguments pertaining to the scope of PIE. There may be merit in the applicant's argument. The City states in its affidavit that its ability to evict people from land unlawfully occupied is hamstrung in that when it seeks an eviction order, it must provide emergency accommodation for the persons in unlawful occupation and who are evicted. The City's obligation to provide emergency accommodation does not arise from the demolition of structures or the eviction of persons but from section 26(2) of the Constitution and the Constitutional Court judgment of *Grootboom.*[13]

[36] The Province similarly relies upon the doctrine of counter spoliation to justify the demolition of structures and to remove people from their land without a court order. The Province acknowledges that counter spoliation entitles a possessor to take immediate

[13] *The Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC).

counter measures to resist unlawful dispossession as it is occurring, without the need for a court order.

[37] In its application of counter spoliation, the Province argues that it would be acting *instanter* in those instances where:

(i) persons enter onto their land with the intention of settling on it but have not yet commenced constructing any structure;

(ii) persons have entered onto land with the intention of settling thereof and have commenced construction of structures but have not yet completed the construction. The Province argues that in this scenario there is no structure which can be called a home and counter spoliation will also apply;

(iii) persons have entered onto the land, completed the construction of informal structures but have not yet occupied same.

[38] The Province accepts that counter spoliation has to occur before the original act of spoliation is completed, in the sense that the new possessor has not yet gained peaceful and undisturbed possession of property as counter spoliation is a continuation of the original act of dispossession.[14] If the original dispossessors are in peaceful and undisturbed possession, it would show/ imply that their possession was sufficiently stable or durable.[15] In the circumstances of the present case, the Province contends that it is only when the construction of the informal structures are completed and occupied that it can be said that the spoliator actually gained physical control of the land which would be peaceful and undisturbed.

[14] *Ness and Another v Greef* 1985 (4) SA 641 (C).
[15] Ibid at 647C-E.

[39] The second respondent argued that the element of physical control is not necessarily indicative of the requirement that the spoliator must have completed a building or structure so as to have the full use and occupation thereof. It is possible that an occupier can (albeit unlawfully) be in peaceful and undisturbed possession of a structure even of it has not been erected completely, provided, it is submitted, that the structure constitutes a place of dwelling for his/her and offers sufficient shelter for his/her possessions.

[40] The second respondent argued further that it was doubtful that unlawful occupiers who commenced erecting a structure on public land mere hours before the commencement of demolition by the local authority could regard themselves as enjoying *'peaceful an undisturbed possession*" of the structures and of the land on which they were being erected.

[41] All the parties agree with the theoretical application of and requirements for counter spoliation but differ on the practical application thereof, more particularly the parties disagree on when the *instanter* requirement would have expired, rendering the defence of counter spoliation unavailable. Interlinked with this, the parties do not agree on when the original despoiler's possession becomes peaceful and undisturbed.

[42] As seen from above, the intervening applicants initially advanced a position that the mere entry upon land with the intention to occupy it would suffice, while the City and the Province advanced a position that they are entitled to invoke counter spoliation at any stage before the land occupiers commence construction, complete construction and occupy the informal structures constructed.

[43] In *The Law of Property*, Silberberg states that two requirements have to be met before a person is regarded as a possessor. Firstly, the person needs to be in effective physical control of the item and secondly, the person needs to have the intention to derive some benefit from the possession. Effective physical control is context sensitive as the nature of the object, its usage and objectives guide the manner of control required to be effective.

[44] As stated above, counter spoliation is not a stand-alone remedy but is used as a defense to counter an act of spoliation and for this reason has to be used at the stage where it can be considered as being part of the act of spoliation. This stage is known as *instanter*. This would mean that it was a mere continuation of the existing breach, it sought to remedy, was not a new breach and consequently, is condoned by the law. If the first victim dispossessed proceeds to take the law into his/her own hands after the original breach is completed and possession is perfected by the despoiler, it would amount to a separate act of spoliation which would not be condoned by the law. What would amount to *instanter* is dependent upon the facts of each case and is inherently flexible but the act of counter spoliation must take place immediately in response to the act of spoliation.

[45] As seen from the factual circumstances in which the parties allege counter spoliation may be invoked, the applicants and the amicus adopt a narrow and limited approach to the application of counter spoliation while the City and the Province and to a limited extent, the second respondent adopt a broader approach to the application of counter spoliation.

[46] The broader approach to counter spoliation finds support by professor A J van Der Walt who argued that the *mandament van spolie* can successfully be resisted by the use of counter spoliation in circumstances where the possession is not sufficiently stable or durable *'for the law to take cognizance of it (which is probably what is meant by the words "the peaceful and undisturbed possession" – the law will not acknowledge the possession exercised by the clumsy snatch-and -grab thief who dropped the nag within seconds of snatching it.)'*[16]

[47] The broader approach to counter spoliation also found favour in *Ness and Another v Greef*[17] where the scope of the *instanter* requirement was widened. It found in those circumstances where a true owner was exercising his/her right of recovery of his/her property, particularly in those instances where he/she was despoiled against his/her clearest expression of the despoiler's prohibition, that the court had a wide discretion to approve of an act of counter spoliation and thus to refuse to assist the original spoliator against the original possessor, the lawful owner. As a result of this approach, the court found that the act of spoliation was not completed 11 days after it commenced, thus allowing the true owner to counter-spoliate and regain possession of her property. The court in *Ness* broadened the scope of the *instanter* requirement by incorrectly inquiring into the merits of the possession of the original despoiler and that of the original despoiled.[18] This is evident from the statement that *'a more liberal construction of instanter should be given to a true owner exercising his right of recovery of the property*

[16] Professor AJ van Der Walt *Defences in Spoliation Proceedings* (1985) 102 SALJ 172 at 177.
[17] Footnote 14 above.
[18] Silberberg and Schoeman's *The Law of Property*, 6th edition categorically states that the decision in *Ness v Greef* cannot be regarded as correct.

– particularly in a case where the applicant against the clearest expression of the respondent's prohibition, deliberately takes the law in his own hands.'

[48] A consideration of the *instanter* requirement with reference to the true ownership of the despoiled item is contrary to the maxim *spoliatus ante omnia restituendus est,* which means that any defence based on the respondent's claim to the item will be considered irrelevant to the central issue which is the restoration of the status *quo ante.* In accordance with this principle, courts will restore the spoliated possessed without any reference to the alleged illegality of it, pending a judicial appraisal of the merits of the parties' claims to the disputed item.[19] This is because it is the fact of possession which is material and not the basis thereof.[20]

[49] In discussing the broad approach adopted in *Ness v Greef,* Silberberg stated that: *'. . .The decision in Ness v Greef, where it was found that a recovery 11 days after the original dispossession, amounts to a justifiable act of counter-spoliation, can, however, not be regarded as correct. Our courts will not easily condone a recovery of lost possession after a considerable time has elapsed, but what precisely would amount to immediate recovery depends on the facts of each case, the determining factor being whether the conduct concerned constituted a new breach of the peace or merely a continuation of the existing one. The courts will furthermore not allow a defence of counter spoliation where there is a mere threat of interference with possession.'*[21] It is apparent that Silberberg is not a proponent of the broader approach to counter spoliation and that he is of the view that the facts of each case would be determinative of whether

[19]Professor AJ van der Walt; *Blendrite,* footnote 5 above.
[20] *Blendrite*, footnote 5 above.
[21] Silberberg and Schoeman's *The Law of Property* 6th edition, pg 354.

or not the *instanter* requirement had expired and the spoliator's possession perfected to become peaceful and undisturbed.

[50] The traditional approach to counter spoliation is found in the case of *Yeko v Qana*[22] which was followed by *Setjwetla Informal Settlement v Johannesburg City.*[23] *Yeko v Qana* determined that self-help may be justified if it concerns contra spoliation which is *instanter* resorted to, in other words, when the contra spoliation forms part of the *res gestae* in regard to the despoiler's appropriation of possession. The court went on to cite the example of a thief of stolen goods caught *flagrante delicto*. Therefore, counter spoliation would result in wrestle for possession between the despoiler and the original possessor resisting dispossession.

[51] The Court in *Yeko* found that the party who asks for spoliation must establish that he/she enjoyed possession. However, this possession was not possession in the juridical sense; but that it was the holding of with the intention of securing some benefit.

[52] In *Setjwetla* the applicants commenced invading the respondent's land unlawfully on 20 June 2016 and started construction of informal structures, which the respondent demolished 3 days later. Some of the informal structures were completely constructed, while other were halfway constructed. None of the informal structures were occupied.[24] The court found the demolition of the informal structures to be an unlawful resort to self-help. The applicants had unlawfully acquired possession of the sites of the informal structures and had unlawfully dispossessed the respondent. The actions of the applicants amounted to spoliation.

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[22] Footnote 8 above.
[23] Footnote 11 above.
[24] This was on the respondent's version.

[53] On the respondent's version, the applicants had commenced constructing informal structures. The court found that this construction implied that the applicants had driven poles into the ground; perhaps wrapped corrugated -iron sheets around some of those and perhaps fixed roofing material on top of those. It implied further that the applicants actually moved around on the sites of the informal structures while construction was busy. The court also found that it implied that the applicants' own movable assets were affixed with a sufficient measure of permanence to afford them effective protection against the elements. The act of constructing (either completed or in-completed) the informal structures sufficed to bestow the applicants with sufficient possession to constitute unlawful spoliation. The act of the respondent was not *instanter* to or part of the *res gestae* and could not be justified as counter spoliation but constituted a new breach of the peace.

[54] The decision of *Setjwetla* is criticised by Johan Scott in his article *The precarious position of a land owner vis-à-vis unlawful occupiers: Common-law remedies to the rescue?*[25] Scott argues that the grounds on which the applicants were found to be in 'peaceful and undisturbed possession' had been totally insufficient. He continues that in respect of immovable property, the nature of possession required is more that the mere cursory moving around on property with the intention to erect flimsy shelters. He then goes on to discuss the requirements of possession. However, he discusses possession in the accepted juridical sense, as seen from the statement that *'the law generally poses more stringent requirements regarding the corpus requirement of possession (control) when control is established by means of an original method. . . and not by way of*

[25] 2018 (1) TSAR 158.

derivative means. . .' However, this discussion ignores *Yeko v Qana* in that it unequivocally stated 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.

[55] Scott also accepts that to determine whether the act of counter spoliation qualified as *instanter* is where it was part of the *res gestae* of the original act of spoliation. However, he states further that in very early times, the act of self-help could validly be days removed from the original act of spoliation, even allowing a party the opportunity of gathering his/her friends to assist with the act of counter spoliation. Within this context, the lapse of 3 days in *Setjwetla* could still constitute part of the *instanter* of the *res gestae*. Furthermore, Scott points out that Panormitanus (Nicolaus de Tudeschis) recommended that the evaluation of the *instanter* period should be left to the reasonable man, thereby implying that a longer period could be accepted as being *instanter*. [26]

[56] Scott's position is supported by G Muller and EJ Marais.[27] They argue that there are not two forms of possession in South Africa, with one form being relevant for property law and the other being relevant for spoliation. But this is exactly what *Yeko v Qana* held in saying that: *'The very essence of the remedy against spoliation is that the possession enjoyed by the party who asks for the spoliation order must be established. As has so often been said 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.'*

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[26] Ibid at 169.

[27] *Reconsidering counter-spoliation as a common-law remedy in the eviction context in view of the single-system-of-law principle* 2020 (1) TSAR 103.

[57] Marais and Muller further attempt to broaden the non-juridical possession, as set out in *Yeko* to have the same meaning as occupy. They state that: *'Though Act 19 of 1998 uses the term "occupation", it probably has the same meaning as "possession" in private law for purposes of the spoliation remedy (ie peaceful and undisturbed physical control with the intention to benefit from such control) (the Fischer SCA case para 22-23; on the requirements of the mandament van spolie. . .). If the actions of the intruders were insufficient to comply with the definition of "unlawful occupier" in Act 19 of 1998, it automatically means they did not have exclusively physical control of the land, which means they did not dispossess the applicant and, hence, the defence of counter-spoliation could then be used.'* Marais and Muller argue that possession and occupation may be used interchangeably or as synonyms. They do not substantiate this submission with reference to legal authority. We find this proposition to be without merit.

[58] Paragraph 22 of the *Fischer*[28] judgement referenced in their article states that in the case of immovable property, possession involves factual control as well as the intention to derive some benefit from the land. The possession must be both peaceful and undisturbed and that a full court determined that this meant that the physical possession had to be sufficiently stable and durable for the law to take cognisance of it. It went on to state that the decision of the full court was binding on the court a *quo.*

[59] The full court to which the Supreme Court of Appeal was referencing was the decision of *Ness and Another v Greef.*[29] We have already set out why the decision in *Ness* was incorrectly decided.

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[28] *Fischer and Another v Ramahlele and Others* 2014 (4) SA 614 (SCA).
[29] Footnote 14 above.

[60] Counter spoliation and the Rule of Law are diametrically opposite constructs, as set out above. It is trite that the Rule of Law is a cornerstone of our democracy. In circumstances where a construction of a legislative provision could negatively affect constitutional rights, a narrow construction of that provision is to be favoured.[30] Similarly, when an interpretation and/or approach to a common law remedy could negatively affect and/or undermine constitutional values, a narrow interpretation of that common law remedy is to be favoured. As argued by the amicus, when there is any ambiguity arising from interpreting the common law, then regard must be had to the Constitution as an interpretative guide, and the interpretation which more closely reflects the spirit, purport and objectives of the Constitution.[31] The interpretation of *instanter* and of the possessory element required for spoliation and the application of counter spoliation must be approached through the prism of Constitution.

[61] As applied to the factual matrix of this case, a broad approach to *instanter* and to the application of counter spoliation is contrary to the City's and the Province's constitutional obligation to take reasonable legislative and other measures within its available resources to achieve the right to have access to adequate housing as set out in section 26(2) of the Constitution. [32]

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[30] *Pheko and Others v Ekurhuleni Metropolitan Municipality* 2012 (2) SA 598 (CC).
[31] *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Another* 2009 (1) SA 337 (CC).
[32] Both the applicants and the amicus argued that section 26 of the Constitution obliged the City to take reasonable legislative steps to achieve the right to have access to adequate housing. The amicus further argued that that the City could not sidestep this constitutional obligation by resorting to counter spoliation instead of to eviction in terms of the PIE. The City argued that if it cannot invoke the defence of counter spoliation, they would be hamstrung as they would have to provide emergency housing to those they evict. The City appeared to have approached the matter on the basis that it only had two alternatives available to it- either counter spoliation or PIE. The City and Province also decried what they considered to be the inadequacy and inefficacy of having to resort to urgent court proceedings to ward of unlawful invasions of vacant land or to have bring applications under section 5 of PIE for urgent relief. They were unable though to demonstrate that any court would not properly entertain urgent proceedings. More importantly, the resolution of disputes by the use of the courts as contemplated in section 34 of the Constitution is a fundamental tenet of a constitutional democracy.

[62] A narrow interpretation and application of *instanter* is preferable because it is consistent with the common law and the constitutionally enshrined Rule of Law. The very label of counter spoliation is indicative that its objective is to resist spoliation and that it may be resorted to during the act of spoliation. Furthermore, the description of counter spoliation indicates that it must be part of the *res* gestae or a continuation of the spoliation- thus giving guidance to what is meant by *instanter.* Counter spoliation is no more than the resistance to the act of spoliation. Therefore, it follows that once the act of spoliation is completed and spoliator has perfected possession, the window within which to invoke counter spoliation is closed. A broadening of the interpretation and application of the *instanter* requirement and of counter spoliation itself will result in an increased sphere within which persons may breach the Rule of Law by taking the law into his/her own hands. The amicus argued that the adoption of the broader approach opens the window for the application of guidelines to regulate when and how persons may take the law into his/her own hands. The very need for guidelines is indicative that the broad interpretation cannot be sustained as it would result in a broad discretion being bestowed upon City and Provincial employees, who may not have the necessary training and /or qualification to exercise that discretion in a manner consistent with the Constitution, more particularly the Bill of Rights, thereby rendering it susceptible to a Constitutional challenge.[33] Further, a narrow approach is consistent with the underlying rationale of the *mandament van spolie* which is the prevention of self-help; the fostering of respect for the Rule of Law and the encouragement of the establishment and maintenance of a regulated society as it

[33] *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC).

limits the period and circumstances within which a party may take the law into his/her own hands.[34]

[63] The inadequacy and ineffectiveness of guidelines within this context is evident by the existence of the SALGA's guidelines and the City's non-compliance therewith. In accordance with the SALGA guidelines:

(i) any structure could only be accepted as being vacant if it had no furniture and if there were no signs that any person resided there for a period of 3 months. Evidence also had to be gathered in respect of whether the structure was unoccupied for 3 months; and

(ii) the City had to engage in peaceful negotiations with the occupants.

[64] It is clear from the facts of this matter that the City paid no heed to the SALGA guidelines. Furthermore, if it adhered to the guideline to determine whether or not a structure was occupied, it would not be able to resort to counter spoliation as the *instanter* requirement would not be fulfilled.

[65] Therefore, a narrow interpretation of *instanter* and possession and the application of counter spoliation is to be favoured to a broader approach. A narrow application of counter spoliation merely requires the possessory element to be peaceful and undisturbed or stable and durable. The qualification of the possessory element as being stable and durable means no more than that it must be peaceful and undisturbed. The qualification of stable and durable cannot expand the possessory element to require more than being peaceful and undisturbed.[35]

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[34] *Setjwetla*, footnote 11 above.
[35] As shown above, [. . .].

[66] In *Bisschoff and Others v Welbeplan Boerdery*[36] it was held that what constitutes spoliation or unlawful possession must be determined on the facts. Effective physical control must be exercised over the object which is the subject of the possessory claim. Effective physical control is context-sensitive as the nature of the object, as well as its use and objectives would determine what manner of control is required to constitute physical control. In the circumstances, the construction of incomplete structures could very well amount to a physical manifestation of the possession, as set out by *Yeko v Qana*, of the land with an intent to derive some benefit.

[67] In light of the above, we are of the view that when counter spoliation is applied with a narrow interpretation of *instanter* and with the requirement of possession, as referenced by *Yeko v Qana*, which does not require it to be stable and durable in the sense of constituting some measure of permanence or that more is required than possession having to be peaceful and undisturbed then counter spoliation is not unconstitutional and remains a valid common law remedy.[37]

[68] In the final draft order proposed by the applicants, they sought a declaratory order that *'the common law principle of counter spoliation is inconsistent with the Constitution and invalid to the extent that it permits the evictions of persons from, and the demolition of, occupied structures.'*

[69] Both the City and the Province readily conceded that if structures were occupied they would not be able to resort to counter spoliation to evict the occupants as they would be statutorily obliged to seek legal redress in terms of PIE. Therefore, it is not clear why

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[36] Footnote 6 above.

[37] Professor van Der Walt who introduced the description *sufficiently stable and durable* understood it to have the same meaning as the description *peaceful and undisturbed.* It was not meant to, nor understood to construe something more.

the applicants seek a declarator in circumstances where PIE would clearly apply and counter spoliation could not lawfully be used as a remedy to seek eviction. Secondly, whether or not counter spoliation would allow or authorize the demolition of temporary structures would depend on the facts of a particular case and whether the party acted *instanter* to the act of spoliation and whether or not the spoliators perfected possession. In those instances where permanent structures have been constructed, it may be indicative that the party invoking counter spoliation did not act *instanter* and that the spoliators perfected their possession as the completed structure is a physical manifestation of their peaceful and undisturbed possession with the intent to derive some benefit.

[70] Constructively, in response to the court's invitation, the Minister deposed to an explanatory affidavit. She dealt, in particular, with remarks that she had made in the National Council of Provinces on 6 July 2020, in response to the much-publicised incident involving Mr Qolani, and about other evictions that had taken place at that time in the south of Johannesburg. In her response to a question from a parliamentarian, she stated: *'When we say that there should be no land invasions, it is actually that which we mean. The responsibility of making sure that this happens is with law enforcement. It is in our regulations and therefore we expect that the law enforcers will make sure that any land that is on the cusp of being invaded is protected appropriately.'* The Minister pointed out that what she meant to convey, on her understanding of what had occurred at Empolweni, was that the structures were complete and inhabited and were demolished and the occupants evicted. She was of the view that on her understanding of PIE that was unlawful. She stated, however, that she was not a lawyer.

[71] In the context of PIE and with reference to Section 26 (3) of the Constitution, she pointed to the decision of *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) and emphasised the following as of particular significance:

'[18] It is not only the dignity of the poor that is assailed when homeless people are driven from pillar to post in a desperate quest for a place where they and their families can rest their heads. Our society as a whole is demeaned when State action intensifies, rather than mitigates, their marginalisation. The integrity of the rights-based vision of the Constitution is punctured when governmental action augments, rather than reduces, denial of the claims of the desperately poor to the basic elements of a decent existence. Hence the need for special Judicial control of a process that is both socially stressful and potentially conflictual.'

[72] In the heads of argument Counsel for the second respondent stated:

'One does not require judicial authority for the proposition that, in the circumstances prevalent in this country, particularly since the onset of the COVID pandemic, the homeless and marginalised have increased in number and their plight has been exacerbated. One need only look around to see the proliferation of rudimentary and desperate forms of shelter that have been erected by persons without access to adequate housing. These structures are indisputably their homes. It is, accordingly, apparent that the definition of "building or structure" in PIE may encompass a variety of forms of dwelling or shelter, albeit that they are only temporarily erected or established, and despite the humbleness or fragility of the structure involved.'

[73] As indicated above, the court requested of the Minister's counsel to provide the factual basis for the contentions contained therein. The State Attorney, acting on behalf of the second respondent, provided the court with a note, in which it was contended that as result of the circumstances prevalent in the country, particularly since the onset of the

COVID 19 pandemic, homelessness had exacerbated with significantly increased numbers of vulnerable people living on the streets, in no more than rudimentary structures. It was submitted on behalf of the Minister that there had been a proliferation of these rudimentary forms of shelter, comprised of no more than cardboard, plastic sheeting or tarpaulin structures, erected by persons without access to adequate housing. Counsel for the second respondent contended that these were 'indisputably their homes'. He also pointed out that land invasions occurred over a relatively short period of time, and that the court could apply the well accepted principal of judicial notice of such facts which were both notorious and readily ascertainable. None of the other parties challenged the explanation provided by counsel for the second respondent. The court indeed takes judicial notice of the ever-increasing rudimentary structures that have mushroomed all over the City since the onset of the Covid 19 pandemic. Many of the structures are made of plastic and cardboard, and provide no more than precarious protection from the elements and, needless to say, can literally be erected in minutes. The City and the Province accepted that such structures would and could only be demolished and persons evicted therefrom in terms of a court order in application of the provisions of PIE.

[74] The Minister adopted the position that the remedy of counter spoliation, in itself, was not unconstitutional or unlawful. She contended, though, that it was the manner in which it was applied that could undermine the constitutional protections offered to individuals who, due to circumstances beyond their control, could only establish basic and temporary structures. The Minister also criticised the relief sought by the applicants, and intervening applicants, inasmuch as she considered that they sought the prohibition

of counter spoliation in 'all instances involving the unlawful occupation of land regardless of whether or not a structure constituted a "home".' She pointed out that what the application did, was to highlight the mischief that emanated from the application of counter spoliation in the absence of clear guidelines dealing with the remedy.

[75] The Minister`s position was that a determination of whether a building or structure was a home, without any guidelines, was problematic. In this regard she also relied on the decision of *Dawood, Shalabi and Thomas v Minister of Home Affairs and Others*[38]. The second respondent further contended that the City's attempt to apply a rigid distinction save in respect of two opposite ends of the spectrum of factual possibilities, was problematic, given the following:

i. a partially constructed dwelling or structure can provide shelter from the elements and thus qualify as a home.

ii. an unoccupied structure does not on that basis alone denote that it is not a home. In this regard he pointed out that an occupier could have left a place for a legitimate reason and that would not entitle officials to demolish the structure if same would be otherwise subject to the protection of PIE.

iii. the fact that the structure did not have furniture and other belongings did not mean that it was not occupied as a home, and thus not subject to the protections of PIE.

[76] In her submissions with regard to what she regarded as a lacuna in the application of PIE, the Minister contended that the application of PIE would require legislative

[38] Footnote 33 above.

guidelines to be imposed through regulations issued by the Ministry in terms of Section 12.[39]

[77] In dealing with the common law remedy of counter spoliation, the Minister contended that the remedy could not be relied upon once the initial spoliator was in peaceful and undisturbed possession of the property. In this regard it contended that: (i) the spoliator had to be in effective physical control of the property (ie an objective element); and (ii) the control must be coupled with the intention to derive a benefit from the possession (ie the subjective element). Counsel for the second respondent contended that *'arguably, however the element of physical control is not necessarily indicative of a requirement that the spoliator must have completed the building or structure so as to be in full use and occupation thereof'.* He contended that it was possible that an occupier, albeit having acted unlawfully, could be in peaceful and undisturbed possession of a structure, even if it had not been erected completely, provided the structure constituted a place or dwelling for her and offered sufficient shelter.

[78] With regard to the element of effective physical control, it appeared that the second respondent equally conflated that with the notion of whether a structure provided shelter for the purposes of a home, which relates to the requirements of the application of PIE as opposed to that of the common law remedy of counter spoliation.

[79] Again the second respondent pointed out in relation to the remedy of counter spoliation that the concept of 'a home is fluid especially in the South African context where

[39] 'The Minister may make regulations in respect of any matter which is required to be prescribed by the Minister in terms of this Act or which is necessary or desirable in order to achieve the objectives of this Act, and any such regulation may create offences and provide for penalties in respect thereof.'

structures in issue are vulnerable to destruction'. The second respondent therefore suggested that the answer laid in limiting the 'unfettered' discretion exercised by City officials 'apparently without any clear guidelines or directions in place'.

[80] However, inasmuch as the applicants' founding affidavit in the matter had raised and conflated the scope and reach of PIE with that of counter spoliation, it appeared that ill-conceived approach had also impacted on the response by the Minister. In her affidavit and in the heads of argument filed on her behalf, the scope of PIE was dealt with extensively.

[81] We turn now to apply the principles of counter spoliation to the factual matrix of this case.

[82] The interpretation favored by the applicants and the intervening applicants are too narrow as it does not require the spoliator possessor to establish peaceful and undisturbed possession before their claim to possession may be resisted by counter spoliation. This may be because they have elected not to set out their explanation of counter spoliation and fashioned the relief they seek on the incorrect interpretation and application of counter spoliation by the City.

[83] When applying the requirements of counter spoliation to the factual scenarios postulated by the City (and the Province) it becomes clear that the City attempts to widen the scope of counter spoliation by contending that it is available to it at any stage before an informal structure becomes a home.[40] The City acts under the misguided belief that at any stage prior to an unlawful occupier being subject to the provisions of PIE, it may

[40] Buchner's affidavit and the City's heads of argument.

utilize counter spoliation to demolish structures and to remove unlawful occupiers from land. That is simply wrong. The City must act *instanter* to the act of spoliation if its reliance on counter spoliation is to be sustained. This *instanter* requirement is absent when the occupiers perfected possession when their possession of the land was peaceful and undisturbed and exercised with the intention of securing some benefit therefrom. In applying this to the facts of the case, it would appear that the peaceful and undisturbed possession was physically manifested by the occupiers commencing construction of informal structures on the land. The structures need not be completed nor occupied for the possessory element of spoliation, as defined by *Yeko,* to be perfected. The fact that occupiers did not fall within the ambit of PIE did not mean that the window to use counter spoliation remained open. The availability of counter spoliation is not dependent upon the unavailability of PIE.

[84] When the inquiry focuses on whether a structure is occupied as a home the inquiry becomes irrelevant to the application of counter spoliation, and to make this the subject of the inquiry in the present factual matrix is to conflate eviction with counter spoliation.

[85] We turn now to the circumstances in which the City claims it may invoke counter spoliation. In the circumstances where persons are in the process of seeking to unlawfully occupy land and it takes action to prevent them from gaining access to the targeted land, the City's actions would be *instanter* and as a resistance to the act of spoliation. In the second scenario where persons have gained access to the land unlawfully and are in the process of erecting or completing structures on the land and it takes action to prevent structures being erected or completed on the land. This would depend on whether the action to prevent the structures being erected are *instanter* to the act of spoliation and

would be dependent on the facts of the matter. An important factor in these cases would be the stage of construction and time period within which the City responded. The stage of construction would be an indicator of whether the occupier had peaceful and undisturbed possession. If the occupier was merely putting pegs in the ground, it may be a clear indicator that the required possession was not perfected. But if the occupier was putting on the last wall and/or roof it may be an indicator that the possession was perfected. In those circumstances where structures are completed and unoccupied and it took some time and effort to transport the building materials to the land and to commence construction of the informal structures, it would, *prima facie* appear that the possession was perfected and the City and Province cannot rely upon counter spoliation. It may even be that these structures are occupied as homes but that they may appear unoccupied for various reasons, such as the occupiers having gone to work or to seek work, gone to the shops or gone to visit friends.

[86] In those circumstances where completed structures have been erected on the land and it is doubtful whether the structures are occupied, it would similarly be most likely that the necessary possession has been perfected and the act of counter spoliation was not carried out *instanter*.

[87] Counter spoliation is an interim restoration of the status quo, pending judicial determination.[41] However, on the facts of this matter it appears that the City uses the remedy of counter spoliation as a means of obtaining final relief which do not require judicial intervention. The City cynically argued that the homeless occupiers, without the

[41] *Eskom Holdings*, footnote 4 above.

necessary knowledge, information and resources should be the ones to approach the court if they believed that the conduct of the City was unlawful.

[88] Counter spoliation could never lawfully justify the eviction from occupied informal structures. When informal structures are occupied, the occupants have to be dealt with in terms of PIE. Counter spoliation does not *per se* authorize nor permit the demolition of any informal structure. If the demolition of the informal structure occurs by way of counter spoliation which is invoked *instanter* and before the unlawful occupier's possession has been perfected, then it may validly be used to resist spoliation. If it does not occur *instanter* or occurs after the occupiers' possession, as per *Yeko v Qana* has been perfected then the demolition would be unlawful and would constitute a new breach of the peace.

[89] The applicants argued that the City's use of counter spoliation violates the rights of access to a fair public hearing set out in section 34 of the Constitution in that ALIU is entitled to demolish structures solely on a visual observation and determination by ALIU. As shown above, the City's interpretation and application of counter spoliation is incorrect. In any event, spoliation and counter spoliation properly interpreted and applied should facilitate access to a fair public hearing. Spoliation provides a temporary solution by restoring the status quo, **pending** a judicial determination of the parties' rights.[42] Further, self-help *per* se may not always be unconstitutional as, the Constitutional Court has recognised that if good reason exists, a party may have need to resort to self- help.[43]

[90] The applicants argue further that to the extent that counter spoliation applies to the demolition of structures and the removal of people occupying or intending to occupy the

[42] *Eskom Holdings*, footnote 4 above.
[43] *Chief Lesapo v North West Agricultural Bank an Another* 2000 (1) SA 409 (CC).

land, it limits the right of access to housing in section 26 of the Constitution. We have shown that counter spoliation cannot validly be used to evict persons and that the demolition of structures and removal of people intending to occupy the land can only occur lawfully if it occurs *instanter* to their unlawful spoliation of the lawful possessor. A narrow interpretation and application of counter spoliation would not undermine the right to access housing.

[91] The applicants argue that an inevitable consequence of permitting land owners to take the law into their own hands is that they will use violence to achieve their ends which will undermine the right to dignity and freedom and security of the person. However, the applicants concede that counter spoliation need not involve violence. The facts and circumstances of each case will dictate whether the violence, if any, and the level thereof employed could be justified. The applicants have not established that counter spoliation breaches the right to dignity and freedom and security of the person.

[92] The applicants argued that the City need not rely upon counter spoliation but that instead, it could rely upon the Trespass Act, Act 6 of 1959 and have the land occupiers arrested by the police. This argument was supported by the intervening applicants. The arrest of persons by police for trespassing within the context of land incursions would, in our view, result in the potential escalation of conflict and violence, more so than any reliance on counter spoliation.

[93] The applicants have also argued that counter spoliation, as applied by the City, results in the arbitrary deprivation of property because when occupiers are forcibly removed from the property, there is a risk that their belongings will be confiscated or destroyed. However, as shown above, if the occupiers brought their belongings onto the

land and physically manifested their peaceful and undisturbed possession of the land, the original breach of the peace would have been completed and the *instanter* requirement of counter spoliation would have lapsed. Therefore, counter spoliation, with a narrow construction of the *instanter* and possessory requirements would not result in the arbitrary deprivation of property.

[94] In light of our finding that the City's interpretation and application of counter spoliation cannot be sustained, it is not necessary to do a limitation analysis on its interpretation and application thereof.

[95] In as much as this court finds the City's interpretation of counter spoliation inconsistent with a narrow interpretation thereof, we are, for the reasons set out above, unable to find that the applicants have made out a case to declare the common law principle of counter spoliation inconsistent with the Constitution and invalid to the extent that it permits the eviction of persons from, and the demolition of, occupied structures.

We reiterate that the City's interpretation and application of counter spoliation is incorrect. The City invalidly relied upon counter spoliation to demolish structures and to evict. On the facts of this matter, this conduct was unlawful.

[96] Although the intervening applicants made common cause with the applicants in their challenge to the City's and Province's understanding and application of the common law defence of counter spoliation, they separately raised two further constitutional challenges to the defence of counter spoliation.

[97] Firstly, inasmuch as counter spoliation, on the City's understanding, allows for the summary decision by an official of the City (the ALIU or any other official) to demolish a structure, depending on whether the official had visually established that it was

unoccupied or occupied and/or reasonably construed it as a home, the intervening applicants contended that such conduct on the part of the City and its officials was an arbitrary exercise of power, contrary to the rule of law protected under section 1 (*c*) of the Constitution.[44] Counsel for the intervening applicants pointed out that the challenge did not have to be tested against the provisions of sections 36 (1) of the Constitution, as it did not implicate any one of the listed rights under the Bill of Rights. The intervening applicants sought that the court make a finding of unlawfulness and unconstitutionality, and relied on the authority of the Constitutional Court in *Zondi v MEC for Traditional and Local Government Affairs and Others* 2005 (3) SA 589 (CC), para 61,[45] and claimed the defence of counter spoliation was both arbitrary, impermissible and unsanctioned self-help. In our view, the intervening applicants lost sight of the view expressed by Mokgoro J in *Chief Lesapo v North West Agricultural Bank and Another*[46], in which the court recognised that in certain circumstances self-help was both permissible and lawful. In this regard Mokgoro J remarked:

'[12] There are circumstances in which the coercive power of the State may be invoked without the sanction of a court. For instance, arrest and detention for the purposes of trial are permitted if there are reasonable grounds therefor. There may even be circumstances where self help might

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[44] '1. The Republic of South Africa is one, sovereign, democratic state founded on the following values:
. . .
(c) Supremacy of the constitution and the rule of law. . . .'

[45] 'Section 34 is an express constitutional recognition of the importance of the fair resolution of social conflict by impartial and independent institutions. The sharper the potential for social conflict, the more important it is, if our constitutional order is to flourish, that disputes are resolved by courts. As this Court said in *Lesapo*:
"The right of access to court is indeed foundational to the stability of an orderly society. It ensures the peaceful, regulated and institutionalised mechanisms to resolve disputes without resorting to self-help. The right of access to court is a bulwark against vigilantism, and the chaos and anarchy which it causes. Construed in this context of the rule of law and the principle against self-help in particular, access to court is indeed of cardinal importance."' (Internal footnote omitted.)

[46] Footnote 43 above.

be permissible, but once again good reasons must exist for this to be permitted. Whether good reasons must exist for the provisions of s 38(2) is an issue that can be decided later. What has to be decided first is whether s 38(2) is inconsistent with s 34 of the Constitution.' (Internal footnotes omitted.)

[98] The second leg of attack by the intervening parties to the defence of counter spoliation, was that based on section 34 of the Constitution.[47] The attack is already dealt with above and needs no repetition.

[99] A third area of challenge raised by the intervening applicants related to a contention by the City that it did not have to provide emergency housing if it acted under the defence of counter spoliation. Needless to say, if the application of the defence of counter spoliation allows for such an important incursion into the provision of emergency housing for homeless people, it would in our view be unconstitutional. However, that does not arise given the clear provisions of the Housing Act and the judgment of *Grootboom and Others v Oostenberg Municipality and Others* (6826/99) [1999] ZAWCHC 1 (17 December 1999) relating to emergency housing. Counsel for the Province was unequivocal in their concession that emergency housing would have to be provided to persons even when counter spoliation was resorted to, and that it would depend on the circumstances of each matter. The City for its part was somewhat coy on the issue, and referred extensively to the Extended Housing Program (EPH). The City was moreover not even able to provide the court with any records which should have been kept by its officials who conducted such operations, and a recordal of what happened to those

[47] '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.'

persons and their families whose structures were demolished when its officials resorted to the defence of counter spoliation against desperate and homeless people.

THE RELIEF RELATING TO THE ALIU

[100] After all the amendments it appears that the relief sought by the applicants, which incorporates that one sought by the intervening applicants, is a declaration of unlawfulness in respect of (a) the City's decision to instruct the ALIU to demolish structures without a court order if its officials deem such structures to be unoccupied; alternatively, (b) the process the ALIU uses to determine whether a structure is occupied or not. Allied to this the applicants also seek an order declaring the establishment of the City's ALIU, alternatively, the powers granted to the ALIU, to be unlawful, unconstitutional and invalid and setting aside the establishment of this unit.

[101] With regard to Tender 3085/2019/20 issued by the City on the 12th of June 2020, calling for bids by private contractors to provide demolition services to the City, the applicants sought an order reviewing and setting aside the City's decision to issue, adjudicate or award this tender.

[102] These parts of the relief sought are also opposed by the City. To put the contestations of the parties on the lawfulness or otherwise of the ALIU into proper perspective it is necessary to briefly set out the background to its formation. The ALIU was established on the 27th of November 2008 by the City Manager in terms of his delegated authority. According to the City the ALIU was established in good faith and, on the strength of Supreme Court of Appeal **(SCA**) and Constitutional Court decisions, which recognised that a person whose property has been despoiled is entitled to rely on the defence of the counter spoliation where the requirements of the defence are satisfied and

that the State has the same rights as an owner of the private property, respectively, to help in combating the scourge of land invasions. The City asserts its entitlement to rely on the ALIU to respond to unlawful land occupation so as to protect the land it owns.

[103] The City averred that it had been engaged, over the past year, in the process of developing a Standard Operating Procedure **("SOP")** and an operating manual dealing with unlawful land occupations for the ALIU. While the City conceded that it is yet to finalise its specific policy, by-laws and SOP in respect of the ALIU it has been guided by the South African Local Government Association **("SALGA")** Operating Manual in Relation to unlawful occupation of land as well as the Western Cape Government's Guidelines on the role of Municipalities in eviction proceedings, to navigate through the minefield of land invasions and counter spoliation. The City submitted that the SALGA guidelines on which it relied also recognised the importance of establishing a specific unit set up for unlawful land occupation that must be involved in the [operation of preventing land occupation], hence the establishment of the ALIU. We have already referred to the inadequacy of the SALGA's guidelines, the criticism whereof was shared by the Province. Counsel for the City in a note provided the court with the copy of a By-Law ;"Unlawful Occupation By-Law 2021 it had recently adopted with regard dealing, in part with unlawful land invasions. The court was informed that the By –Law is the subject of a separate court challenge and we therefore make no comment on it.

[104] In paragraph 7.2 of a Report to the City Manager, dated the 27th of November 2008, the establishment of the ALIU is motivated as follows:

'The ALIU will consist out of 57 staff members and will work together with 40 staff members from Law enforcement: Specialised Services on an 8-hour shift system to ensure a 24/7 operation to all parts of the city with maximum effectiveness. In total, 97 staff members will be part of the ALIU

from which 57 will be directly linked to the Housing Directorate whereas the 40 from Law Enforcement: Specialised Services will be linked to the Safety and Security Directorate. The 40 staff members from Specialised Services will execute their functions under the overall command of Housing but reporting under the Head of Law Enforcement: Specialised Services. Their role will primarily be to patrol vacant land, enforce the rule of law with respect to illegal shack building and provide backup protection to Housing officers from attacks and resistance from members of the public in the event of eviction, relocation and shack demolition.'

[105] The applicants argued that the establishment of the ALIU was reviewable in terms of the principle of legality which requires that a body exercising public power, such as a municipality, had to act within the powers lawfully conferred on it[48]. In this respect it was submitted that the establishment of the ALIU is reviewable under four grounds which are discussed infra. Firstly, it is said to be unlawful because it is premised on the demolishing of structures that resemble shelters on dwellings under the PIE Act (whether occupied or unoccupied) without a court order.

[106] Secondly, the ALIU was accused of unlawfully exercising policing powers. It was submitted that the City does not have the power to unilaterally confer policing powers upon its employees. Although the City denied that the ALIU exercised policing powers but simply removed unoccupied structures erected unlawfully on its land, the applicants maintained that the ALIU usurped the powers conferred by section 205 (3) of the Constitution on the SAPS. This section has been interpreted to mean that it grants variety of powers to SAPS which include, in certain circumstances, the power to enter and search premises and people, to seize property and to use reasonable force to achieve their

[48] *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC) para 58.

objectives. According to the applicants the City, in establishing the ALIU, has violated the provisions of section 64A of the South African Police Service Act[49] and the regulations promulgated thereunder, which set out a detailed process in terms of which a municipality may apply for, and be granted permission to, create a municipal police force.

[107] On the City's reliance on its broad constitutional duty to protect its land for purposes of realizing socio-economic rights to justify the establishment of the ALIU the applicants submitted that such a duty does not confer on the City the broad powers to do anything that it considers necessary to protect its land but must fulfil this duty by exercising the powers available to it within the confines of the law. Finding support in *Chief Lesapo v North West Agricultural Bank*[50] where it was held that, with few exceptions, such as where an arrest and detention is effected for purposes of trial if there are reasonable grounds therefore, and for self-help (counter spoliation), as formulated in *Yeko v Qana, supra*, coercive powers of the state cannot be invoked without the sanction of a court order, the applicants argued that the ALIU acts contrarily by using the coercive powers of the state to destroy property and seize building material without a court order.

[108] Lastly, on this aspect, the applicants submitted that members of the ALIU have a complete discretion to determine whether a structure is occupied or not or constitute a "home" since there are no by-laws or SOP's in place to guide their decision making, nor have they received any training in this regard. This unfettered discretion has a potential to be exercised in a way that limits constitutional rights. This, according to the applicants is contrary to the clear pronouncement of the Constitutional Court in *Dawood and Another*

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[49] Act 68 of 1995 ("SAPS Act").
[50] Footnote 43 above, para 12.

v Minister of Home Affairs and Others[51] that where Parliament confirmed a discretionary power on an official which could limit fundamental rights, it was necessary for Parliament to provide guidance as to how such constitutional rights were to be protected. The lack of such guidelines, the applicants submitted, may lead to infringements of constitutional rights.

[109] The City argued, in the first place, that this court has no discretion to entertain a challenge to the ALIU, since proceedings for judicial review must be instituted without unreasonable delay and not later than 180 days after the date on which the person concerned was informed of the administrative action, became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons[52]. The City argued that the ALIU has been in existence for almost 12 years and the applicants, no doubt, have been aware of its existence. No explanation has been proffered as to why the challenge has only been brought at this stage, submitted the City. Absence such explanation this court is asked not to exercise its discretion to overlook the inordinate delay. Counsel for the City found support in *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd*[53], where it was held that:

'From this, we see that no discretion can be exercised in the air. If we are to exercise a discretion to overlook the inordinate delay in this matter, there must be a basis for us to do so. That basis may be gleaned from facts placed before us by the parties or objectively available factors. We see no possible basis for the exercise of the discretion here. That should be the end of the matter. Not according to Sita.'

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[51] Footnote 33 above, paras 52-56.
[52] Section 7(1) of the Promotion of Administrative Justice Act 3 of 2000.
[53] 2018 (2) SA 23 (CC) para 49

[110] The City further submitted that the ALIU was nevertheless lawful: it argued that the ALIU is necessary for the City to realise its constitutional obligation and that, without this unit, land invasions will occur unabated, thereby undermining the rule of law, property rights and the progressive realisation of socio-economic rights. The City found support for its contention that the conduct of the ALIU was permissible in the Constitutional Court judgement of *Minister of Public Works and Others v Kyalami Ridge Environmental Association and Another (Mukhwevho Intervening)*[54] a case in which the legality of the decision of the government to establish a transitional emergency camp for flood victims on its land, in the absence of legislation specifically empowering it to do so, was challenged. The court held that:

'. . . It cannot be said that these laws excluded or limited the government's common-law power to make its land available to flood victims pursuant to its constitutional duty to provide them with access to housing.'

And that;

' I can see no reason why the government as owner of property should not under our law have the same rights as any other owner. If it asserts those rights within the framework of the Constitution and the restrictions of any relevant legislation, it acts lawfully.'

[111] The City argued therefore that the absence of a policy on guidelines should not be a basis for a finding that the ALIU is unlawful and contended that it was in the process of developing such a policy while, in the meantime, was relying on the SALGA operating guidelines.

[112] The City disputed that the ALIU exercised policing powers and the argument that it was doing so was not borne out by the evidence. According to the City the ALIU is not

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[54] 2001 (3) SA 1151 (CC) paras 48 and 40]

armed as a police officer exercising police power would be but only wears protective gear; that the ALIU does not arrest or detain people, as the police would; and that the ALIU will be accompanied as required, by personnel from law enforcement agencies, such as the Metro Police and SAPS, who are armed. The City contend that the primary function of the ALIU is to prevent land intrusions in the way that any South African would to ensure that vacant possession is not disturbed, and that it is not precluded by section 205(3) of the Constitution from acting in defence of its property. In this respect it submitted that the removal of a structure is not the exercise of policing power but is an act permitted under the defence of counter spoliation which is not an exclusive police power.

[113] The question is whether the ALIU is unlawful and if so, whether the applicants are entitled to the relief sought in the notice of motion. In answering this question it is necessary to determine whether the ALIU unlawfully exercises policing powers; whether the mandate conferred on the ALIU by the City and the ALIU's conduct in summarily seizing and demolishing structures "deemed"(perhaps footnote their very terse letter in response to the request for the record?) to be unoccupied is consistent with section 25(1) of the Constitution; and whether the continued operation of the ALIU in the absence of legislation as guidelines limiting the exercise of its discretionary powers is lawful and consistent with the constitution.

[114] There is no doubt, as was held by the Constitutional Court in *Mkontwana v Nelson Mandela Metropolitan Municipality and Another*[55] that owners of property bear the primary responsibility to take reasonable steps to protect their property. Such steps and measures, in our view, include the establishment of a unit by a municipality, such as the

[55] See President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd (Agri SA and Others, Amici Curiae) 2005 (5) SA 3 (CC) para 29.

ALIU, dedicated to patrolling and guarding against the invasion of its land. This, however, has to be done strictly within the confines of the law.

[115] The City, being an organ of state has the added obligation to uphold and advance the values of the constitution. Counter spoliation has to be *instanter*, as set out above, and must comply with the strict requirements of the defence. To the extent that the ALIU operates and carries out its functions based on the incorrect interpretation, understanding and application by the City of the common law defence of counter spoliation such conduct is unlawful.

THE LAWFULNESS OF THE CITY'S OFFICIALS' CONDUCT AND THE ALLEGED DISPUTE OF FACTS (the relief sought in paragraph 1 of the applicants Draft Order and paragraph 4.2 and 4.3 of the relief sought by the intervening applicants)

[116] Counsel for the City contended that this court is not able to determine whether the conduct of the City's officials, and in particular the ALIU, was unlawful, given the claimed disputes of fact on the papers. The deponent to the founding affidavit for the applicants, the Reverend C. Nissen, to the contrary, claimed in his replying affidavit to that of Ms Pretorius that*: 'The video footage regarding Mr Qolani's eviction speaks for itself. It is unclear why the City appears to be of the view that dragging a naked man out of his dwelling and demolishing it virtually over his head is "perfectly lawful".'* The Rev Nissen adds: '*The deponent has missed the point [with reference to the affidavit of Ms Pretorius]. The point is that on the City's own version it demolishes structures it deems unoccupied or not a home. This Court may determine the legality of the City's conduct in this regard*

without resolving factual disputes as to whether a particular structure was occupied or not.'

[117] So too did the remaining applicants, and intervening applicants, contend that there exists no bona fide dispute of fact that bars this court from determining the lawfulness of the City's and it officials' conduct in the demolition of their structures, and effectively their unlawful eviction. It is therefore necessary to consider what exactly are the disputes of fact, and whether it impacts at all on the ability of this court to make findings on whether the conduct of the City and its officials was either lawful or not, based on the evidence on record.

[118] In respect of the conduct of the City's officials in demolishing the informal dwellings and structures erected on Erf 18332 Khayelitsha (Empolweni / Ethembeni), the most glaring and un-contradicted exemplar of their conduct was that contained in the video clips entered into evidence by the applicants and supported on affidavit by Mr Qolani himself. An affidavit by a Mr Bonga Zamiso, who described himself as a social activist with the Social Justice Coalition, was also filed in support of the application, in which he narrated his observations of the actual scene depicted in the video clips.

[119] Mr Zamiso explained how he arrived at the scene, having been alerted by community leaders in the area that evictions were in the process of taking place, and that structures were being demolished by the City's officials. He was accompanied by other social activists, and describes in the affidavit what he observed on arrival at the scene, and in particular the incident at Mr Bulelani Qolani's structure. On his arrival, he noticed that there were two big ALIU trucks present, as well as a white Nyala security vehicle that

apparently belonged to the City`s law enforcement officers. One of the trucks appeared to be loaded with materials from demolished structures. He claimed that at as soon as he arrived on the scene, he immediately started recording his observations of the incident on his cellular phone. He saw that there was a commotion outside one of the structures. Members of the community were yelling at the law enforcement officers, requesting them to stop what they were doing as there was someone inside taking a bath. The officers ignored them and proceeded to go inside. Mr Zamiso claimed that as he got closer he saw four officers dragging a naked man out of the structure. He then zoomed in to ensure that he captured the scene clearly. While the officers were dragging the man out of the structure, members of the ALIU were visibly busy demolishing the structure. As they dragged him out he noticed that the man's back appeared to be wet. The man tried with all his might to break free so that he could return to the structure, but the officers physically restrained him from doing so. They threw him onto the ground and one officer pressed a knee on his back to prevent him from getting up. He claimed that the person struggled to free himself from the officers' hold. He finally managed to get up and bolted to the door of his now partially demolished structure. As the person was about to enter the door, one of the officers grabbed him by the chest. Again, this person resisted and struggled to break free. He eventually managed to get inside the structure. Mr Zamiso claimed that at that stage the structure was partially destroyed, and that enabled him to see what was taking place inside. When the person got inside he sat down on a bed, and Mr Zamiso noticed that the man was bleeding from the top of his head. He was then informed by one of the community leaders, a Mr Wanda Magingxya, that the naked man was Mr Bulelani Qolani, one of the residents at Ethembeni. He further claimed that one of the

law enforcement officers instructed the others to go and demolish the structure next to that of Mr Qolani's. The law enforcement and ALIU officials then proceeded to demolish the structure. He claimed that was the last structure he saw demolished that day. He also claimed that he saw the ALIU remove some of the material from the structures they demolished. They did not take any of the material of Mr Qolani's structure, nor that of his neighbour, as those were damaged. Mr Zamiso claimed further that while all of this was taking place, the community members repeatedly asked the law enforcement and ALIU officials to furnish them with a court order and to identify themselves. Their requests were blatantly ignored.

[120] On a careful viewing of the video footage that was entered into evidence by the applicants, much of the narrated version deposed to by Mr Zamiso was evident. Most importantly that there was in fact a fully erected structure, that the person who was identified to him as Mr Bulelani Qolani was outside the structure at some stage, and at another stage entered the structure. Also that Mr Qolani was forcefully dragged out of the structure by City officials, that his back appeared wet, that he resisted and that Mr Qolani re-entered the structure, whereupon he was forcefully dragged out again. During this process, the structure was being demolished all around him. That much is abundantly clear from the video footage and is not contradicted by any evidence put up by the City. Ms Pretorius simply claimed that "*City law enforcement and ALIU officials involved in the incident have all indicated that the structure that Mr Qolani alleges was occupied by him was in fact unoccupied.*" Significantly none of the officers who were alleged to have been involved in the actual breaking down of the structure, and dragging Mr Qolani out of the structure, provided any affidavits or evidence to contradict what was said by Mr Zamiso

or visible on the video footage. Furthermore, Mr Qolani's own affidavit confirms the events as described by Mr Zamiso. More importantly, the City in the course of the proceedings provided the court with clips of their own video footage of the incident. The court viewed the incident on the footage provided by the City, which to a large extent confirmed the incident at the structure of Mr Qolani as it unfolded and as described both by him and Mr Zamiso. What is equally evident is that the video tendered by the City confirmed what had taken place at the time of the incident, the brutality applied and the fact that a completed structure was demolished even while Mr Qolani was inside it. The court requested of counsel for the City to provide it with a narrative of the video, whether by the person who took it or a City official who was present, to confirm its content. None was provided and counsel for the City simply stated that there was no narrative available. The court expressed its dissatisfaction with the City for having simply sought to enter into evidence a video without any narrative, or for that matter even an affidavit by the person who took the video. Nonetheless, the content of the video footage by the City importantly confirms how the incident unfolded on that fateful day in which Mr Qolani was brutally manhandled by officers of the City, and the fully erected structure, evidently occupied by him, was literally torn down even while he was in it. In doing so, the City claimed that its officials acted under the defence of counter spoliation. In this regard, they disputed that Mr Qolani was an occupant of the structure. Mr Qolani was alleged to have referred to various different dates and times at which he had taken occupation of the land and the structure. The City, for its part, disputed the dates at which Mr Qolani alleged he had taken occupation of the land, and claimed that on the day prior to the incident, 30 June 2020, members of the ALIU observed that there were only four structures which had been

unlawfully erected on the site concerned, contrary to the order made by Hack AJ, referred to earlier. The City claimed that its officials were only able to demolish one of the structures and returned to the site the following day to break down the remaining structures, notionally in an act of counter spoliation as provided in the order of Hack AJ. On that day, they found that two further structures had been erected overnight, one of which they claimed was Mr Qolani's. They therefore disputed that Mr Qolani's structure had been on the site the day before. In our view, nothing turns on this dispute, inasmuch as on the morning of 1 July 2020 Mr Qolani's structure was already fully erected on the site, and he had clearly and visibly taken occupation of it. His furniture, a bed, was seen inside and he had claimed to have taken a bath. Mr Qolani had clearly demonstrated that he had effective control of the structure, even on the City's own version that it had merely been erected overnight. The significance of this is that the City, in its response to the incidents referred to by the intervening applicants at Mfuleni, Delft, pointed out that literally a thousand structures are 'erected and occupied' overnight, and at times 'in minutes or hours'. Inasmuch as they accept that occupation can literally take place overnight, there could have been no basis for their officials to have formed a view, despite the fact that Mr Qolani was seen in front of his shack and inside it, that the structure was not occupied. The position adopted by the City, even on its own and incorrect understanding of the defence of counter spoliation, is untenable and its claim that Mr Qolani's structure was 'unoccupied', was as far-fetched as it gets. Their conduct was clearly an attempt at a summary eviction and the demolition was blatantly unlawful. The City's version in respect of the demolition of the structure and removal of Mr Qolani, is characterised more by what it has not said in its papers, than by its rather glib reliance on a dispute of fact. None of

the officials who decided to demolish the structure provided any explanation of what steps, if any, were taken to establish if the structure was in fact occupied, whether they had or attempted any engagement with Mr Qolani about his occupation of the structure, or for that matter whether they asked anybody in the immediate vicinity as to who erected the structure and whether it belonged to anyone. None of the City's officials explained what "visual observation" had been conducted to establish if the structure was occupied, and on what the City relied on as its avowed policy. Nothing was forthcoming but a barefaced claim that Mr Qolani had not occupied the structure, even in the face of the evidence on the various pieces of video footage.

[121] In its answering affidavits the City expressed its disquiet about the conduct of its members, and in the manner in which they had dealt with Mr Qolani. It claimed that it had suspended the officials concerned, and that an investigation was being conducted into the matter. In a letter dated 2 July 2020, in response to that from the first applicant with regard to a complaint of unlawful evictions in the Khayelitsha area, the City Manager, Mr Lungelo Mbandazayo, elaborately referred to the Habile application[56]. He also stated that the City was aware of the incident involving Mr Qolani, who the City Manager crudely referred to as 'the nude member of the public'. He then referred to their preliminary investigations, which revealed that an unknown male person involved in the incident had initially not been naked and had been wearing long pants at the time the City officials arrived on site in Empolweni. This unknown male person, along with a crowd, followed the demolition team from the commencement of demolitions. When law enforcement officials and their contractors approached the fourth structure, the same unknown male

[56] Footnote 1 above.

moved into the structure while still wearing his pants. The male person who went into the structure, undressed himself, and emerged naked. The law enforcement officials then moved into the structure, where after they tried to remove him. The City Manager then refers to the man who appears as 'the nude streaker on social media'. He further claims that it 'appears to be a calculated and deliberately (sic) act to ward off action by their law enforcement officials and is the latest trend whereby people undress themselves when police conduct operations in response to illegal actions, the intention being to cause the policing staff to discontinue the operation due to the discomfort created by the actions of the person disrobing'. Whether Mr Qolani, as on the City's version, had purposely undressed himself so as to ward off his removal from the structure by the City's officials, does not detract from the very fact that he was removed in a naked state from the structure wherein he was found. The City Manager's referral to Mr Qolani as the 'nude streaker on social media' is moreover shocking to say the least. Nude streakers are associated more often than not with half-drunken exhibitionists attending sporting games, who run onto the field of play for nothing more than to attract the attention and wild applause of the crowd as the streaker is literally rugby tackled and removed by sport officials. It is an exercise of crude exhibitionism to delight and distract the crowd and players. The nakedness of Mr Qolani, or for that matter any of the persons who may have adopted that strategy, cannot be compared to that of 'nude streakers'. What they do demonstrate, and without condoning unlawful conduct, is the naked, unarmed and defenceless state of people who, in utter desperation, resort to the unlawful invasion of land and occupation of informal structures. The conduct of all of the City officials involved in the incident, whether in the physical manhandling of Mr Qolani, or the demolition with

crowbars of his structure while he was still in it, and any of those in authority at the City who condoned it, is deprecated.

[122] The City admitted to having broken down other completed structures at Empolweni, and cannot, in our view, rely on the defence of counter spoliation in the manner in which its officials sought to apply the defence. On the City's version four fully erected and unoccupied structures were already seen by its officials on 30 June 2020, but were not demolished as the crowd that had gathered was unruly. They simply returned the next day to demolish the structures, ostensibly under the defence of counter spoliation. Nothing at all is said in the papers about what steps its official took to establish whether the structures were in fact occupied, on either 30 June or 1 July 2020. Such conduct is indicative of not only the abuse of the remedy, but the very arbitrary conduct sanctioned by the City's incorrect and unlawful understanding and implementation of the defence of counter spoliation. Moreover, the order of Hack AJ on which the City also sought to reply for its conduct did not permit the unlawful demolition of completed structures by officials of the City. The applicants in support of the relief sought with regard to the unlawful demolition of structures and conduct by officials of the City on erf 18332 Khayelitsha also relied on affidavits filed by amongst others, Ms Nomfuneko Konokono, Mr Vuyani Madikane, Ms Anathi Nongwana and a Mr Marshall Brewis. Their claims of unlawful conduct were disputed by the City. We make no findings on such disputed claims and if the deponents believe that they were unlawfully handled by any officials of the City they have recourse to the criminal justice system, (if not already engaged by them).

[123] The City sought to rely on a dispute on the facts and on *Fisher and Another v Ramahlele and Others*[57] where it was stated that the court should not make findings where there are disputes of fact, and where one of the parties specifically requested that the matter be referred to oral evidence. The facts on record in this matter are different to those in *Fisher* and, more importantly, the dispute does not go to the heart of the City's claim of having acted lawfully under counter spoliation. Even applying the principles in *Plascon-Evans* and on the City's own version, it is in our view patently clear that the City, through its officials, acted unlawfully at the attempted eviction of Mr Qolani from his erected structure and its partial demolition.[58]

THE HANGBERG (HOUT BAY) EVICTIONS AND DEMOLITIONS.

[124] In respect of the second applicant's claim of unlawful conduct on the part of City officials, in demolishing structures on erf 5144 in the Hangberg area, the City again sought to establish a dispute of fact on the papers with regard to what exactly took place at Hangberg. Ms Kashiefa Achmat, the Chairperson of the second applicant, the Housing Assembly, a Social Justice Movement based in Hout Bay, deposed to an affidavit with regard to incidents of alleged unlawful demolitions of structures during May 2020. The area referred to, which is the subject of the relief, is approximately 15 hectares in extent

[57] Footnote 28 above.
[58] The court requested of counsel for the City to inform it with regard to the outcome of the disciplinary proceedings which were brought by the City against the officials concerned, apparently on charges of gross misconduct. The court was informed that a tribunal chaired by an 'independent lawyer' had found the officials concerned not guilty. Counsel for Mr Qolani pointed out that they were surprised by the finding, as they were neither informed of the proceedings, nor was their client even invited to attend and participate in such proceedings. In respect of criminal charges which were laid against the officials, counsel for the 4th 5th and 6th respondents pointed out that the Provincial Director of Public Prosecutions had declined to prosecute the officials. Counsel for the applicants pointed out that the lawyers representing Mr Qolani in that criminal matter were seeking to review the decision of the Provincial Director of Public Prosecutions.

and is privately owned by the Ocean View Development Trust ("the Trust"). The second applicant had given instructions to their attorneys, the Legal Resource Centre ("the LRC"), who made contact with a Mr Peter Dick, a Trustee of the Trust, who on 17 May 2020 confirmed that Erf 5144 Kommetjie, Ocean View, was under the control and ownership of the Trust. The Trust had resolved to sell the land for development and had still been in the process of discussions with a potential buyer. Mr Dick informed the LRC that the trustees were aware that persons had illegally occupied the land, and that the Trust had been in the process of launching eviction proceedings before the national state of disaster was declared and the regulations promulgated declaring a moratorium on evictions. The Trust therefore opted to hold the proceedings in abeyance until those restrictions were lifted. Mr Dick confirmed to the LRC that the Trust had initially not sought the assistance of the City of Cape Town, or its ALIU, to demolish any unlawful structures on the property, or evict any of occupiers, as they intended to deal with the issue once the national lockdown was lifted. In her affidavit Ms Achmat stated that on 15 May 2020 she had been contacted by an Ocean View community member, Ms Bernadette Rossouw, regarding evictions and demolitions that were being conducted by the City law enforcement officials and the ALIU at the informal settlement on erf 5144, Hangberg. Ms Achmat immediately proceeded to the property, where she observed that structures which had been built by people were being demolished by City officials. The officials were also in the process of confiscating the materials which were used in the building of the structures. Ms Rossouw had taken video footage of the demolition operation, which was made available to the court in a drop box. She pointed out that the City had no approval or consent from the Trust to effect the evictions and demolitions, and that the City had only obtained such

permission from the Trust after the LRC had written to the City on 18 May 2020. She contended that the evictions and demolitions on 15 May 2020 on the land that belonged to the Trust were manifestly unlawful.

[125] In response to the allegations by Ms Achmat the City elaborately referred to land invasions that had allegedly taken place on land in the Hangberg area, part of which belonged to SAN Parks, another part that belonged to the Trust, and a part that belonged to the City. It was apparent, even from the City's own version, that it had not obtained any permission from the Trust to effect demolitions or evictions from the Trust's property prior to 21 May 2020, and that only at 16h24 on that day it obtained permission from the Trust's attorneys, Gunston and Strandvik, as was evident from a copy of an email attached to Ms Achmat's affidavit. In Ms Achmat's affidavit she also referred to a letter from a Mr Derick Dlamini, who responded on behalf of the City, and who stated 'the City denies that an eviction was conducted on the said date and time. The City's Anti-Land Invasion Unit acted within their mandate to demolish illegally erected structures provided they are unoccupied. On 15 May 2020 about 10 illegal unoccupied structures were taken down and building materials removed. The City reserved its rights. Clearly, and to the extent that the City demolished structures on property belonging to the Trust, it acted unlawfully and without the authority of the Trust. When this was pointed out to counsel for the City at the hearing of the application, he simply uttered words to the effect of *'mistakes are made. . .'.* No apology was tendered to any of the persons affected by the unlawful demolition, and the impact it had on their lives during the lockdown period. Such conduct on the part of the City was clearly untenable and is equally deprecated.

[126] Likewise the dispute of fact that the City sought to rely upon, with regard to when and how occupation was taken, was hopelessly irrelevant to the central issue that it had neither the authority nor a mandate from the Trust to conduct any operations on its property on 15 May 2020, be it evictions or demolitions of structures that had been unlawfully erected.

THE RELIEF SOUGHT BY THE INTERVENING APPLICANTS IN RESPECT OF ERF 544 PORTION 1 MFULENI

[127] The City once again sought to rely on a dispute of fact with regard to when and how occupation occurred on the property. It appeared that the property concerned, erf 544 Portion 1, is owned by the Western Cape Nature Conservation Board ("Cape Nature") and adjoins property that belongs to the City in the Mfuleni area. On the City's version the ALIU observed the occupation on the land since 17 June 2020. The ALIU returned to the property the following day and discovered 18 unoccupied structures and several plots marked out. All of the pegs and the 18 unoccupied structures are removed. The City claimed that on 18 and 19, 28 and 29 June 2020, and 4 and 8, 10 to 15, and 17 July 2020, they conducted further operations on what it referred to and regarded as its property, in which they removed what they claim to have been a number of unoccupied structures. It was, however, clear from the affidavits that the City had only on 8 and 9 July 2020, when it considered bringing an application for an interdict to prevent further attempts at the occupation of the property, realised that its own property bordered that of Cape Nature. The Cape Nature property was much larger than the other property. The City then contacted Cape Nature, who only at that stage requested the City's assistance with regard to the demolition of structures on its property. It was apparent from the

affidavits that the City had also conducted operations and demolitions on the property that belonged to Cape Nature until 8 July 2020, and to the extent that the City had demolished structures on Cape Nature's property, it acted unlawfully as it had neither permission nor the authority to do so. Moreover, inasmuch as the City claims that it had demolished structures which, although fully erected, were unoccupied, its conduct cannot not be countenanced based on its claim of relying on the defence of counter spoliation.

[128] Cape Nature for its part obtained an interdict with regard to the occupation of its land on 11 and 17 July 2020. What was of particular significance was the City's claim that between 14 and 15 July 2020 the occupation of the site had increased by at least three thousand structures, which had been erected and occupied. In this regard the City claimed that '*erections and occupations of sites take place literally in minutes, hours and days'.*

[129] The second intervening applicant occupied land that belonged to Cape Nature. They were the subject of the court application under case no: 8913/2020, heard on 11 and 17 July 2020 before Papier J. They also attached to their affidavit copies of photographs of structures on the site that had been occupied by them, and which had been demolished by City officials. Some of the photographs depicted furniture in the structures. The fifth intervening applicant also provided video footage of the demolitions. The City for its part dismissed the photographs and the video footage as not substantiating the case of the intervening applicants, and disputed that it was evidence of the actual demolitions. The City provided no photographs or video footage of the operation taken by its own officials. The intervening applicants concerned, pointed out in their affidavits that they had occupied the land that belonged to Cape Nature and which

was the subject the court application and disavowed speaking on behalf or representing any other persons who had unlawfully invaded and occupied land and structures in the surrounding area. Needless to state, the demolition of structures by City officials on any property that belonged to Cape Nature prior to the 8 July 2021, and contrary to the lawful requirements of the common law defence of counter spoliation, were squarely unlawful and equally attracts the deprecation of this court. In respect of the relief sought by the 5th intervening applicants (in their prayer 4.3) that they could only lawfully be evicted by order of a court under PIE, the City correctly conceded the merit thereof.

THE RELIEF SOUGHT AGAINST THE POLICE RESPONDENTS

[130] As apparent from the various iterations of the relief sought by the applicants, the eventual relief sought by them against the 4th, 5th and 6th respondents (the police respondents) significantly departed from that which was sought in the initial notice of motion and its various amendments. It appeared that the applicants had adopted the same approach in dealing with the relief in respect of the police respondents in the hearing of the application under Part A. After the hearing in Part B before us, the applicants again sought to amend the relief in respect of the police respondents (see above.) They were met with a sharp notice of objection to their draft order, on the following grounds:

i. that counsel for the applicants had conceded the relief sought against the police respondents;

ii. that it was irregular and impermissible to resile from the above concession;

iii. they also pointed out that in any event, and without derogating from the issue of the concession, the police respondents contended that no case had been made out for any of the relief sought against the police respondents.

iv. the also pointed out that the relief now sought under the latest draft order was objectionable for the following reasons:

(i) that it was not the case that the respondents were called upon to meet;

(ii) that Section 26 (3) of the Constitution regulates evictions, also in particular PIE;

(iii) that it is the function of the Sheriff of the court to execute court orders. Furthermore the police respondents contended that the applicants had not shown that they were entitled to the relief now sought, which was also not argued nor indeed addressed at all at the hearing.

The police respondents contended that should the applicants persist with seeking a court order against them in terms of the proposed draft order, the police respondents would seek a punitive costs order against them. There was no response by the applicants to the objections raised by the police respondents.

[131] In our view the relief sought by the applicants does not require any exhaustive analysis of the affidavits filed by the parties, nor of the arguments. Put simply, we are of the view that the applicants had failed to establish the requirements for the final relief sought against the police respondents. Counsel for the police respondents pointed

elaborately to the mandate of the South African Police Service, in particular to Chapter 11 of the Constitution, section 205, which provides as follows:

'Police service

205. (1) The national police service must be structured to function in the national, provincial and, where appropriate, local spheres of government.

(2) National legislation must establish the powers and functions of the police service and must enable the police service to discharge its responsibilities effectively, taking into account the requirements of the provinces.

(3) The objects of the service are to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law.'

They also referred to the South Africa Police Service Act 68 of 1995 ("the SAPS Act") with regard to the establishment, organisation, and regulation of the police, and matters connected therewith. The SAPS Act also deals with the powers of the National Commissioner of Police, none of which requires any elaboration in this judgment. Counsel for the police respondents pointed out that nowhere in any of the statutory provisions, nor in any Act associated with that of the responsibilities of the South African Police Service, are police officers given any responsibility with regard to housing or the execution of court orders. That responsibility, they correctly pointed out, resides with the Sheriffs of the court, as provided in Section 43 of the Superior Court's Act. In brief, that section provides that it is the responsibility of the Sheriff of the court to execute, amongst

others, judgments and warrants issued by a court. It is not the function of the South African Police Service to enforce court orders, nor to carry out demolitions.

[132] The applicants moreover failed to set out any facts and evidence for the relief which they sought. None of the sweeping and vague allegations made against police officials, of having failed in their statutory functions, were supported with any substantiated evidence. All that was provided in the supplementary affidavits for the relief sought in Part B, was a leaked draft memorandum compiled by the deponent to the answering affidavits, Mr Melville Cloete, the Section Head: Operational Legal Services in the Western Cape. The memorandum related to problems apparently experienced by the police services in the City of Cape Town with the ALIU who allegedly reneged on arrangements made with the police when dealing with demolitions and eviction of large groups of people. The leaked memorandum was clearly of very limited weight and had not even been signed off by senior officials of the department, nor had the City or its officials had sight of it. In response to the draft memorandum, the City contended that there was in fact a good working relationship between officials of the police respondents and that of the City. The draft memorandum, in our view, does not serve as sufficient evidence to warrant any order against the police respondents. The police respondents' reservation of their rights in its answering affidavit in Part B to seek at the hearing of the application the cross examination of the applicants to establish the source of the leaked memorandum was however in our view entirely misplaced.

[133] The relief sought against the police respondents in the initial iterations of the notice of motion were moreover far reaching, inasmuch as it would place an enormous burden on the limited resources of the police respondents. Counsel for the applicants in oral

argument even sought to argue that no more than one police officer would be required for any individual eviction. Clearly, such relief in our view had not been properly considered by the applicants. Moreover, where a court order provides for the police to assist or be present during a demolition or eviction proceedings, under the provisions of PIE, that court would be responsible for the compliance of its order by members of the police services. There is simply no basis for this court to make any general order, as it would be no more than telling the police to do what they are obliged to do by court order, where so ordered. There is moreover no basis for this court to do so in the absence of any evidence by the applicants, nor the intervening applicants, that the police failed to comply with court orders. In our view, the relief sought by the applicants, and the intervening applicants, in respect of Part B, whether on the basis of the initial relief sought in the Notice of Motion or that in the draft order, stands to be dismissed.

THE DEMOLITIONS TENDER

[134] As a corollary to the challenge to the lawfulness of the ALIU the applicants also seek to review and set aside the decision to issue Tender No. 3085/2019/20 and to the extent necessary, any decision to award and implement the tender on the ground that they are unlawful, arbitrary and unreasonable.

[135] The applicants submit that this tender, if awarded and implemented, would allow the City to expand the unlawful work of the ALIU; that the scheme of the Tender Documents provides incentives to potential private contractors to violate constitutional rights. This, they argue, is done by the payment of incentives and penalties structure which would motivate the successful tenderer to demolish as many structures as quickly as possible without first establishing whether a structure was occupied or not, since the

successful tenderer would be paid per demolished structure and per ton of building material removed. Furthermore, the tender documents stipulate a tight turnaround time for the demolition of informal structures while empowering the City to impose penalties of up to R2000 per day for failing to demolish structures within the stipulated time period, which is that a demolition task be completed within the 1 to 8 hours of having been instructed to undertake a demolition. Given the performance incentives, the lack of protocols and training, and the absence of judicial oversight, the scheme created by the tender will perpetuate the rights violations suffered by occupiers at the hands of the ALIU and the City, the applicants argued: the private contractors who attend the sites on behalf of the City will have a discretion regarding which structure to demolish as the ALIU would not be present on site[59].

[136] The tender is also said to be arbitrary and unreasonable since the City was not able to provide a Rule 53 record of the documents that were before the decision-maker and which informed the decision to issue the tender. As such the City has failed to consider why the tender was necessary; what the impact of the tender would be; and whether these were adequate safeguards in place to protect the rights of occupants, it was submitted.

[137] The City argued that the issuing of the tender cannot be seen as arbitrary and capricious or unreasonable but that it was necessary for the City to realise its obligations in respect of socio-economic rights under the Constitution. In response to the allegation that it failed to provide the Rule 53 record it submitted that aside from the documents

[59] This latter submission is based on the City's apparently contradictory versions in part A and B; it alleged that it does not have sufficient ALIU or law enforcement officials to attend at every unlawful land occupation site or to remove every structure in place.

establishing the ALIU there are no further documents that could as a matter of law or logic constitute the record, if regard is had to the manner in which the applicants framed in their relief in the notice of motion.

[138] The question of the review and setting aside of the tender is inextricably interwoven with the question of the lawfulness or otherwise of the ALIU. As seen above the ALIU is not per se unlawful. It has a place in the City's efforts to prevent the invasion of its property provided in carrying its mandate, especially in instances of counter spoliation, provided it acts according to the prescripts of the law. There is therefore no basis for reviewing and setting aside the tender, save once again to emphasise that in carrying out its functions in relation to the protection of City land, the prevention of land invasions and when resorting to the defence of counter spoliation (as defined above) the ALIU and any contracted entity as contemplated in the tender must do so within the strict confines of the law.

THE REASONS FOR THE REFUSAL OF THE RECUSAL APPLICATION

[139] On 25 September 2021, the City's legal representatives wrote to the parties to inform them that it had recently come to their attention that Justice Slingers' husband was employed as a director in the transport division of the City, and that they thought it prudent to advise them of this fact. Furthermore, the City's legal representatives stated that they did not think that a conflict existed but that the parties may have a different position.

[140] As a result of this correspondence, the first applicant directed correspondence to Justice Slingers wherein they requested her to *'confirm the veracity or otherwise of this information, and if indeed your husband is within the employ of the first respondent, to*

advise as to when he assumed such a position. Finally, our clients have instructed us (should it be the case that your husband is indeed within the employ of the City of Cape Town) for the reason (if any) why this fact was (and still has not) been disclosed to the parties.' In response, the first applicant was informed that Justice Slingers' spouse is employed as a Director: Transport Planning and Network Management in the Transport Directorate and that his employment was not disclosed as it was irrelevant to the matter and issues before the court. The first applicant was also advised to direct any questions pertaining to Mr Slingers' employment to his employer.

[141] Thereafter, the first to third applicants brought an application seeking the recusal of Justice Slingers and for the merit application to be heard *de novo* before a new Full Bench. The recusal application was based not on Justice Slingers' husband's employment with the City but on her failure to disclose this fact to the parties. It was submitted that the said non-disclosure caused the first to third applicants to have a reasonable apprehension that Justice Slingers was biased. The fourth and fifth applicants echoed the call for Justice Slingers to recuse herself and supported the recusal application.

[142] The first respondent submitted that the employment of Mr Slingers did not give rise to any conflict as the Transport Directorate *"plays no role in the proceedings before the Court and the issues for determination do not in any way concern the workings of the transport directorate."* The City argued that it was common knowledge that it employed thousands of employees and that it was clear that Mr Slingers was employed in a directorate that played no role in the proceedings before the court which required determination. This was not disputed by the applicants. Therefore, it was argued, the

failure to disclose the employment of Mr Slingers could not, objectively result in a reasonable apprehension of bias.

[143] The second respondent argued that the recusal application was manifestly without merit and verged on the irresponsible. The 4th to 6th respondents had no objection to Justice Slingers hearing the matter and elected to abide by the decision of the Court. The amicus argued that the failure to disclose Mr Slingers' employment did not amount to a reasonable apprehension of bias.

[144] The doctrine of recusal originates in the rules of natural justice and has been constitutionally entrenched in section 34 of the Constitution, which provide that:

'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.'

[145] Section 165(2) of the Constitution states that:

'The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.'

[146] In accordance with section 174(8) of the Constitution, judicial officers are obliged to take an oath or affirm, that they will uphold and protect the Constitution before they may perform their functions.

[147] Article 4 of the judicial code of conduct also obliges a judge to uphold the independence and integrity of the judiciary and the authority of the courts and to maintain an independence of mind in the performance of judicial duties. Article 9(a)(ii) of the judicial code of conduct obliges a judge to remain manifestly impartial and article 13 obliges a judge to recuse herself if there is a real or reasonably perceived conflict of

interest; or a reasonable suspicion of bias based upon objective facts, and shall not recuse herself on insubstantial grounds.

[148] The presumption that judicial officers are impartial in determining disputes arises from the judicial oath of office, the legal training judicial officers undergo, as well as their experience which prepares them for the task of determining the truth.[60]

[149] This is the framework within which a recusal application has to be considered.

[150] In recusal applications, the applicant bears the onus to rebut this presumption of legal impartiality and to establish the existence of bias. In determining whether or not the applicant discharged this onus, the court has to answer the question of *'. . .whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the Judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel.'*[61]

[151] A judicial officer is only required to recuse him/herself where there is a *real likelihood* of bias. This is more exacting than the test of reasonable apprehension or suspicion of bias.[62] As an inquiry into bias cannot be considered in a vacuum, the context within which the allegation of bias is made must be considered when determining whether there is a real likelihood of bias.[63]

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[60] *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 1999 (4) SA 147 (CC).
[61] Ibid para 48.
[62] *BTR Industries South Africa (Pty) Ltd and Others v Metal and Allied Workers' Union and Another* 1992 (3) SA 673 (A) at 693I.
[63] *Ibid* at 695C-D.

[152] The application for the recusal of a judicial officer must be based on convincing and cogent evidence and an application based on inaccurate or insufficient information cannot succeed.

[153] The applicants placed no evidence before the court to substantiate its apprehension of bias and was based solely on Justice Slingers' omission to disclose her spouse's employment with the City.

[154] As it was not disputed that Mr Slingers was employed in a directorate that played no role in the proceedings before the court which required determination, it cannot be said that the applicants' apprehension of bias was reasonable. As the recusal application was brought on insubstantial grounds, and as judicial officers should not lightly recuse themselves, it was determined that there was no cogent nor convincing reasons why Justice Slingers should continue to hear the application.

[155] Therefore, the recusal application was dismissed.

COSTS

[156] The application has raised important constitutional and legal questions. In our view the approach adopted in *Biowatch Trust v Registrar, Genetic Resources, and Others* 2009 (6) SA 232 (CC) is appropriate in this matter, save for that raised in Prayer 1 of the relief sought by the applicants and the associated relief sought by the intervening applicants in respect of the demolition of structures on erf 544 Portion 1 Mfuleni which should be paid by the City given the blatant unlawfulness of the conduct of its officials.

[157] The applicants had not pressed their ill-fated relief in response to the objections raised by the police respondents and each party in respect thereof should in our discretion carry their own costs.

[158] The remaining relief relates to the correct interpretation, requirements and scope of the common law defence of counter spoliation and save for the court recording its appreciation to the very constructive and considered assistance provided by the amicus curiae, all of the parties should in our view be liable for their own costs.

[159] In the circumstances, we unanimously make the following orders:

159.1 **Prayer 1 of the amended notice of motion and Prayer 4.2 of the relief sought by the intervening applicants**

159.1.1 The conduct of the first respondent, the City on the 1st July 2020 is declared to have been both unlawful and unconstitutional in respect of the attempted demolition and eviction of Mr Bongani Qolani from the informal structure that he occupied at Empolweni;

159.1.2 The conduct of the City in the demolition of structures (and effective eviction of persons affected thereby), based on its incorrect interpretation and application of the common law defence of counter spoliation on erf 18332 Khayelitsha (the Empolweni/Entabeni site) in Khayelitsha is declared to have been both unlawful and unconstitutional;

159.1.3 The conduct of the first respondent, the City in respect of the demolition of structures (and the effective eviction of persons affected thereby) on land that

belonged to the Hout Bay Development Trust on erf 5144 prior to it having obtained the permission from the Trust to lawfully conduct counter spoliation operations on the property belonging to the Trust is declared to have been both unlawful and unconstitutional;

159.1.4 The conduct of the first respondent, the City is declared to be both unlawful and unconstitutional in respect of the demolition of structures(and the effective eviction of persons affected thereby) on erf 544, Portion Mfuleni prior to having obtained permission from Cape Nature on the 8 July 2020 to assist it with conducting lawful counter spoliation operations; and

159.1.5 The first respondent, the City is ordered to pay the costs of the three applicants and intervening applicants in respect of the relief in prayers, 1.1 to 1.4 inclusive including the costs of two counsel where so employed.

159.1.2 Prayer 2 of the amended notice of motion

159.1.2.1 The relief sought by the applicants and to the extent supported by the intervening applicants against the 4th ,5th and 6th respondents, the police respondents, is dismissed; and

159.2.2 No order as to costs is made in respect of the relief in prayer 2.1 of the amended notice of motion.

159.1.3. Prayer 3 of the amended notice of motion

159.1.3.1 The relief sought in terms of prayer 3 is covered by the order we make in respect of prayer 6 of the amended notice of motion.

159.1.4. Prayer 4 of the amended notice of motion

159.1.4.1 The relief sought in terms of prayer 4 of the amended notice of motion is covered by the order we make in respect of prayer 6 of the amended notice of motion.

159.1.5. Prayer 5 of the amended notice of motion

159.1.6. It is declared that the first respondent (the City)'s ALIU is not *per se* unlawful provided that, in discharging its mandate to guard the City's land against unlawful invasions, it acts lawfully.

159.1.7. Prayer 6 of the amended notice of motion

159.1.7.1 We reiterate that counter spoliation, properly interpreted and applied, is neither unconstitutional nor invalid. However, the APPLICATION of counter spoliation, incorrectly interpreted and applied by the City, is inconsistent with the Constitution and invalid 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.

159.1.8. Prayer 7 of the amended notice of motion

159.1.8.1 The application to review and set aside the decision by the City to issue Tender No 3085/2019/20 and to the extent necessary, any decision to award and implement the tender, on the ground that it is unlawful, arbitrary and/or unreasonable, is dismissed.

159.1.9. Prayer 8- costs

159.1.9.1 In respect of the relief sought under prayers 2 to 7 of the amended notice of motion, each party shall pay his/her own costs.

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V C SALDANHA

Judge of the High Court

I agree.

_____

M J DOLAMO

Judge of the High Court

I agree.

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H SLINGERS

Judge of the High Court