IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: **8631/2020**

In the matter between:

THE SOUTH AFRICAN HUMAN RIGHTS COMMISSION	First Applicant
THE HOUSING ASSEMBLY	Second Applicant
BULELANI QOLANI	Third Applicant
and	
THE CITY OF CAPE TOWN	First Respondent
THE MINISTER OF HUMAN SETTLEMENTS	Second Respondent
THE MINISTER OF COOPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS	Third Respondent
THE NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE FORCE	Fourth Respondent
and	
THE ECONOMIC FREEDOM FIGHTERS	First Intervening Applicant
THE PERSONS WHO CURRENTLY OCCUPY ERF 544, PORTION 1, MFULENI (LISTED IN ANNEXURE B)	Second Intervening Applicant

FIRST RESPONDENT'S HEADS OF ARGUMENT

INTRODUCTION

1. This is an urgent application for interim relief. In essence, the application concerns how local governments are permitted to respond to unlawful land occupations.

2. The applicants seek five orders -

   2.1. An order interdicting the first respondent, the City of Cape Town (the City), its Anti-Land Invasion Unit (ALIU) and the City's contractors, from evicting anyone from or demolishing any "*informal dwelling hut, shack, tent or similar structure"* (informal structures) *"or any other form of temporary or permanent dwelling or shelter"* (dwellings), whether occupied or unoccupied, anywhere in the City's jurisdiction for the duration of the state of disaster (the state of disaster) proclaimed in terms of the Disaster Management Act 57 of 2002 (DMA), without a court order.[1]

   2.2. An order directing that when the City evicts persons from dwellings or informal structures, whether occupied or unoccupied, in terms of a court order, (a) the eviction must take place in a manner that upholds and respects the dignity of evicted persons, and (b) the City is expressly prohibited from using excessive force and destroying and/or confiscating the materials of the persons being evicted.[2]

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1 NoM para 2.1, rec. 2.
2 NoM para 2.2, rec. 2-3. In the alternative the applicants seek a declaratory order to the same effect.

2.3. An order directing the South African Police Service (SAPS*)* to ensure that all evictions and/or demolitions by the City comply with the Constitution and the law generally. [3]

2.4. An order prohibiting the City from relying on any orders issued by this court which authorise the City to demolish dwellings and/or informal structures whether occupied or unoccupied,[4] alternatively, granting the aforesaid relief for the duration of the state of disaster. [5]

2.5. An order interdicting the City from considering, adjudicating and awarding bids in respect of a tender for the demolition of illegal formal and informal structures within the City.[6]

3. In summary, the City submits that the application for interim relief falls to be dismissed for three reasons -

3.1. The effect of the interim relief is to facilitate the unlawful occupation of land. This subverts the public order and undermines the rule of law.

3.2. The interim relief infringes on the City's constitutionally protected rights to protect its property and not to be deprived of its property in an arbitrary manner. Indeed, the interim relif prohibits the City from utilising lawful means to protect its property.

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3 NoM para 2.3, rec. 3.
4 NoM para 2.4, rec. 3.
5 *Id*.
6 Tender No 308S/2019/20. NoM para 2.5, rec. 4.

3.3. The interim relief frustrates the City's constitutional obligations to provide housing on a planned basis in terms of s 26(1) of the Constitution of the Republic of South Africa 1996 (the Constitution) and undermines the fulfilment of the City's constitutional obligations to the poor and marginalised.

4. In addition, two parties seek leave to intervene in these proceedings (the intervention application). The first party seeking leave to intervene is the Economic Freedom Fighters (EFF). The second party seeking leave to intervene is cited as *"the persons who currently occupy Erf 544, Portion 1, Mfuleni, Cape Town"* (the occupiers).[7]

5. The City opposes the intervention application.

6. The relevant factual background is canvassed in the affidavits and is not repeated in these submissions save as may be necessary.

7. These remainder of these heads of argument are structured as follows –

7.1. First, we deal with the matters arising from the intervention application including:

7.1.1. the failure of the intervening applicants to join the owner of Erf 544, Portion 1 Mfuleni (the Cape Nature property),

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[7] The EFF and the occupiers are collectively referred to in these heads of argument as "the intervening applicants".

being the Western Cape Nature Conservation Board (Cape Nature);

7.1.2. the intervening applicants' failure to establish standing to seek relief in these proceedings; and

7.1.3. why the relief sought in the intervention application is without merit.

7.2. Second, we set out the deleterious consequences of unlawful occupation of land.

7.3. Third, we explain why the applicants are not entitled to an order interdicting the City from removing unoccupied structures that do not constitute homes within the meaning of s 26 of the Constitution and the Prevention of Unlawful Occupation of Land Act 19 of 1998 (PIE).

7.4. Fourth, we set out the approach of the ALIU when it conducts demolitions and explain why the applicants are not entitled to the second and third orders that they seek.

7.5. Fifth, we explain why it is impermissible for this court, in these proceedings, to suspend competent court orders issued by this court permitting the demolition of structures.

7.6. Finally, we explain why the applicants are not entitled to interdict the City from considering, adjudication and awarding Tender No. 308S/2019/20 (the tender).

THE INTERVENTION APPLICATION

8. The intervening applicants seek the leave to this court to join these proceedings as co-applicants.[8]

Non-Joinder of Cape Nature

9. The occupiers refer to the Cape Nature property as *"Zwelethu"*.[9] However, the area referred to as Zwelethu in fact stretches across two properties, one being the Cape Nature property and the other being a property which borders on the Cape Nature property and which is owned by the City (the City property).[10]

10. In the founding affidavit the intervening applicants state that they were served with an application brought by Cape Nature to interdict persons from occupying the Cape Nature property (the Cape Nature application) and that they intend to oppose that application.[11]

11. Further, this court on 11 July 2020 granted Cape Nature an interim interdict preventing further occupation of the Cape Nature property and that order was served on the occupiers on the same date.[12]

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8 FA intervention application para 7.1, rec.284.
9 FA intervention application para 1, rec. 283.
10 The City property and the Cape Nature property are referred to collectively in these heads of argument as "the Mfuleni properties".
11 FA intervention application para 26, rec. 290. The Cape Nature application is currently before this court under case number 8913/2020.
12 City SAA para 25, rec. 331. Annexure RP3, rec. 379-382.

12. Consequently, when the founding affidavit was deposed to, the intervening applicants were aware that the Cape Nature property was not owned by the City and is in fact owned by Cape Nature.

13. They were further aware that there was an interim interdict over the Cape Nature property that expressly authorised, inter alia, the ALIU (a) to dismantle or demolish informal structures on the Cape Nature property and (b) to bar persons acting in breach of the interim interdict from entering the Cape Nature property and to remove such persons from the Cape Nature property together with their belongings.[13]

14. This notwithstanding the intervening applicants have failed to join Cape Nature as a party to these proceedings.

15. The intervening applicants admit that the order granted in the Cape Nature application on 11 July 2020 was served on them,[14] yet they fail to take the court into their confidence as to why they did not disclose the existence of the order in their founding papers.

16. The intervening applicants do not deny that the deponent to the founding affidavit in the intervening application was also the instructing client in the Cape Nature application. [15]

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13 City SAA, Annexure RP3, para 4 rec. 381.
14 RA intervention application, para 39, rec. 474.
15 City SAA para 25, rec. 331; RA intervention application, para 39, rec. 474.

17. In these circumstances the contention made in reply that the Cape Nature application has *"nothing to with [them]"*[16] ought to be rejected by this court.

18. The test whether there has been non-joinder is whether a party has a direct and substantial interest in the subject matter of the litigation which may prejudice the party that has not been joined.[17] If an order or judgment cannot be sustained without necessarily prejudicing the interest of third parties that had not been joined, then those third parties have a legal interest in the matter and must be joined.[18]

19. In these circumstances and given the nature of the relief sought by the intervening applicants and the relief sought in the main application with which the intervening applicants seek to associate themselves it was incumbent upon them to join Cape Nature as a party to these proceedings in that it has a direct and substantial interest in the relief sought.

20. Further, in the Cape Nature application the occupiers seek to rely on the same factual contentions and legal arguments that they rely in in the intervention application in particular in regard to:[19]

    20.1. the purported actions of the ALIU at the Mfuleni properties;

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16 RA intervention application, para 24.2, rec. 467.
17 *Absa Bank Ltd v Naude NO* 2016 (6) SA 540 (SCA) para [10]-[11].
18 *Ibid.*
19 City SAA para 27-28, rec. 332 and para 48-49, rec. 337.

20.2. the City's obligations to provide emergency housing in circumstances where unoccupied structures have been removed in terms of an order of court; and

20.3. Whether Cape Nature is entitled to seek and to rely upon on the order granted by this court which authorises it to protect its property by means of the removal of unoccupied structures and the removal of persons seeking to unlawfully occupy the Cape Nature property.

21. Further, if the intervening applicants (and the applicants in the main application) were to obtain the relief sought in paragraph 2.4 of the Notice of Motion in the main application such relief would effectively override any order granted in the Cape Nature application.

22. Consequently, Cape Nature has a a direct and substantial interest which may be affected prejudicially by the judgment of this court and its joinder is thus required as a matter of necessity.[20]

Lack of standing

23. An applicant seeking to intervene in legal proceedings must show that it has a direct and substantial interest in the subject-matter of the litigation, which could be prejudiced by the judgment of the court.[21]

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[20] *Judicial Service Commission and Another v Cape Bar Council and Another* 2013 (1) SA 170 (SCA) para [12]. See also *Bowring NO v Vrededorp Properties* CC 2007 (5) SA 391 (SCA) para [21].

[21] *SA Riding For The Disabled Association v Regional Land Claims Commissioner and Others* 2017 (5) SA 1 (CC) para [9].

24. A direct and substantial interest means a "*legal interest in the subject-matter of the case which could be prejudicially affected by the order of the court. This means that the applicant must show that it has a right adversely affected or likely to be affected by the order sought".*[22]

25. The founding affidavit does not demonstrate why the EFF has any interest, let alone a direct and substantial interest, in the subject-matter of this litigation.[23]

26. It appears that the EFF's interest is political—it seeks to advance its legislative and/or policy agenda on land reform through the courts by seeking orders which have the effect of permitting the unlawful occupation of the land.

27. The advancement of particular policy positions by a political party is not a direct and substantial interest that warrants intervention in pending litigation proceedings.

28. The EFF does not assert any right that is or could potentially be prejudiced by the judgment of this court.

29. Insofar as the occupiers are concerned the relief sought in the main application, if granted, will protect them. Consequently, the occupiers assert no right that would be prejudiced if they are not permitted to intervene as co-applicants in these proceedings.

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22 *Ibid*.

23 The City does not dispute the authority of the deponent to depose to the affidavit on behalf of the EFF as suggested in the reply (RA intervention application para 26, rec. 470). The City contends that the EFF lacks standing either as an own interest litigant or in the public interest.

30. It is further contended in the founding affidavit that the intervening parties seek intervention and joinder "*in the public interest and in the interest of Zwelethu".*[24]

31. In *Ferreira v Levin,* O'Regan J held that a court should be circumspect in allowing litigation prefaced "*in the public interest"* by requiring an applicant to show that "*he or she is genuinely acting in the public interest".*[25]

32. In elaborating on this requirement, O'Regan J remarked that:

> *"Factors relevant to determining whether a person is genuinely acting in the public interest will include considerations such as: whether there is another reasonable and effective manner in which the challenge can be brought; the nature of the relief sought, and the extent to which it is of general and prospective application; and the range of persons or groups who may be directly or indirectly affected by any order made by the court and the opportunity that those persons or groups have had to present evidence and argument to the court. These factors will need to be considered in the light of the facts and circumstances of each case".*[26] [emphasis added]

33. The founding affidavit in the intervention application does not address any of the factors relevant to determining whether either if the intervening applicants acts in the public interest, other than a bald statement to that effect.

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24 FA intervention application para 4, rec. 283.
25 *Ferreira v Levin* 1996 (1) SA 984 (CC) para [234].
26 *Ibid*.

34. The "*Zwelethu"* area compromises of more than 3000 unlawfully erected structures.[27] The intervening applicants purport to represent 100 individuals who occupy "*approximately 120 homes".*[28]

35. It is clear that the intervening applicants cannot be said to represent the "*interests of Zwelethu"* as they claim to do.[29]

36. For these reasons, it is submitted this court neither of the intervening applicants has demonstrated the requisite standing to intervene in these proceedings and this court should decline to permit their intervention and joinder.

37. In the alternative, and only in the event that this court may find that the occupiers have an interest which warrants granting them leave to intervene in these proceedings (which is denied), it is submitted that the hearing of the main application cannot proceed without Cape Nature being joined as a necessary party to the proceedings for the reasons set out above.

38. Consequently, in the event that the occupiers are granted leave to intervene, the main application should be postponed for hearing together with the Cape Nature application, alternatively postponed for Cape Nature to be joined to these proceedings.

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27 City SAA para 42, rec. 336.
28 FA intervention application para 10, rec. 286 and Annexure B, rec. 300-307.
29 FA intervention application para 4, rec. 283.

THE IMPACT OF UNLAWFUL OCCUPATION ON THE CITY'S CONSTITUTIONAL OBLIGATIONS

39. The City does not evict persons from their homes without a court order.[30]

40. The City accepts that s 26(3) of the Constitution provides that no one may be evicted from their home or have their home demolished without an order of court granted after considering all the relevant circumstances, and that the provisions of PIE give effect to the rights arising from s 26(3).

41. Once an unlawful occupier has established a home (in the sense contemplated by s 26(3) of the Constitution and PIE) on City owned land, the City may not, and indeed does not, effect an eviction in the absence of a court order obtained in terms of the relevant legislation permitting evictions. [31]

42. In order to ensure that a number of important constitutional objectives are not undermined, in particular the City's constitutional obligations in respect of housing delivery, it is necessary for the City to prevent unlawful occupation of its land. Accordingly, the City removes informal structures and dwellings that do not constitute the home of any person, where such structures are unlawfully erected on City owned land.[32]

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30 City AA para 18, rec. 218.
31 City AA para 14, rec. 217.
32 City AA para 65, rec. 235.

43. The City is entitled to do so in terms of the common law principle of counter-spoliation. If the City fails to do this, it undermines its ability to provide housing and other socio-economic rights on a planned basis.[33]

44. The City's answering affidavit provides a full account of the impact of unlawful occupation on the City realising its constitutional obligations.

45. The following facts bear emphasis in this regard:

45.1. In 2017 there were 14 289 unlawful and occupations in the City and in 2018 that number increased to 87 500 unlawful and occupations.[34]

45.2. 232 8559 ha of City owned land had been unlawfully occupied by 2018 and this figure has increased to 241 4671 ha in 2020. [35]

45.3. By June 2020, 338.743 ha of state and privately owned land in the City had been unlawfully occupied. [36] 73% of the land unlawfully occupied is City owned land. [37]

45.4. The City estimates that by 2032 there will be approximately 650 000 families earning less than R13 000.00 per month living within the City's jurisdiction and who will some form of government housing assistance.[38]

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33 City AA para 27 and 28, rec. 220.
34 City AA para 45, rec. 226-227.
35 City AA para 47, rec. 228.
36 City AA para 47-48, rec. 228-230.
37 City AA para 47, rec. 228.
38 City AA para 42, rec. 224.

45.5. It is anticipated that the City's population will increase to approximately 5 million people by 2028, an increase of 800 000 from 2018.[39]

45.6. At present the City needs to deliver 330 555 housing opportunities to persons currently awaiting housing opportunities.[40]

45.7. The City anticipates that it will need to deliver between 47 920 and 52 930 housing opportunities per annum to meet the housing demand over the next 10 years.[41]

45.8. Further, in order to address the current backlog of households living in informal dwellings the City will need to deliver approximately 23 000 new housing opportunities each year to address demand by 2028.[42]

45.9. Quite aside from the increasing need for housing within the City, the scale of the Covid-19 pandemic the Western Cape and in the Cape Metropole in particular is anticipated to place unprecedented pressure on the City's resources.[43]

45.10. National Government has mandated that a de-densification strategy be implemented in particular focus areas. Three areas within the City with high population densities and overcrowded living conditions have been identified for de-densification by the National and Provincial

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39 City SAA para 235, rec. 373.
40 City SAA para 236, rec. 373.
41 *Ibid.*
42 *Ibid.*
43 City SAA para 215-217, rec. 370; para 233-234, rec. 372.

Departments of Human Settlements in consultation with the City in order to minimise the spread of Covid-19.[44]

45.11. The City's current USDG/UISPG/HSDG funding is insufficient to complete all three projects.[45] The budgetary allocation required by the City for three projects in respect of the provision of services and top structures is estimated at R650m. [46]

45.12. Although the 2020/2021 budget allocation to the City in respect of USDG funding was initially approved at an amount of R540 563 667, the proposed August 2020 Covid-19 adjustment budget reduces the allocation to the City to R437 443 667. [47]

45.13. The 2020/2021 budget allocated an amount of R611 740 000 to the City in respect of HSDG funding. [48] However this amount has been reduced to an amount of R173 740 000 as a consequence of the Covid-19 adjustments made to the budget. [49]

46. The applicants in reply, contend that these facts are irrelevant as this matter does not relate to the City's ability to deliver housing.[50]

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44 City SAA para 219-222, rec. 370-371.
45 City SAA para 226, rec. 371.
46 City SAA para 227, rec. 371.
47 City SAA para 228-231, rec. 372.
48 City SAA para 232, rec. 372.
49 *Ibid.*
50 RA para 46, rec. 417.

47. However, the applicants choose to ignore the fact that unchecked unlawful land occupations directly impacts on the City's ability to deliver housing in that:

47.1. the City has to reallocate its finite pool of resources to respond to the need for emergency housing that results from such occupations; and

47.2. the City loses land which is earmarked for housing development to unlawful land occupations.

48. The applicants seek to rely on a pre-pandemic newspaper article (dated February 2020)[51] dealing with proposed budget cuts at the time for the contention that there is no certainty as regards cuts to the City's housing budget. The applicants astutely ignore the fact that the answering affidavits were deposed to after the Minister of Finance announced the Covid-19 budgetary adjustments. There can be no dispute that the City has fewer resources to allocate to the delivery of its housing obligations in circumstances where the need for housing delivery has increased.

49. The City is currently cited in 12 major eviction cases where it asked to provide emergency housing. These 12 matters require approximately 3648 emergency housing opportunities. This excludes the emergency housing needs in respect of matters such as the ongoing Woodstock Hospital and Helen Bowden evictions, the occupied PRASA reserve which involves 7844 structures, or the Marikana settlement which involves in the region of 30 000 structures.[52]

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51 RA para 47, rec. 417.
52 City AA para 60, rec. 234.

50. The domino effect of unlawful occupations is severe and is not meaningfully disputed by disputed by the applicants.

51. The applicants do not (and indeed cannot) respond to the fact that when persons unlawfully occupy City owned land earmarked for housing, the City must either choose to evict those persons in which case it attracts an obligation to provide emergency housing for those persons or it must choose to leave those persons in *situ* in which case it cannot use the land for the intended purpose of providing housing.

52. It is no answer to say that this case "*is not about whether the City is being provided with sufficient resources to deliver on its housing obligations"*[53] and to ignore the far reaching impact of the relief sought on the City's ability to use its resources to deliver on its housing obligations.

53. Often tensions arise between communities awaiting housing, and those who unlawfully occupy land, with the latter appearing to garner preferential treatment from the City at the expense of those who patiently wait for housing.[54]

54. Once an unlawful occupation takes place, it nearly impossible for the City to regain large pockets of land meant for housing, and the realisation of other socio-economic rights.[55] If the City is unable to protect its land from unlawful occupation it will be unable to deliver not only on its housing obligations but also the nationally mandated Covid-19 projects.

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53 RA para 46, rec. 417.
54 City AA para 108, rec. 243.
55 City AA para 50, rec. 230-231.

55. It is within this context, that the relief sought by the applicants must be understood.

THE INTERIM INTERDICTORY RELIEF

56. An interim interdict is by definition a court order preserving or restoring the *status quo* pending the final determination of the rights of the parties.[56] It does not involve a final determination of these rights and does not affect their final determination.[57] In an application for an interim interdict the dispute is whether, applying the relevant legal requirements, the *status quo* should be preserved or restored pending the decision of the main dispute.[58]

57. The requisites for interim interdict are:[59]

    57.1. a *prima facie* right, namely *prima facie* proof of facts that establish the existence of a right in terms of substantive law;[60]

    57.2. a well-grounded apprehension of irreparable harm if the interim relief is not granted, and the ultimate relief is eventually granted;[61]

    57.3. that the balance of convenience favours the granting of an interim interdict;[62] and

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56 *National Gambling Board v Premier, Kwazulu-Natal and others* 2002 (2) SA 715 (CC) para [49].
57 *Ibid.*
58 *Ibid.*
59 Harms, *Interdict*, LAWSA, Vol. 11 (2nd Ed.) para 403 and the authorities there cited.
60 *Ibid* para 404: *National Council of Societies for the Prevention of Cruelty to Animals v Openshaw* 2008 (5) SA 339 (SCA) para [20].
61 *Harms*, para 405.
62 *Ibid.* para 406 and the authorities there cited.

57.4. that the applicant has no other satisfactory remedy.[63]

58. These requirements must not be considered separately or in isolation, but in conjunction with one another in order to determine whether the Court should exercise its discretion in favour of granting interim relief.[64] *Prima facie* proof of facts for purposes of interim relief has been formulated as follows:[65] the right can be *prima facie* established, even if it is open to some doubt; mere acceptance of the applicant's allegations is insufficient; but a weighing up of the probabilities of conflicting versions is not required.

59. The proper approach is (i) to consider the facts as set out by the applicant together with any facts set out by the respondents which the applicant cannot dispute; (ii) to decide whether, with regard to the inherent probabilities and the ultimate onus, the applicant should[66] on those facts obtain final relief in due course; and (iii) to then consider the facts set up in contradiction by the respondents, and if they throw serious doubt on the applicant's case the latter cannot succeed.

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63 *Ibid.* para 407 and the authorities there cited.

64 *Olympic Passenger Services (Pty) Ltd v Ramlaga* 1957 (2) SA 382 (D) at 383E-F.

65 *Webster v Mitchell* 1948 (1) SA 1186 (W), as qualified by *Gool v Minister of Justice* 1955 (2) SA 682 (C); *Spur Steak Ranches Ltd v Saddles Steak Ranch* 1996 (3) SA 706 (C) at 714.

66 In *Webster v Mitchell*, the test was whether the applicant could obtain final relief on those facts. *Gool v Minister of Justice*, qualified this, saying the test was "should".

THE ORDER INTERDICTING THE CITY FROM PROTECTING ITS LAND THROUGH COUNTER-SPOLIATION

60. The interim relief implicates the right not to be deprived of property except in terms of a law of general application, as contemplated by s 25(1) of the Constitution.

Occupied structures

61. Insofar as the applicants seek relief related to occupied structures, the City accepts that occupied structures attract the protections of PIE.

62. The applicants are, however, not entitled to an order interdicting the City from evicting persons from occupied structures or demolishing occupied structures, in that the City does not engage in the conduct complained of. The evidence on which the applicants rely for such relief is disputed and the evidence put up by the City throws serious doubt on the applicants' version.

63. The applicants rely, inter alia, on the events which took place at the settlement known as Empolweni in Khayelitsha during April 2020 and the events in relation to Mr Qolani which took place on 1 July 2020 at the settlement which they refer to as "Ethembeni".[67] The City explains in its answering affidavit that Ethembeni is the same property which is the subject matter of the order of this court granted on 17 April 2020, i.e. Empolweni.[68]

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67 The property in question being the portion of Erf 18332 Khayelitsha (Erf 18332).
68 City AA para 124, rec. 246.

64. It is not in dispute that during 2017 and 2018 the City obtained interdicts from this court protecting various portions of the Erf 18332 from unlawful occupation.[69] Notwithstanding, some 300 structures occupied structures have been unlawfully erected on the portions of Erf 18332 that are the subject matter of these orders.[70] It is not in dispute that the City has not sought to evict these persons or to remove their structures without a court order.

65. A different portion of Erf 18332 became the subject of an unlawful occupation during April 2020. It is not seriously in dispute that the portion of Erf 18332 (now known as Empolweni) was unoccupied from 13 November 2019 until at least 4 April 2020.[71] On 17 April 2020 this court granted an interim order which remains in place, interdicting any further unlawful occupation of Empolweni.[72]

66. The founding affidavit astutely avoids dealing with how and when Mr Qolani is alleged to have taken occupation of his structure.

67. Presumably to avoid the otherwise inescapable inference that he took occupation of the property in the face of a court order, the applicants merely refer to the property where Mr Qolani erected his structure as "Ethembeni" and do not address where the property is, save for a passing reference in a letter from the South African Human Rights Commission which refers to the area as being "*near Empolweni"*.[73]

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69 City AA para 125-129, rec. 246-247.
70 City AA para 129, rec. 247.
71 City AA para 150 rec. 253 and Annexures RP1-RP6, rec. 267-272. The bare denial in the replying affidavit is not sufficient to cast doubt on the City's version. RA para 89, rec. 426.
72 FA Annexure CN3, rec. 72-75.
73 FA para 48.1, rec. 28.

68. In response to the City's assertion that Ethembeni and Empolweni are in fact the same settlement, the applicants for the first time in reply contend that "Ethembeni" is a different informal settlement to Empolweni, albeit on the same property, with the structures in "Ethembeni" facing east and those in Empolweni facing west. [74]

69. Given that the attorneys for the applicants also represent the Empolweni occupiers in the proceedings currently before this court, it stands to reason that if Empolweni and "Ethembeni" were in fact different settlements this would have been canvassed in the founding affidavit, in particular in light of the fact that this court has interdicted further occupation of the property in question. The fact that the explanation is belatedly tendered for the first time in reply raises serious doubts as to the veracity of the explanation.

70. Surprisingly the applicants in reply state that Mr Qolani moved to Empolweni on 16 March 2020, this notwithstanding the undisputed evidence from the aerial photographs which demonstrate this simply cannot be the case.[75] This explanation too should be viewed with circumspection.

71. Similarly, the founding affidavit is silent on how and when Ms Rossouw and others took occupation of the properties owned by the Ocean View Trust and SANParks.

72. In reply, the applicants set out an entirely new factual version setting out a detailed description of an interaction with unnamed SANParks staff relating to

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74 RA para 73, rec. 423.

75 The bare denial of the photographic evidence is not sufficient to cast doubt on the City's version.

the borders of the properties; [76] when they took occupation of the property; [77] an incident during February 2020 during which Ms Rossouw's daughter was injured by City officials;[78] her son was allegedly threatened with a firearm[79] and relays details of 8 persons not previously referred to whose occupied structures had apparently been demolished[80] with no explanation as to why these seemingly crucial facts were not canvassed in the founding papers and without providing confirmatory affidavits.[81]

73. It appears from the reply that Ms Rossouw was aware of attempts (presumably during February 2020) by persons to whom Ms Achmat refers as *"the community"* and *"the people"* to *"demarcate plots amongst themselves"* and that they had *"decided to take plots themselves"* after hearing that the Ocean View Trust intended to sell the property.[82]

74. Ms Achmat attempts to distance Ms Rossouw from the unlawful behaviour of *"the community"* but fails to explain why, if Ms Rossouw was aware in 2019 of the fact that the properties in question was owned by the Ocean View Trust she nonetheless took occupation of the property in January 2020 nor does she explain why Ms Rossouw did not raise this with the other persons who took occupation at the same time as she did. The inescapable conclusion is that

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76 RA para 106-107, rec.430.
77 RA para 105, rec. 430 and para 108, rec.431.
78 RA para 109, rec.431.
79 RA para 115, rec.432-433.
80 RA para 108, rec. 431 and para 117-118, rec. 433.
81 In the founding affidavit the lack of confirmatory affidavits is explained away due to urgency, however, this explanation cannot hold true for the reply given the passage of time and the postponement of the urgent proceedings on 15 July 2020.
82 RA para 112-113 rec. 432.

they were part of the *"the community"* who decided to take the law into their own hands.

75. It is submitted that given that it is central to the applicants' case that the City demolished occupied structures on the properties and violated the rights of the occupiers, the fact that these new facts are put up for the first time in reply should also be viewed with circumspection.

76. It is submitted that having regard to the inherent probabilities and the ultimate onus, the applicants it cannot be said that the applicants on the facts put up by them should (or indeed could) obtain final relief in due course. Further the court then considers the facts set up in contradiction by the City serious doubt is thrown on the applicants' case. For these reasons the applicants cannot succeed in obtaining an order as sought in paragraph 2.1 of the Notice of Motion in regard to occupied structures.

77. The intervening applicants rely on video evidence which does not support their contentions, and which does not disclose the dates on which the videos were taken. In the replying affidavit which was delivered some 8½ hours after it was due in terms of the order regulating the conduct of these urgent proceedings, the intervening applicants state that they can provide the metadata *"should the need arise"*.[83] However, they fail to disclose to the court that the City's attorneys had requested the metadata from their attorneys before the City's

[83] RA intervention application para 72.2, rec. 482.

supplementary answering affidavit was due and to date no reply has been received.

78. The purported offer the metadata in a replying affidavit which is delivered substantially out of time, shortly before heads of argument are due in urgent proceedings and where a timeous request for the information has simply been ignored appears to be calculated to ensure that the parties and the court cannot properly interrogate the purported evidence.

79. The intervening applicants' conduct in failing to respond to correspondence, failing to comply with court orders to which they have agreed and failing to disclose pertinent information to this court demonstrates a concerning disregard for the court and the rule of law.

80. The occupiers of the Cape Nature property have not been in occupation of the property since March 2020 as they claim. This is clear from the evidence put up by the City. Due to the urgency with which the supplementary affidavit was prepared it was not possible to obtain a confirmatory affidavit from the person responsible for producing the satellite images. The City will endeavour to obtain the confirmatory affidavit prior to the hearing.

81. Aside from bare denials the occupiers do not seriously dispute the City's evidence as to how and when the occupation of the Cape Nature property and the adjacent City property took place and their denials must accordingly be rejected.[84]

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84 *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another* 2008 (3) SA 371 (SCA) para [13].

Unoccupied structures

82. In regard to unoccupied structures, what the applicants are asking this court to do is to sanction unlawful land occupation and to provide unlawful land occupiers with a shield which would not only provide those occupiers with carte blanche to unlawfully occupy both privately owned and State owned land without consequence, but would deprive landowners of the ability to protect and vindicate their property rights.

83. The interim relief does not seek to preserve or restore the *status quo*.

84. The applicants do not approach this court on behalf of a specific occupier or group of occupiers in circumstances where it is contended that the City intends to demolish the structures which are the homes of those persons or where there is doubt as to whether the structures are the homes of those persons.

85. The applicants are asking this court to interdict the City from demolishing <u>any and all</u> unoccupied dwellings and informal structures which are unlawfully erected on City owned land, without regard to whether those structures constitute a home within meaning of s 26 of the Constitution and PIE.

86. The applicants are asking this Court, in interim relief proceedings, to extend the definition of home for the purposes of PIE, to <u>any</u> unoccupied structure and in so doing to fundamentally alter the key jurisdictional fact for the application of PIE, namely that the structure in question must be the home of the person whose eviction is sought.

87. The effect of this order is that the City will be precluded from relying on the principle of counter-spoliation in order to prevent the unlawful occupation of land.

88. The applicants are not entitled to this relief for two reasons.

88.1. first, they have not established prima facie right warranting the interdict sought; and

88.2. secondly, neither PIE nor the Constitution prohibits the City from demolishing structures that are not *"homes"*.

89. The law does not recognise a right to unlawfully occupy land. There is no right in law which prohibits a landowner from demolishing or removing an unlawfully erected unoccupied structure from their land.

90. The applicants claim that the *prima facie* rights violated are the rights to dignity, freedom and security of the person and the right to housing. However, none of these rights create entitlements to unlawful occupation of land, nor do these rights preclude a landowner from engaging lawful means to protect its land.

91. The Constitutional Court has emphasised that no-one is entitled to take the law into his or her own hands. Self-help, in this sense is inimical to a society in which the rule of law prevails, taking the law into one's own hand is thus inconsistent with the fundamental principles of our law.[85]

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[85] *Chief Lesapo v North West Agricultural Bank and Another* 2000 (1) SA 409 (CC) paras [11], [18] and [22]. See also *Zondi v MEC for Traditional and Local Government Affairs and Others* 2005 (3) SA 589 (CC) para [59].

92. If an individual is dissatisfied with any aspect of an organ of State's conduct or its policy, the appropriate (lawful) response is to approach the Courts. It is not to resort to self-help.

93. The general rule against self-help applies in the context of the ss 26(1) and 26(3) rights.[86]

94. In *Grootboom*, Yacoob J commented:

> *"The issues here remind us of the intolerable conditions under which many of our people are still living. The respondents are but a fraction of them. It is also a reminder that, unless the plight of these communities is alleviated people may be tempted to take the law into their own hands in order to escape these conditions. The case brings home the harsh reality that the Constitution's promise of dignity and equality for all remains for many a distant dream. People should not be impelled by intolerable living conditions to resort to land invasions. Self help of this kind cannot be tolerated, for the unavailability of land suitable for housing development is a key factor in the fight against the country's housing shortage".* [87]
>
> ….
>
> *"This judgment must not be understood as approving any practice of land invasion for the purpose of coercing a State structure into providing housing on a preferential basis to those who participate in any exercise of this kind. Land invasion is inimical to the systematic provision of adequate housing on a planned basis. It may well be that the decision of a State structure, faced with the difficulty of repeated land invasions, not to provide housing in response to those invasions, would be*

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86 *Groengras Eiendomme (Pty) Ltd and Others v Elandsfontein Unlawful Occupants and Others* 2002 (1) SA 125 (T).

87 *Government of the Republic of South Africa v Grootboom and Others* 2001 (1) SA 46 para [2].

reasonable. Reasonableness must be determined on the facts of each case".[88] (Emphasis added).

95. In *PE Occupiers,* Sachs J stated at para [26]:

> *"Furthermore, persons occupying land with at least a plausible belief that they have permission to be there can be looked at with far greater sympathy than those who deliberately invade land with a view to disrupting the organised housing programme and placing themselves at the front of the queue. The public interest requires that the legislative framework and general principles which govern the process of housing development should not be undermined and frustrated by the unlawful and arbitrary actions of a relatively small group of people. Thus the well-structured housing policies of a municipality could not be allowed to be endangered by the unlawful intrusion of people at the expense of those inhabitants who may have had equal claims to be housed on the land earmarked for development by the applicant. Municipalities represent all the people in their area and should not seek to curry favour with or bend to the demands of individuals or communities, whether rich or poor. They have to organise and administer their affairs in accordance with the broader interests of all the inhabitants"*. (Emphasis added).

96. In *Modderklip*,[89] Langa ACJ commented at para [49]:

> *"…The progressive realisation of access to adequate housing, as promised in the Constitution, requires careful planning and fair procedures made known in advance to those most affected. Orderly and predictable process are vital. Land invasions should always be discouraged …"*. (Emphasis added).

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88 *Ibid* at para 92.

89 *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 (3) SA 3 (CC).

97. This Court (per N C Erasmus J) in *Capricorn*,[90] in granting an eviction order, stated:

> *"In my view, the most compelling factor weighing in applicants' favour is simply that it is imperative that land invasions are denounced and rejected as an appropriate way to enforce one's constitutional right to adequate housing"*. (Emphasis added).

98. In short, under the rule of law, a founding principle of the Constitution, courts are to make orders which discourage unlawful land occupations. Preferential treatment obtained through self-help conduct is contrary to the rule of law and constitutional democracy and must be rejected.[91]

99. The authority of the both the Constitutional Court and this court makes it clear that the applicants do not have a *prima facie* right that entitles them to the interdict sought.

100. Further, the National Minister of Housing has stated in terms that *"land invasions would not be tolerated"* and that *"the responsibility of making sure that this happens is with law enforcement*' which is required to *"make sure that any land that is on the cusp of being invaded is protected appropriately."*[92]

101. Even the SAHRC has expressed its concern to the City in regard to what Commissioner terms Nissen termed the *"the land invasion that is taking place all over Mfuleni"*.[93] He expressed particular concern at the absence of City Law

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90 *City of Cape Town v Unlawful Occupiers, Erf 1800 Capricorn* 2003 (6) SA 140 (C) at 151I.
91 *Gundwana v Steko Development and Others* 2011 (3) SA 608 (CC) para [45].
92 FA Annexure CN14, rec. 118.
93 City SAA para 54, rec. 338 and RP5, rec. 387.

Enforcement the ALIU and stated that the SAHRC does not condone land occupations. [94]

102. Not only is there no *prima facie* right, the balance of convenience (being the prejudice to the City as weighed against the prejudice to the applicants) does not favour the granting of the interdict.

103. If this Court were to grant the interdict, it would signal that there is an entitlement to unlawfully occupy land. The City would either be forced to seek the removal of the unlawful occupiers (and to provide emergency housing for the persons removed) or forego the public purposes (including housing) for which that land had been earmarked. This means that funds allocated for housing commitments for those on a housing list will be diminished, affecting the City's ability to realise access to housing for those law-abiding citizens.

104. The applicants incorrectly contend that the City would not be required to provide emergency housing were it to seek the eviction of persons who have unlawfully occupied City land. Invariably such persons are desperately poor and will be rendered homeless in the event that they are evicted.

105. The lawfulness of the occupation is irrelevant to the enquiry as to whether an eviction would be just and equitable.[95] Irrespective of how the occupation of the property occurred, where an eviction will render persons homeless, a constitutional obligation rests on the relevant municipality to provide suitable

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94 City SAA para 54, rec. 338 and RP5, rec.387.
95 *Ibid* para [48].

accommodation.[96] An eviction which renders persons homeless is not just and equitable and thus cannot be granted.[97]

106. The consequences of allowing unchecked unlawful land occupations are not merely adverse to the City but to the rule of law and to many thousands of residents who are in need of housing assistance and who have chosen to act lawfully. The balance of convenience does not favour the applicants. Instead, it undermines the rule of law by subverting public order, and it frustrates the City's legitimate efforts to provide housing on a planned basis.

107. Finally, if the applicants fear that the City might demolish homes within the meaning of s 26 of the Constitution and PIE, then an interdict is not the only available remedy.

108. The City has explained that it does not evict persons or demolish structures where they occupied as homes without a court order.

109. In any event, if the applicants fear that the City might do this, or has done this, it may seek an order mandating the City to restore demolished structures.

110. In *Tswelopele,* the Supreme Court of Appeal ordered the City of Tshwane to do so because it was established that municipality unlawfully evicted and

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96 *Jones & others v Sutherland & another* (478/2018) [2019] ZASCA 146 (14 November 2019) (unreported) para [34]. See also *City of Johannesburg v Changing Tides 74 (Pty) Ltd and Others* 2012 (6) SA 294 (SCA)) para [14].

97 *Occupiers of Erven 87 and 88 Berea v De Wet N.O. and Another* 2017 (5) SA 346 (CC) para [65].

demolished persons homes.[98] Accordingly, if there an apprehension of harm, then the applicants are not without a remedy as *Tswelopele* demonstrates.

111. For these reasons the applicants are not entitled to the interdict sought.

112. Moreover, it is clear that the City is entitled to counter-spoliation because PIE does not preclude the City from doing so.

113. In *Barnett,* the Supreme Court of Appeal made it clear that PIE only applies to the eviction of persons from their homes.[99]

114. As to what constitutes a home the SCA stated:

> *"This leads to the next question: can the cottages on the sites that were put up by the defendants for holiday purposes be said to be their homes, in the context of PIE? I think not. Though the concept 'home' is not easy to define and although I agree with the defendants' argument that one can conceivably have more than one home, the term does, in my view, require an element of regular occupation coupled with some degree of permanence. This is in accordance, I think, with the dictionary meanings of: 'the dwelling in which one habitually lives; the fixed residence of a family or household; and the seat of domestic life and interests' (see eg The Oxford English Dictionary 2 ed vol VII). It is also borne out, in my view, by the following statement in Beck v Scholz [1953] 1 QB 570 (CA) at 575 - 6:*
>
> > *'The word "home" itself is not easy of exact definition, but the question posed, and to be answered by ordinary common sense standards, is whether the particular premises are in the personal*

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98 *Tswelopele Non-Profit Organisation and Others v City of Tshwane Metropolitan Municipality* 2007 (6) SA 511 (SCA).

99 *Barnett and Others v Minister of Land Affairs and Others* 2007 (6) SA 313 para [37].

> *occupation of the tenant as the tenant's home, or, if the tenant has more than one home, as one of his homes. Occupation merely as a convenience for . . . occasional visits . . . would not, I think, according to the common sense of the matter, be occupation as a "home".'*

Moreover, within the context of s 26(3) of the Constitution - and thus within the context of PIE - I believe that my understanding of what is meant by a 'home' is supported by Sachs J, speaking for the Constitutional Court, in Port Elizabeth Municipality v Various Occupiers 2005 (1) SA 217 (CC) (2004 (12) BCLR 1268) in para [17] where he said*:*

> *'Section 26(3) evinces special constitutional regard for a person's place of abode. It acknowledges that a home is more than just a shelter from the elements. It is a zone of personal intimacy and family security. Often it will be the only relatively secure space of privacy and tranquillity in what (for poor people, in particular) is a turbulent and hostile world. Forced removal is a shock for any family, the more so for one that has established itself on a site that has become its familiar habitat.'"*[100]

115. Accordingly, a structure in the process of assembly cannot be considered a *"home"* within the meaning of PIE and the Constitution.

116. *Barnett* is accordingly dispositive and binding. The Supreme Court of Appeal has previously rebuked overlooking the binding effect of *Barnett.*[101]

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100 *Barnett* para [38]-[39].
101 *Fisher and Another v Ramahlele and Others* 2014 (4) SA 614 (SCA) para [22].

117. The definition of "*home*" adopted by the Appellate Division (as it was then) in *Grusd, N.O. v Grusd*[102] is instructive: "*...a person has his home where he has settled his household belongings, and the bulk of his possessions and fortunes, whence he will not depart if nothing calls him away; when he has left it, he regards himself as a wanderer, and when he returns to it, his wanderings have now ceased*".

118. The Appellate Division observed that the definition contains the essential constituents of a *home*, namely residence and the "*animus manendi*" (an intention to remain indefinitely).[103]

119. An analysis of the limited cases in which the term has been considered in the context of s 26(3) of the Constitution read with the definition in *Grusd* albeit in a different context, suggests that a "*home*" has two components:

    119.1. an objective component: It must comprise a shelter from the elements, where a person has settled his household belongings and the bulk of his possessions, and which is regularly occupied by that person; and

    119.2. a subjective component: It must be considered by that person to be the place to which he or she will return for shelter, if not indefinitely, then for as long as he or she will not be prevented from doing so.

120. It is submitted that the degree of security and/or permanence required before a structure may be called a *home* in the context of s 26(3) must be informed by

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102 *Grusd, N.O. v Grusd* 1946 AD 465.
103 *Grusd* at 479 to 480.

its purpose and the legislation giving effect to it. That purpose is to govern the eviction of people whose occupation of buildings or structures or the land on which these are erected is likely to be precarious and is, often to their knowledge, unlawful.

121. It is submitted that a structure which is in the process of being erected cannot and does not constitute a *home* within the meaning of s 26(3) of the Constitution.

122. That is because the objective element, namely a shelter from the elements, is not present. Nor would a completed structure constitute a *home* if the would-be occupier has not yet moved into it, and regularly occupied it with a degree of permanence, with his or her possessions or the bulk thereof. A completed structure which is not regularly occupied by a would-be occupier would also not comprise a *home*.

123. For this reason, the City is entitled to counter-spoliation in order to protect its property rights for the purposes of giving effect to a number of socio-economic rights.

124. Under the common law, as a general rule a possessor who has been unlawfully dispossessed of property may not take the law into his or her own hands to recover possession. Instead he or she is required to make use of one of the remedies provided by law, for example the *mandament van spolie*. [104]

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[104] The *mandament van spolie* is a remedy which is designed to restore unlawfully deprived possession to the possessor immediately, pending determination of the merits in due course.

125. An exception to the general rule is however that if recovery of possession is made forthwith (or *instanter*) in the sense that it is still a part of the act of dispossession, then it is regarded as a mere continuation of the existing breach of the peace and is consequently condoned by the law. Put another way, counter-spoliation will not be permitted if the original act of dispossession has been "completed".[105]

126. As to whether the principle of counter-spoliation finds any application in the present constitutional context, it is submitted that there is a window period between the time when would-be occupiers first identify land for the erection of structures and begin to erect such structures, and the point at which s 26(3) is triggered and the provisions of PIE becomes applicable. In that window the City may take steps to repossess the land in question.

127. This approach fits with the common law principle that counter-spoliation will not be permitted if the original act of dispossession has been "completed." Until a structure has become a *home* as contemplated in s 26(3) of the Constitution, a would-be occupier has not completed his or her act of dispossession.

128. The Constitutional Court has previously recognised that a positive obligation on the State may provide authority for State conduct.

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[105] *Mans v Loxton Municipality* 1948 (1) SA 966 (C) at 977. See also *De Beer v Firs Investments Ltd* 1980 (3) SA 1087 (W).

129. In *Kyalami Ridge,* the Constitutional Court held that even though no legislation existed authorising the government's conduct, the obligations created by the Constitution meant that the government's conduct was permissible.[106]

130. In this case, however, the common law does authorise the City's conduct.

131. Accordingly, the City of Cape Town is entitled to rely on the common law remedy of counter-spoliation because *it is necessary* to give effect to a number of other socio-economic rights that the City is constitutionally mandated to realise.

132. It is for this reason that the Constitutional Court held in *Kyalami Ridge* 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 restriction of any relevant legislation, it acts lawfully".* [107] (emphasis underlined).

133. Finally, the intervening applicants seek an alternative remedy: if the City is entitled to demolish unoccupied and incomplete makeshift structures for the duration of the national state of disaster,[108] they seek an order mandating the City to provide temporary emergency accommodation.[109]

134. The intervening applicants do not set out the legal basis for this alternative relief.

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106 *Minister of Public Works v Kyalami Ridge Environmental Association* 2001 (3) SA 1151 (CC) para [52].
107 *Kyalami Ridge* para [41].
108 As declared by the Minister of Cooperative Governance and Traditional Affairs in terms of s 27 of the Disaster Management Act 57 of 2002.
109 NoM Intervention application para 4.1, rec. 274-275.

135. The National Housing Code, made pursuant to s 4 of the National Housing Act 107 of 1997, makes provision for assistance to people who, for reasons beyond their control, find themselves in emergency housing situations either because their homes have been damaged or destroyed or because an immediate situation poses a threat to the lives, health and safety of individuals or because they have been evicted from their homes.[110]

136. Housing assistance in emergency housing circumstances takes the form of grants to municipalities and requires national, provincial and local governments to work together.[111]

137. The Housing Code also recognises that national government may make "*grants… available to a municipality to undertake an approved project for exceptional emergency housing".*[112]

138. However, the Emergency Housing Programme does not mandate the provision of temporary emergency accommodation every time an unlawful structure is erected by an unlawful occupier. Indeed, not only is this unfeasible and impractical, but it would also have a disastrous effect on the provision of housing in general by municipalities.

139. National government has not ignored the fact that homelessness poses a threat to curbing the spread of the Covid-19 virus. But the solution to this problem is not the creation of a quixotic mechanism for emergency accommodation where an individual unlawfully occupies land and attempts to erect an unlawful

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110 Overview of the National Housing Code.
111 Overview and 2.13 of the National Housing Code.
112 2.3 of the National Housing Code.

structure. Instead, the regulations made in terms of s 27(2) of the Disaster Management Act 57 of 2002 (*Disaster Regulations*), adequately addresses the harms of homeless in light of the Covid-19 pandemic.

140. Two regulations in particular seek to address the problem of homeless during the state of disaster:

140.1. The first is regulations 19 and 36 of the Disaster Regulations which stays the execution of all eviction orders for the respective lockdown alert levels during the national disaster.

140.2. The second is regulation 10 which provides that the State shall identify temporary shelters for homeless people that comply with the necessary health protocols and adequate spacing standards.

141. The intervening applicants allege that they were forced to erect makeshift structures because the pandemic has rendered many unemployed and unable to afford rent resulting in their evictions.[113]

142. The intervening applicants do not provide any reasons for not pursuing the legal remedies which the Disaster Regulations entitle them to. And indeed, no evidence of criminal charges laid against landlords seeking to evict tenants is placed before this Court.

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[113] FA intervention application para 14-15, rec. 2878.

143. The Disaster Regulations, therefore, provide the remedy to any unlawful evictions experienced by the intervening applicants, and there is no legal basis for the alternative remedy sought.

APPLICANTS' RELIEF *VIS-À-VIS* THE ALIU AND SAPS

144. The City accepts that that the demolition of structures must be done in a manner that respects the dignity of persons. Excessive force may not be used and the ALIU is required to act in a circumspect manner.

145. The ALIU was established to respond to the ongoing risk faced by the City of its land being unlawfully occupied and, in some instances, large-scale orchestrated and violent land invasions.

146. The ALIU is a specialised unit within the City's law enforcement directorate consisting of specially trained officers mandated by the City's Human Settlements Department to prevent unlawful occupation of City owned land. This is the primary function of the ALIU.

147. The ALIU monitors and patrols vacant City land on a 24-hour basis, taking steps to prevent the erection of structures on such land, alternatively to remove unoccupied structures from such land, and providing support to City housing officials during evictions, relocations and demolition of illegal structures. It also assists with the planning of services and emergency services during flood and fire disasters on City owned land.

148. The purpose of the ALIU is to ensure that City land is not illegally occupied thereby losing its ability to be developed for its intended use.

149. The ALIU does not remove, demolish or otherwise interfere with structures, even those illegally erected, where such structures are occupied and/or could reasonably be considered to constitute the home of any person.

150. ALIU officers are trained as to which structures may be lawfully demolished and when an eviction order is required. They face dismissal from their employment and/or serious disciplinary consequences if they demolish an occupied structure which constitutes a home.

151. They are therefore under strict instructions to take all necessary steps to check structures before they are identified for the purposes of demolition or removal, to ensure that those structures are not occupied and as a general rule ALIU officers err on the side of caution in circumstances where there is doubt.

152. The ALIU only takes action to remove unlawfully erected structures when those structures are clearly unoccupied and/or vacant. Where there is a degree of doubt as to whether the structures are in fact occupied or not, they are not removed by the ALIU.

153. This has been and continues to be the City's policy.

154. There is no evidence before this court that ALIU acts in a manner that undermines constitutional rights.

155. In respect of Mr Qolani, the law enforcement officers are the persons depicted in the video footage. The ALIU officers did not manhandle Mr Qolani. The law enforcement officers involved in this incident have been suspended and face disciplinary proceedings. The outcome of these proceedings cannot be pre-empted, and it would be impermissible to assume that the ALIU as a whole acts unlawfully based on the actions of certain law enforcement officers involved in one incident.

156. The relief sought against SAPS is also incompetent.

157. The affidavit filed on behalf of the SAPS evidences that the applicants have cited the incorrect party, notwithstanding the longstanding injunction that "*constitutional litigation requires precision".*[114]

158. In any event, the relief against SAPS is also substantively incompetent. It is not within the statutory or constitutional mandate of SAPS to carry out evictions or to monitor evictions, and no basis for this relief is established by the applicants.

SUSPENDING COMPETENT COURT ORDERS

159. A court order will not apply in three instances.

159.1. First, where the order is appealed, and the appeal is successful.

159.2. Secondly, where the order is reviewed, and the review is successful.

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114 *Shaik v Minister of Justice and Constitutional Development* 2004 (3) SA 599 (CC) para [24]-[25].

159.3. Third, where an order is rescinded or varied in terms of the Rules of Court, or the common law.

160. The applicants seek to suspend the operation of competent court orders obtained by the City permitting evictions and demolitions.[115] They do this without seeking to appeal, review, rescind or vary any of the orders.

161. It is not permissible for a Court in urgent proceedings to suspend the operation of court orders.

162. The applicants request that this be done without considering the content of those order, the parties involved, and the merits of the individual cases in which orders were obtained.

163. Indeed, where this court has issued orders permitting the City to remove structures on its property, it must be assumed that this court has considered the merits of each of those applications and granted appropriate orders. To do otherwise would render the entire judicial process meaningless.

164. The intervening applicants have sought to use these proceedings as a mechanism for rendering a valid court order in respect of the Cape Nature property against them, impotent.

165. They have not disclosed in their founding affidavit that Cape Nature obtained an interim order on 11 July 2020, restraining the unlawful occupation of the Cape Nature property.[116]

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115 NoM para 2.4, rec. 3.
116 City SAA para 26, rec. 331, Annexure RP3 rec. 379-382 .

166. This, notwithstanding the fact, that the same attorneys represented the intervening applicants in the Cape Nature proceedings, and the deponent to the founding affidavit in these proceedings was also the client in the Cape Nature proceedings.

167. So, it is clear that the purpose of the intervention application is to extirpate a competent and valid court order without engaging the established legal rules for overturning court orders. They have done this without disclosing material information, within their knowledge, to this court.

168. It is not permissible for a Court in urgent proceedings to suspend the operation of valid court orders. The applicants request that this be done without considering the content of those order, the parties involved, and the merits of the individual cases in which orders were obtained. The dangers of this are starkly highlighted by the intervening applicants' failure to disclose material information.

169. The rule of law requires legal certainty.[117] The established rules for the suspending the operation of a court order exist to give effect to legal certainty.

170. The applicants seek to create a new rule, without any foundation in law, that suspends competent orders without identifying the principles that empower this court to do so. Indeed, there are none.

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117 *Daniels v Campbell and Others* 2004 (5) SA 331 (CC) para [104].

171. In that the rule of law demands it, this Court is not empowered to interfere with the operation of competent court orders obtained by the City.

THE CITY IS ENTITLED TO CONSIDER, ADJUDICATE AND AWARD BIDS IN RESPECT OF TENDER 308S/2019/20

172. The applicants seek to interdict and restrain the City from considering, adjudicating and awarding tender 308S/2019/20.[118]

173. The applicants claim that sections 10, 11, 12, 26, 27 and 28 of the Constitution create a *prima facie* right which entitles them to this interdict.

174. In any event the tender on its face expressly excludes actions which are unlawful, and contractors are not left to their own devices as the applicants contend. In regard to informal structures the tender states that:

174.1. contractors are required to *"demolish illegal structures … within the ambit of the Prevention of Illegal Eviction and Unlawful Occupation of Land Act 19 of 1998 or within terms of Court Orders";* and[119]

174.2. "*all demolitions will be carried out under supervision of City officials"*; and[120]

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118 NoM para 2.5, rec. 4.
119 FA, Annexure CN11, para 10.1.1, rec. 101.
120 *Ibid*.

174.3. it may be necessary to *"dismantle legally built structures and to transport residents with their possessions from one area to other areas within the City".*[121]

175. These constitutional rights bear no rational connection to the City's entitlement to award the bid in question.

176. The applicants do not seek to review the lawfulness of the bid invitation, nor do they suggest that the legal principles relating to public procurement have been violated.

177. Moreover, the balance of convenience does not favour the applicants. If this Court interdicts the City from adjudicating the tender in question, it would severely undermine the City's ability to ensure that unlawful occupation of land does not take place.

178. This in turn has the effect of subverting the rule of law and undermining the City's ability to ensure that housing is provided on a planned basis.

179. In Part B of these proceedings, the applicants seek to review and set aside the decision by the City to issue the tender in question. This relief turns on whether the ALIU is constitutionally permissible. This matter should be determined in those proceedings where the Court has the benefit of all the relevant facts and full argument.

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121 *Ibid*.

180. For now, this Court should be guided by the Constitutional Court's injunction: landgrabs are inimical to the rule of law.[122] The City is entitled to take steps to ensure that the rule of is not undermined, and the ALIU is essential to this end.

181. Accordingly, the requirements for the interdict sought by the applicants in respect of tender 308S/2019/20 are not met.

CONCLUSION AND COSTS

182. Because the relief sought by the applicants subverts the public order, undermines the rule of law and frustrates the City's legitimate efforts to provide housing on a planned basis, the application should be dismissed with costs, including the costs of two counsel.

183. As regards the intervention application, this application should be dismissed with costs.

184. The intervening applicants were also aware that the Cape Nature property is not owned by the City but failed to disclose this fact, despite being represented by the same attorneys in the Cape Nature application.[123] Moreover, the deponent to the EFFs affidavit in these proceedings was also the instructing client in the Cape Nature application.

185. Bearing in mind that the intervening parties seek to use these proceedings to suspend the operation of a competent and valid Court order obtained by Cape Nature, it is incumbent on the intervening applicants to disclose the material

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122 *Grootboom* above para [92]; *Modderklip Boerdery* above para [48].
123 City SAA para 19-20, rec. 330 and para 25, rec. 331.

facts of that application before this Court as they are directly relevant to the interim relief sought in these proceedings. They have not done so, and in the circumstances, costs on a punitive scale are warranted.

SP ROSENBERG SC
M ADHIKARI
K PERUMALSAMY

Chambers, Cape Town
23 July 2020

FIRST RESPONDENT'S AUTHORITIES

1. *Absa Bank Ltd v Naude NO* 2016 (6) SA 540 (SCA).
2. *Judicial Service Commission and Another v Cape Bar Council and Another* 2013 (1) SA 170 (SCA).
3. *Bowring NO v Vrededorp Properties* CC 2007 (5) SA 391 (SCA).
4. *SA Riding For The Disabled Association v Regional Land Claims Commissioner and Others* 2017 (5) SA 1 (CC).
5. *Ferreira v Levin* 1996 (1) SA 984 (CC).
6. *National Gambling Board v Premier, Kwazulu-Natal and others* 2002 (2) SA 715 (CC).
7. *National Council of Societies for the Prevention of Cruelty to Animals v Openshaw* 2008 (5) SA 339 (SCA).
8. *Olympic Passenger Services (Pty) Ltd v Ramlaga* 1957 (2) SA 382 (D).
9. *Webster v Mitchell* 1948 (1) SA 1186 (W).
10. *Gool v Minister of Justice* 1955 (2) SA 682 (C).
11. *Spur Steak Ranches Ltd v Saddles Steak Ranch* 1996 (3) SA 706 (C).
12. *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another* 2008 (3) SA 371 (SCA).
13. *Chief Lesapo v North West Agricultural Bank and Another* 2000 (1) SA 409 (CC).
14. *Zondi v MEC for Traditional and Local Government Affairs and Others* 2005 (3) SA 589 (CC).
15. *Groengras Eiendomme (Pty) Ltd and Others v Elandsfontein Unlawful Occupants and Others* 2002 (1) SA 125 (T).
16. *Government of the Republic of South Africa v Grootboom and Others* 2001 (1) SA 46.

17. *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 (3) SA 3 (CC).
18. *City of Cape Town v Unlawful Occupiers, Erf 1800 Capricorn* 2003 (6) SA 140 (C).
19. *Gundwana v Steko Development and Others* 2011 (3) SA 608 (CC).
20. *City of Johannesburg v Changing Tides 74 (Pty) Ltd and Others* 2012 (6) SA 294 (SCA).
21. *Occupiers of Erven 87 and 88 Berea v De Wet N.O. and Another* 2017 (5) SA 346 (CC).
22. *Tswelopele Non-Profit Organisation and Others v City of Tshwane Metropolitan Municipality* 2007 (6) SA 511 (SCA).
23. *Barnett and Others v Minister of Land Affairs and Others* 2007 (6) SA 313.
24. *Fisher and Another v Ramahlele and Others* 2014 (4) SA 614 (SCA).
25. *Grusd, N.O. v Grusd* 1946 AD 465.
26. *Mans v Loxton Municipality* 1948 (1) SA 966 (C).
27. *De Beer v Firs Investments Ltd* 1980 (3) SA 1087 (W).
28. *Minister of Public Works v Kyalami Ridge Environmental Association* 2001 (3) SA 1151 (CC).
29. *Shaik v Minister of Justice and Constitutional Development* 2004 (3) SA 599 (CC).
30. *Daniels v Campbell and Others* 2004 (5) SA 331 (CC).

Unreported cases

31. *Jones & others v Sutherland & another* (478/2018) [2019] ZASCA 146 (14 November 2019).