NOT REPORTABLE

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

Case No. EL 738/2020

In the matter between:

NATIONAL DEPARTMENT
OF PUBLIC WORKS **Applicant**

And

SIMPHIWE FANI & 77 OTHERS
COLLECTIVELY REFERRED TO AS
"RESIDENTS OF FARM GREYDELL
(AIRPORT PARK)" **First Respondent**
VATHISWA JACK **Second Respondent**

JUDGMENT IN RESPECT OF
APPLICATION FOR LEAVE TO APPEAL

HARTLE J

[1] The applicant seeks leave to appeal against the whole of my judgement delivered in the above matter on 29 October 2020 in favour of the respondents on

the bases that the proposed appeal would have a reasonable prospect of success[1] and that (even though that prospect be slim) that there is a compelling reason why the appeal should be heard.[2]

[2] The compelling reason advanced in this instance is the right of the applicant (originally the first respondent) as the owner of land against the rights of those who invaded her land, especially in the context of the very frequent land invasions throughout the Republic, and the need to develop legal remedies around the issues that such land invasions raise.

[3] Regarding the ground firstly that I erred in determining the factual dispute whether the respondents were evicted *from their homes* in their favour, I accept that an appeal court may well find that there was a true dispute of fact that ought to have been referred for oral evidence (albeit the applicant misses the point that it was its failure to pertinently assert that the sample photographs depicting incomplete structures on which the deponent on her behalf relied *belonged to any of the applicants who were joined in the proceedings and who claimed to have had their homes demolished* that rendered the claimed dispute of fact illusory). Indeed, I found that since the applicant had skimpily dealt in her answering affidavit with the respondents' claims that they had been unlawfully evicted from their *homes* I could in effect determine the matter on the basis of the respondents' allegations.

[4] I accept though the criticism that even in reaching that premise (that the applicant had a case to answer) that I may have too generously read in or (as was contended on behalf of the applicant) attributed "cumulative credence" to the

[1] Section 17 (1) (a) (i) of the Superior Courts Act, No 10 of 2013.
[2] Section 17 (1) (a) (ii) of the Superior Courts Act, No 10 of 2013.

respondents' somewhat unconventional affidavits[3] whereas they failed to carefully plead their cases individually (as opposed to collectively) that they had in fact established homes in their respective structures, i.e. that each of them enjoyed individual possession of identifiable structures comprising those among the number that the applicant purported to demolish pursuant to the order which the Sheriff (originally the second respondent) asserts she was executing, what rights were derived therefrom in each instance, and how those rights were specifically impacted by the demolition exercise.

[5] I concede that it was for this very reason (that they contented themselves with making vague assertions in respect of their respective positions) that I concluded that I could not entertain the aspect of their entitlement to constitutional reparation to assuage the unfortunate consequences of them been left bereft of their homes and thus granted them leave to supplement their papers in this respect.

[6] The ground referred to above ought to be enough reason to accede to the application on the basis that another court would either have referred the dispute for the hearing of oral evidence or rejected the application out of hand.

[7] Leave was initially sought to the full court of this Division which would be appropriate especially if the proposed appeal is upheld on this limited basis as this would be dispositive of the matter. If not however, there remains the issue of appropriate relief to be granted pursuant to my finding that the respondents were arbitrarily evicted from their homes in violation of their constitutional rights.

[8] I am not in agreement with counsel for the applicant that I should not have entertained some form of redress for the respondents in all the circumstances

[3] No case was made out in the founding papers. Their joinder was belated and effected after the applicant's answering affidavit had been filed. Even the supplementation of the papers by those who sought leave to join was underwhelming and required assistive reading in.

consequent upon my finding that the respondents had being unlawfully evicted from their homes in breach of their constitutional right not to be arbitrarily evicted, or that that aspect could not stand over for determination to be established at a later juncture on papers appropriately amplified in due course.[4] I concede however that I adopted an unconventional approach in this respect and that this was premised on the lack of specificity pleaded by each of the respondents to highlight their circumstances and penury in each instance occasioned by the demolition exercise.

[9] The Supreme Court of Appeal in Ngomane and Others v City of Johannesburg Metropolitan Municipality[5] endorsed the principle that following a declaration that conduct is unlawful and inconsistent with the Constitution, that such a finding (at least theoretically), entitles an applicant, even in motion proceedings, to appropriate relief for the violation of their fundamental rights as envisaged in section 38 of the Constitution.

[10] As to what constitutes "appropriate relief" the Constitutional Court said in Fose v Minister of Safety and Security:[6]

> 'It is left to the courts to decide what would be appropriate relief in any particular case. Appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case the relief may be a declaration of rights, an interdict, a *mandamus* or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the courts may even have to fashion new remedies to secure the protection and enforcement of these all-important rights.'[7]
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> And that:

[4] This is especially so because the application had been launched on an urgent basis and involved many affected claimants.
[5] (734/2017) [2019] ZASCA 57; [2019] 3 All SA 69 (SCA); 2020 (1) SA 52 (SCA) (3 April 2019).
[6] 1997 (3) SA 786 (CC).
[7] At paras [18] and [19].

> 'ˈ[T]his Court has a particular duty to ensure that, within the bounds of the Constitution, effective relief be granted for the infringement of any of the rights entrenched in it… Particularly in a country where so few have the means to enforce their rights through the courts, it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated. The courts have a particular responsibility in this regard and are obliged to "forge new tools" and shape innovative remedies, if needs be, to achieve that goal.' [8]

[11] In Ngomane the court observed that a claimant in respect of a constitutional breach that has been established (in that instance the court held that the confiscation and destruction of the applicants' property was a patent, arbitrary prevention thereof)[9] is not necessarily bound to the formulation of the relief originally sought or the manner in which it was presented or argued:

> 'Although the applicants sought only the return of their property, it bears mention that a claimant in respect of a constitutional breach that has been established is not necessarily bound to the formulation of the relief originally sought or the manner in which it was presented or argued.[10] Thus, it matters not that the applicants sought to vindicate their constitutional rights for the first time in this Court.'[11]

[12] The court held further that it was not ideal for the applicants in that instance (who had equally failed to sufficiently describe the property of which they were confiscated and permanently deprived by the destruction thereof with sufficient particularity to replace it with fungibles or place a reliable value on the

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[8] At par [69].
[9] *Supra*, at par [21].
[10] Modderfontein Squatters, Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, Amici Curiae); President of the Republic of South Africa & others v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, Amici Curiae) 2004 (6) SA 40 (SCA) para 18; Carmichele v Minister of Safety and Security & another (Centre for Applied Legal Studies intervening) [2001] ZACC 22; 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC); Bannatyne v Bannatyne (Commission for Gender Equality, amicus curiae) [2002] ZACC 31; 2003 (2) SA 363 (CC); 2003 (2) BCLR 111 (CC); President of the Republic of South Africa & another v Modderklip Boedery (Pty) Ltd (Agri SA & others, Amici Curiae) [2005] ZACC 5; 2005 (5) SA 3 (CC); 2005 (8) BCLR 786 (CC) para 53.
[11] At par [23].

property) to have pursued an ordinary remedy in the form of a damages claim and came to a rough and ready assessment of an amount of R1 500,00 each as compensation for the destruction of their property. This amounted was intended not only to assuage the constitutional breach of their fundamental rights but also to protect them and others similarly situated against violations of their rights to dignity and property in the manner envisaged in Fose. The court highlighted the difficulty of confining persons similarly situated against violations of their rights to dignity and property to pursue an ordinary remedy in the form of a damages claim:

> 'In light of these facts, I do not think that the applicants should be left to pursue the ordinary remedy in the form of a damages claim as suggested by the court a quo. They lamented the practical difficulties posed by this route, which were acknowledged by the court itself. Instituting a damages claim would involve them in costly and time-consuming civil litigation in respect of property, which although valuable to them, is otherwise mostly of trifling commercial value. The undisputed evidence is that many of the applicants daily search for work and collect recyclable materials, which they sell in order to survive. They would be hindered in this if they were required to attend court proceedings. They have no money for transport to attend court. And for the very reason that it would not be possible for them to prove the market value of the property destroyed in the conventional way, an action for damages is not an appropriate remedy. Such an action is likely to fail or result in a nominal award of damages.'[12]

[13] The court described the objective of the award in the following terms:

> 'The respondents however were not willing to accede to the applicants' proposal.[13] The amount of R 1 500 for each applicant, R 40 500, is not a large sum of money. But, in my view, it constitutes appropriate relief in the specific circumstances of this case. It

[12] At par [25].

[13] It appears that counsel for the applicants had proposed that they were prepared to accept a standard, nominal amount of R1 500, 00 for each applicant, as compensation for the loss of their property and the wrong they had suffered.

> will vindicate the Constitution and protect the applicants and others similarly situated against violations of their rights to dignity and property in the manner envisaged in *Fose*. This is particularly so, given the applicants' willingness to accept this amount as redress for the wrong they have suffered; the declaratory order and costs award issued below; and the order by the court a quo in relation to the removal by the City of property of homeless people from public places (which hopefully in future will have the desired effect and prevent a recurrence of conduct of the kind in question).

[14] I had in mind in my order the same kind of redress (or opportunity to later pursue same) for those who could not have their shacks reconstituted temporarily as I had envisaged by prayers 2 and 3 of my order.[14]

[15] Having stated above that I am inclined to grant leave to appeal against my factual finding that the respondents were evicted from their homes by the demolition exercise, I believe, as was suggested by counsel for the applicant, that the issue of an appropriate remedy (if it arises) ought more conveniently to be dealt with by the Supreme Court of Appeal for the reason stated in paragraph [2] above and on the legal bases provided for in section 17 (6) (a) (i) or (ii) of the Superior Courts Act that the decision to be appealed involves a question of law of importance (in the context of the very frequent land invasions in the country of property *inter alia* owned by the State) and or the administration of justice, either generally or relative to the peculiar facts of this matter.

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[14] I accept that I did not stipulate clearly in respect of these two prayers (read with prayer 4) that I meant to benefit only such of those who had lived in the felled *shacks* (as opposed to the brick structures) which could be roughly and temporarily reconstituted pending the PIE proceedings. (See Para [43] of my judgment). This was on the basis of the similar constitutional remedy crafted in Tswelopele Non-Profit Organization v City of Tshwane Municipality 2002 (6) SA 511 (SCA) and as the full court had provided for in Ntantanta and Others v Mhlontlo Local Municipality and Another (CA51/15, CA52/15, 75/15/ 76/15, 3412/14, 3434/14, 3407/14) [2016] ZAECMHC 10 (5 April 2016) at para [18] – [28]. I trust that this disposes of the applicants' ground relied upon in the present application that since it was common cause that the structures in issue were *demolished*, that I erred in holding that the respondents were entitled to reconstituted restoration on the basis that this "is against the principles governing spoliation." I believe that the objective of the remedy which I provided for in my order has been misconstrued by the applicant.

[16] Counsel for the applicant referred me to a recent South African Law Journal article by Professor Z T Boggenpoel[15] in which she provides a critical analysis of the judgment of the Supreme Court of Appeal in Ngomane v City of Johannesburg Metropolitan Municipality. Whilst she suggests that although the judgment should be welcomed for speaking out against the violation of constitutional rights in the context of property deprivation especially in this instance, she laments the compartmentalisation of remedies into common-law, legislative and constitutional rights. She argues that the interplay between remedies should not be overlooked, but in fact renegotiated every time the possibility arises that existing common-law remedies can be used to give effect to constitutional rights. She concludes that the matter before the Supreme Court of Appeal could have benefited from a more principled and clear discussion of the interplay aforesaid and the violation of the constitutional right to property under discussion. (She thought that a more principled discussion was warranted in order to conclude that there was in fact an infringement of section 25 (1) of the Constitution)

[17] If my factual finding is upheld, although the nature of the peculiar infringement of rights would be clear in my view, I accept that the issue of how those violations are to be addressed by way of constitutional relief and what approach is to be adopted in a large scale exercise such as applies here under these peculiar circumstances, more especially as to what would constitute appropriate relief and how this is permissibly to be ascertained, certainly requires consideration by the Supreme Court of Appeal.

[18] In the premises I issue the following order:

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[15] Revisiting the Tswelopele remedy: A critical analysis of Ngomane v City of Johannesburg Metropolitan Municipality 2020 SALJ 424.

1. Leave is granted to the applicant to appeal to the Supreme Court of Appeal against the whole of my judgment delivered on 29 October 2020.
2. The costs of this application will be costs in the appeal.

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B HARTLE
JUDGE OF THE HIGH COURT

DATE OF HEARING: 15 December 2020
DATE OF JUDGMENT: 4 January 2021*

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

APPEARANCES:

For the applicant: Messrs T.M Ntsaluba SC and Mr. N Nabela instructed by The State Attorney, East London (ref. Mrs Tyani – 322/16-P2)
For the respondents: Mr. Z Madukuda instructed by Sipho Klaas Attorneys, East London (ref. SK/eviction2020/1)