IN THE HIGH COURT OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT

JOHANNESBURG

CASE No. 2009/51258

REPORTABLE

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES / NO	
(2) OF INTEREST TO OTHER JUDGES: YES / NO	
(3) REVISED.	
..... DATE	..... SIGNATURE

In the matter between:

EMFULENI LOCAL MUNICIPALITY Applicant

and

BUILDERS ADVANCEMENT SERVICES CC

First Respondent

NANGALEMBE ALBERT MBALEKELWA

Second Respondent

THE UNLAWFUL OCCUPIERS OF ERVEN
1070; 1046; 905; 378; 1049; 888; 812; 488; 450; 267;
403; 898; 899; 911; 1484/36 & 1483/12
OF IRONSYDE/DEBONAIR PARK Third Respondent

THE FURTHER UNLAWFUL OCCUPIERS
OF IRONSYDE/DEBONAIR PARK Fourth Respondent

THE INVADERS
OF IRONSYDE/DEBONAIR PARK Fifth Respondent

JUDGMENT

WILLIS J:

[1] On Thursday, 1st April, 2010, the day before the Easter week-end commenced, I made an order in this matter, indicating that I would give my reasons later. Not only the original court file, but also the duplicate file has gone missing. A handwritten draft, reflecting the outcome of deliberations among counsel for the parties and the court, was made an order of the court. As result of the files having gone missing, the draft order has been lost. There has been a considerable dela y occasioned by vain attempts by the attorneys for the applicant and my registrar to locate the missing files and a copy of the order. What follows is a reconstruction of that order, taken from my notes, those of counsel and attorneys for the applicant and my own recollection:

IT IS ORDERED AS FOLLOWS:

(i) The application is postponed *sine die*;

(ii) The applicant is to furnish the respondents' attorneys with copies of items 1 to 6 in the prepared index before the close of business on 6 April 2010;

(iii) The respondents are given a further and last opportunity to file a proper set of answering affidavits by no later than Tuesday, 13 April, 2010;

(iv) The applicant is to file its replying affidavit by no later than Thursday, 29 April, 2010;

(v) In view of the controversy and sensitivity surrounding this matter, the Deputy Judge President is respectfully requested to appoint a full court consisting of three judges to hear the matter;

(vi) In view of the urgency of the matter, the Deputy Judge President is respectfully requested to arrange for a hearing of the matter as soon as reasonably possible;

(vii) The costs of this application incurred thus far are reserved.

No real prejudice has been occasioned to the parties by the reason of the lost order: counsel for the parties, other than the fourth and fifth respondents, were in court and were fully aware of its contents. It is hard to imagine that there can be any justifiable excuses by any of the parties for their failure to comply with the order in the interim.

[2] The file had originally been allocated to another judge. He became unavailable and I was asked to take over the matter as a favour. I did so, unaware that I was being given a "hot potato". As I have recorded above, I informed the parties that I would give my reasons for the order later, in a formal written judgment. These are my reasons.

[3] This application was originally brought as an urgent one on 8th December, 2010. It was heard by my brother Kgomo J. The applicant is a municipality. It seeks the eviction of a large number of persons whom it alleges are in unlawful occupation of State owned property. Kgomo J made an order which restrained the first and second respondents from selling erven in Ironsyde/ Debonair Park and authorised the serving of notices of intended eviction on the remaining respondents. After various postponements, my brother Mbha J made an order on 9th March, 2010 that the respondents were to file their answering affidavits by 16th March, 2010. Despite this order by Mbha J, various of the respondents have not done so, at least insofar as filing an answering affidavit in the sense that such a document is generally understood to be. The affidavit filed fails to deal with the material allegations of the applicant and raises all manner of irrelevant issues. The applicant has asked that I make an order striking out certain passages therefrom. The respondents have also raised a whole number of points that seem to me to be technical in nature. They say that they have not been made properly aware of the nature of the application. I decided that the court should cut through the procedural issues and ensure that everyone received a full and fair hearing in the matter. Initially, Mr *Pullinger*, who appears for the applicant, submitted that, in view of the respondents' failure to deal with the material issues, I should grant an eviction order.

[4] After Mr *Pullinger* and I had exchanged a few "war stories" about our experiences with applications for eviction, he agreed with the broad thrust of the order which has been made. Mr *Ngqwangele*, counsel for the first, second and third respondents, also agreed with it. He submitted "that we need clarity in these matters". Indeed we do. I also informed counsel that I was definitely the wrong person to decide the substantive points. My reasons for doing so will appear for fully later. Furthermore, the making of eviction orders is so fraught

with difficulty that I considered it appropriate that the matter should be heard by a so-called "full bench". Perhaps I should explain.

[5] My experience of the case of *Machele v Mailula*[1]and *Philani-Ma-Afrika v Mailula*[2] may perhaps bear some repeating. Applying the well-known case *Plascon-Evans Paints Ltd v Van Riebeeck Paints*,[3] to determine factual foundation in motion proceedings, I had to consider with a situation in which there had been a transfer of a dilapidated block of flats in central Johannesburg to a *bona fide* purchaser. The purchaser had bought the property in question with a view to renovating and restoring it. His intention was obviously to make a profit. He paid some R3,5 million for the property. He was lent some of this money by the Trust for Urban Housing Finance, which was the mortgagee, with a bond for R7,9 million registered over the property. The size of the bond was indicative of the scale of renovations anticipated. In order to renovate and restore the property, it was necessary to evict the tenants. To this end, he brought an application in this court.

[6] Over a period of months, various judges of the High Court, including myself, made orders to ensure that the provisions of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, No.19 of 1998 (PIE) were complied with. My brother, Gildenhuys J ordered the City of Johannesburg to file a report. It did so in terms that indicated that the eviction would be justifiable. I ordered the Registrar of Deeds to file a report. He did so. He indicated that the documentation submitted by the conveyancer was "incomplete and apparently incorrect". He placed reliance on section 15 (A) (1) (3) of the Deeds Registry Act, No. of 1937, as amended. Essentially, he submitted that he had to rely on the conveyancer to perform the task

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[1] 2010 (2) SA 257 (CC)

[2] 2010 (2) SA 573 (SCA)

[3] 1984 (3) SA 623 (A).

at hand properly and was entitled so to do. The document which gave rise to the transfer specifically recorded that the conveyancer was to act on behalf of the seller, recorded therein as being Philani- Ma-Afrika.

[7] In the meantime, and in response to the eviction application, Philani-Ma-Afrika, a company registered in terms of section 21 of the Companies Act, No 61 of 1973, as amended, brought an application to the South Gauteng High Court, the most salient feature of which application was to set aside the transfer. Prior to the transfer to Mr Mailula as the purchaser, Philani-Ma-Afrika had been the registered owner.

[8] It was common cause that the internal affairs of Philani-Ma-Afrika had been in a parlous state or had "fallen into disarray' for a long time before either the sale or transfer of the property. It was common cause that the provisions of section 228 of the Companies Act (relating to the sale of the greater part of the assets of a company) had not been complied with, that there may have been various other irregularities and that there were pointers to the probability of an internal fraud having been perpetrated on the members of Philani-Ma-Afrika by persons who had not been properly appointed to act on its behalf. Rentals were not being paid to Mr Mailula or anyone acting on his behalf. To use a colloquial expression, the building had been "hi-jacked".

[9] Gildenhuys J ordered that the eviction application and the application to set aside the transfer to Mr Mailula be heard together. By the time the applications were heard by me, the parties were *ad idem* that the applications were so closely interlinked that the result of the application to set aside the transfer would determine the eviction: if the transfer stood, the eviction order would have to be granted but on terms allowing for a reasonable period to vacate and that if the

transfer was set aside, there would be no eviction order. After months and months, we had reached the end of the road.

[10] Although I delivered my judgment *ex tempore* because the matter appeared to have become urgent, needing a determination before the long Court Recess at the end of the year, I took the trouble to review, as far as it was reasonably possible to do so, the law concerning transactions that failed to comply with the provisions of section 228 of the Companies Act as well as the common law with regard to our system of property registration including transfers thereof. I also referred to section 28 (2) of the Alienation of Land Act, No. 68 of 1981 which provides that an alienation in terms of an invalid deed of alienation will in all respects be valid *ab initio* if both parties had performed in full and the land in question had been transferred to the transferee. There was no case law directly in point (i.e. where a transfer had actually been recorded by the Registrar of Deeds, consequent upon deficient internal procedures). I came to the conclusion that, in our law, where the transferee had not been party to any of the alleged irregularities, the finality of transfer was of utterly critical importance: the entire system of property transfer would be chronically undermined with the most dreadful consequences, if this were not so. I also came to the conclusion that the safeguard lay in the role of the conveyancer: it was he who had to be relied upon to protect the interest of the person for whom he acted. In this case the person for whom the conveyancer acted was Philani-Ma-Afrika. Consequently, I dismissed the application to set aside the transfer and granted the eviction order but allowed the tenants a month in which to vacate the premises.

[11] Because the point had never been decided before, I granted the application for leave to appeal. Mr Mailula, the purchaser and transferee, then applied to leave to execute upon the judgment. I granted leave to execute against those tenants who were not members

of Philani-Ma-Afrika. I exempted the members of Philani-Ma-Afrika who were tenants from the order. I took into account the fact that interest was ticking away, that debts for the use of utilities relating to the building of the order of R1 million were rising, as were municipal rates, the risk of foreclosure, the need to support the City in its efforts at promoting urban renewal, the fact that in my view the prospects of success in the appeal were not good and the fact that at rentals of between R600 to R900 per month, the evictees, although they would be inconvenienced, should be able to find alternative accommodation. There was no material difference, in my view, between their situation and that of any other rent-paying tenant whose lease had expired.

[12] The tenants then approached the Constitutional Court on an urgent basis for an order suspending my order granting leave to execute. The Constitutional Court came to their relief. (See the *Machele v Mailula* case above). In the unanimous judgment of the Constitutional Court, it said "That the High Court authorised the eviction without having regard to the provisions of PIE is inexcusable."[4] Quite how the Constitutional Court could have come to this conclusion is one of the great unfathomable mysteries of my life.[5]

[13] The appeal was heard by the Supreme Court of Appeal ("the SCA").[6] The SCA found that a Mr Mkhumbuzi, who signed the deed of sale in respect of which Mr Mailula was the buyer, was not authorised "to sell the building or to sign the conveyancing documents for the property to be transferred to Mr Mailula".[7] Accordingly, the orders which I had made had to be set aside and replaced with orders which set aside the sale and the transfer of the property.[8] The SCA did not refer to any of the statutory or common law authorities or any of the

[4] At paragraph [16]

[5] My judgments have been posted on SAFLII, JDR (Juta) and JOL (LexisNexis).

[6] *Philani-Ma-Afrika and Others v Mailula and Others* 2010 (2) SA 573 (SCA)

[7] See paragraphs [10] and [15] of the SCA judgment.

[8] See paragraphs [16], [19] and [21] of the SCA judgment.

academic literature with which I had engaged when delivering my judgment. Although it did not say so explicitly, the SCA seems to have applied the principle that "fraud unravels all". This principle is one of English law,[9] although it has been adopted in *Phillips and Another v Standard Bank of South Africa Ltd and Others*.[10] Nevertheless, in English law, the applicability of the principle exists so as to prevent, on public policy grounds, a party from relying on "*his own* fraud" (emphasis added).[11] That was not the position of Mr Mailula in the case before either me or the SCA. Applying the *Plascon-Evans* principles to determinations of fact in motion proceedings, Mr Mailula had to be accepted as being *bona fide*. There can be no question that the Trust for Urban Housing Finance was *bona fide*. In any event, the "paper-trail" of the money tells its own story. Moreover, the well-known case of *Jajbhay v Cassim*[12] made clear the distinction between English and Roman-Dutch law principles and points out that the purpose of our common law principles on the subject is to curtail "the right of *delinquents* to avoid the consequences of their performance" (emphasis added). Stratford CJ said that the application of the English law principles "will not always serve public policy but will often defeat it."[13] Furthermore, since the House of Lords' opinion in the *HIH Casualty and General Insurance Limited and Others v Chase Manhattan Bank and Others* case, English law seems now to be closer to our own.

[14] In the result, a "hi-jacked" building in the inner city of Johannesburg remains "hi-jacked" and the Trust for Urban Housing

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[9] See, for example, *HIH Casualty and General Insurance Limited and Others v Chase Manhattan Bank and Others* [2003] UKHL 6 at paragraph 15; *Lazarus Estates Ltd v Beasley* [1956] 1 QB 702 at 712

[10] 1985 (3) SA 301 (W) at 303D-I

[11] See the *HIH Casualty and General Insurance Limited and Others v Chase Manhattan Bank and Others* case (*supra*) at paragraph 16

[12] 1939 AD 538 at 540 *et seq*

[13] At 541.

Finance and others in comparable situations such as banks will have the ponder the security of a mortgage bond – hitherto considered as "good as gold" provided there was a comfortable positive margin between the value of the property and the amount lent.

[15] It is salutary to recollect that the current global economic crisis, which has displaced at least tens of millions of persons from employment, was precipitated precisely by reason of the fact that certain foreign banks lent money in circumstances where the security of mortgage bonds was inadequate. The problem was exacerbated by "naked short selling" (if you please) on various foreign exchanges. In our law "naked short selling" (selling what is not yours to sell) would be worse than an obscenity: it would be unlawful.[14] I am unapologetic in my conviction that the foundations of our common law were laid upon a rock of wisdom. To hold such a view is not to adopt a "classicist" position that our common law should be preserved in a time-capsule as something perfect, pure and unchanging.

[16] Quite how the City of Johannesburg is to accomplish its mission to transform ours into a "world class African city" now eludes me. As someone who used to serve as a representative of the South Gauteng High Court, together with representatives of the City and others on a subcommittee to implement the regeneration and revitalisation of the High Court precinct, as chairperson of the Board of Trustees for the Anglican Diocese of Johannesburg[15] and as a judge who has sat in motion court for more weeks than I care to remember, I used to think (before being tainted by the Constitutional Court and the SCA) that I had a fairly good grasp of the problems faced by our city and that I

[14] Although, of course, the seller does not have to be the owner but is deemed to warrant that he will be able to deliver good title. See, for example, Voet 18.1.14; 19.1.10; Grotius 3.15.4; *Frye's (pty) Ltd v Ries 1957 (3) SA 575 (A).*

[15] The Board of Trustees owns all the assets of the diocese. These assets, worth billions of rands, include St Mary's Cathedral and the Diocesan Office in the city centre.

had as reasonably well informed sense of solution. Relying on the experience the city of London in transforming the its derelict former docklands into economically vibrant and effectively functioning places, of city of New York in restoring dynamism to a city in decay, essentially the solution was considered to lie in always and everywhere promoting virtuous cycles of progress. Bereft of any sense of solution, I am now despondent and despairing.

[17] There is more at stake than the wounded ego of an individual judge. When I was a candidate for appointment to the Constitutional Court, I received disdainful questions from several members of the Judicial Service Commission ("the JSC") about the *Philani-Ma-Afrika* matter. The General Council of the Bar sent a letter to the JSC in which a senior member of the Johannesburg Bar Council had expressed his serious reservations about me, *inter alia* because I did "not have a good record on appeal". It seems he had this case in mind. When I explained that I considered overly zealous restrictions on economic freedom by State institutions, including the courts, ultimately to be inimical to the interests of the people of South Africa, the chairperson asked me: "Who do you mean by 'the people of South Africa'?"[16]

[18] It seems that South African judges are expected to have views on socio-economic rights. I shall therefore, briefly, put my colours to the mast. To my mind, the experience of Britain in the nineteenth century, America in the twentieth century and in contemporary China provide clear and convincing evidence that there is a linkage between economic freedom, with its incentives for innovation and risk-taking, and rapidly rising economic prosperity for all social classes. In other words, the correlation between economic freedom and general prosperity is not coincidental but causal: the former results in the latter. No better facilitator of social transformation has ever been

[16] The interviews are a matter of public record and are recorded.

invented. Money follows opportunity impervious to race, class or gender. Ironically, if anyone doubts the transformative power of this economic model, he or she should read (or re-read) *The Communist Manifesto*, written by Karl Marx and Friedrich Engels. It has high praise for economic freedom's ability to smash repressive social structures. Hong Kong for about 50 years after the Second World War, South Korea for the past 50 years and Germany's *wirtschafftwunder* from the 1950's to the late 1970's are other examples. India, until fairly recently, was often considered, by many well-informed economists to be mired in perpetual poverty. In the past few decades, there have been huge strides in India away from the "poverty trap", accompanied by a shift in favour of economic freedom. India's recent experience may well be illuminating as it shares with South Africa the "Congress tradition". Furthermore, there is a fairly widespread view that the Renaissance had its roots in emerging economic freedom. The Renaissance led to the flowering of so much that was excellent, including the development of our superb, essentially liberal, Roman-Dutch common law.

[19] As it is with employment, so it is with housing: one does not, in my view, "save" jobs by making it more and more difficult to dismiss employees and one does not make housing more widely available by rendering the ownership of property which is let to tenants a serious economic hazard. Why would any sensible person take the risks of employing people when it can be potentially ruinous to do so? Why buy or build housing to let to tenants, if the fundamental link between tenancy and the payment of rentals to landlords is undermined? Why invest in property if there is a serious risk that the "investment" will be worthless? Obviously, economic freedom is not to be confused with economic chaos: economic freedom must function within a legal matrix. Nevertheless, matrices, in order to be nurturing, must allow room for growth and development. If not, they can suffocate. If we

want an African Renaissance to emerge, we shall have to place our faith in greater economic freedom and not less.

[20] In the edition of *Time* magazine of 19 April 2010, the former British Prime Minister, Tony Blair, wrote an essay, "What Aid Can't Buy". In that essay he says: "(G)rowing Africa's private sector is the only long-term way to escape from poverty". I agree. It is not without significance that Mr Blair has been, throughout his adult life, a member of the Labour Party, which has won many plaudits for, traditionally, being well-disposed to the people of South Africa. I refer to this quote to underline the fact that my views are not those of some isolated "eccentric". They are shared by a broad spectrum of persons across the world who have the interests of the poor at heart.

[21] It should not be forgotten that, consequent upon the fall of the Berlin Wall, in 1989, well-informed people throughout the world considered that, if the Berlin Wall had collapsed, the demise of apartheid could not be far behind. The logic was inexorable: if the Berlin Wall, sponsored by the second most powerful nation on earth, could not withstand the clamour for freedom, what chance did apartheid have? The predictions were prescient: within a few months of the fall of the wall, Nelson Mandela was released from prison. Freedom is indeed indivisible. There are those who will not see the connection between the collapse of the Berlin Wall and the end of apartheid. Indeed, there appears to be a high degree of cognitive dissonance – a belief that a successful post-apartheid society can be achieved by applying precisely the policies that led, in the end, to the erection of the Berlin Wall. I doubt that "South African exceptionalism" extends so far as to make it possible for us to succeed where the former Soviet Union failed.

[22] This dissonance extends further. In almost every application to the courts for orders against the government, the relevant minister or

official will make strong appeals to the court for an appropriate recognition of the principle of judicial restraint. On the other hand, there seems to be a strongly prevailing view at the JSC in favour of judicial interventionism, especially when it comes to socio-economic rights.

[23] According to the iron laws of mathematics (which no amount of sophistry by lawyers can change), a compound annual growth rate of 7% results in a doubling of the average standard of living in 10 years, a quadrupling within 20 and an eight-fold increase within 30 years. Imagine our situation if, within a generation, the standard of living of the poor were raised at least eight-fold. Conversely, the same laws of mathematics entail that that at a 10% annual growth rate the average standard of living will double in 7 years, quadruple in 14, increase eight-fold in 21 years and sixteen-fold in 28 years. China has had an annual growth rate of 10% for 30 years.[17] It may be hard to comprehend that since China embarked on its course of economic freedom 30 years, the average standard of living has increased more than 16 times over, but it is true. In the period of 16 years that South Africa has been a democracy, China's average standard of living has more than quadrupled. It shows in innumerable ways. Tellingly, not only has China become a superpower but the world has, literally, had to re-orient its gaze from west to east, from the occident to the orient.

[24] Quite how that reorientation of gaze will affect us is uncertain. What is certain, however, is that we shall all be changed. The view looking to the east is different from the west: even the light, colours and textures become subtly different. I strongly suspect, though, that the smugness and complacency so often apparent in both the first and the third world are in for a rude awakening. Intellectuals will find many of their assumed verities of the past severely challenged.

[17] See, for example, *Time* magazine, 19 April, 2010, p24.

Nevertheless, as William Ewart Gladstone observed, "You cannot fight against the future."[18]

[25] If China, which began its modern course with far fewer advantages than we have, could grow at 10% per annum over thirty years, there is no reason why we should not be able to achieve a more modest 7% in the next 30 years. To my mind, there can be no doubt that much more good would come from that than any amount of judicial decrees on socio-economic rights. Furthermore, we would, of course, have to adopt similar pro-growth economic policies throughout sub-Saharan Africa. Not only would this be necessary to avoid a flood of uncontrollable illegal immigration but it is better to trade with those who are prosperous than with those who are poor. There can be no question that South Africa's destiny is tied to the rest of Africa.

[26] The question may arise: would not such an approach render nugatory the socio-economic rights enshrined in the Constitution? In my view, if the courts reliably, predictably and consistently act to preserve, protect and defend the institutional framework that allows human imagination, creativity, innovation, risk-taking and freedom to soar, that they will best promote the attainment of socio-economic rights. After all, what better socio-economic right can there be than to escape from the bonds of poverty? Indeed, surely almost everyone would rather be prosperous than poor and patronised? Above all, the courts must always protect those who strive to promote the achievement of our constitutionally enshrined socio-economic rights. There is no monopoly of truth. The dissenters must always be free to express their views. It is in the "marketplace of ideas"[19] that human progress is to be found.

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[18] Speech on the Reform Bill, 1866. Gladstone was a former British Prime Minister.

[19] The expression was made famous by Justice Oliver Wendell Holmes in the case of *Abrams v United States* 250 U.S. 616 (1919).

[27] It must be rare indeed for it to be satisfying for a court to order an eviction or to confirm an employee's dismissal. Nevertheless, in my view, unless the courts are well attuned to economic realities and are firm, clear and consistent in applying the principles that provide the foundation for economic prosperity for all, we shall all rue our acquiescence in what may perhaps be a misplaced moral superiority being paraded in high places.

[28] In the cases of *Government of South Africa v Grootboom*[20] and *Port Elizabeth Municipality v Various Occupiers*,[21] for example, the Constitutional Court has expressed itself against the unlawful occupation of immovable property. As far as I am aware, there is effectively only one legal remedy for the unlawful occupation of such property: an eviction order. Obviously, the making of any such order must be exercised with compassion, grace and an awareness of the right of every human being to be treated with dignity. It hardly needs be said that any such order must take into account the provisions of the Bill of Rights in the Constitution. Nevertheless, although it may be postponed the making of the order cannot, it seems to me, be avoided. Questions arise as to whether the court should, *mero motu*, call upon to the Minister of Human Settlements to present a report and make recommendations to the court. Further questions arise as to whether, apart from statistics, he could usefully add to that of which the court is already aware. Lest I be understood, let me make it clear that I intend no disrespect to the minister concerned. My point is that any well-informed person, (and this surely must be presumed to include ministers of state and judges), must be aware that we face serious problems in respect of poverty, unemployment, illegal immigration and housing. Questions arise as to whether the court should order the

[20] 2001 (1) SA 46 (CC) at paragraph [92]

[21] 2005 (1) SA 217 (CC) at paragraph [20]

government to provide alternative accommodation to the occupiers of the property. To my mind, this raises questions as to the following:

(i) Do not the appropriate boundaries between the function of the government, on the one hand, and the courts, on the other, become murky;

(ii) Is it not likely that orders such as these could have major implications for the government which, in any society, has to make complex decisions regarding the allocation of resources – can a well-intentioned order such as this not have major and unfortunate consequences for social policy in other areas;

(iii) How does one ensure compliance with the order;

(iv) In a democracy, is not the primary remedy for those dissatisfied with government policy, to vote it out of office or to reduce its majority;

(v) Should there not be, at the forefront of all court decisions affecting the government, an awareness that power of the courts lies principally in what it *pro*scribes rather than what it *pre*scribes;

(vi) Should the courts not be astute to the fact that they are our shield and defender rather than our supreme social engineer;

(vii) Is it not especially problematic when a single judge of the High Court makes orders against the government which may have such vast implications in respect of social and economic policy;

(viii) What about the implications of time lost through the inevitable process of appeals, probably all the way to the Constitutional Court?

[29] I have a further difficulty: where the law provides a remedy that is clear and certain to follow upon an unlawful act, the likelihood of

expensive and protracted appeals is considerably reduced. Very often, provided a judge furnishes a satisfactorily reasoned judgment on the facts which led to the conclusion of unlawful conduct, the unsuccessful party will not even attempt to take the matter on appeal. Where, however, there are a number of different permutations and combinations as to the appropriate remedy (and thus, the order), appeals are almost inevitable. Furthermore, the likelihood that the order of the judge of first instance will be "second-guessed" is much increased. This undermines the reliability and predictability of law. If there are any doubts that these are virtues in law, the doubter should read the well-known English case of *Cassell & Co Ltd v Broome*[22] which has been referred to with approval by the SCA in *S v Kgafela*.[23]

[30] Unlike the position with various other rights, our Constitution does not enshrine the ownership of property as a right (see section 25 of the Constitution which deals with "property rights"). It merely provides qualified protection against the arbitrary deprivation of property and that a person may only be deprived of property by law "of general application". If the courts above the High Court consider that "all property is theft"[24], the High Court and the people of South Africa need to know this. On the other hand, if these higher courts consider that property rights are deserving of protection but, nevetheless, the common law is not to be applied in doing so, we also need to know how the High Court is to go about doing its duty. Contumely hurled at individual judges will not suffice.

[31] I am bewildered and confused as to how a court is expected to deal appropriately with applications for eviction. As Mr *Ngqwangele* submitted, we need clarity. We also need much wisdom. We need

[22] [1972] AC 1027; [1972] All ER 801 (HL)

[23] 2003 (5) SA 339 (SCA) at para [3]

[24] The original author of the expression was, most probably, P-J Proudhon whose book, *What is Property? An Inquiry into the Principle of Right and Government* was published in 1840.

practical, but nevertheless fair and just answers to some highly vexing issues. I hope that the order which I have made, may play some small part in setting us on the high road to economic prosperity and a better life for all.

DATED AT JOHANNESBURG THIS 28th DAY OF APRIL, 2010

N.P. WILLIS

JUDGE OF THE HIGH COURT

Counsel for the Applicant: Adv. *A. W. Pullinger*
Counsel for the First, Second and Third Respondents: Adv. *B.Y. Ngwangele*
Attorneys for the Applicant: Allen & Associates
Attorneys for the First, Second and Third Respondents: Jegeh Attorneys

No appearance for Fourth and Fifth respondents

Date of hearing: 1st April, 2010
Date of judgment: 28th April 2010