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REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT
JOHANNESBURG

CASE NO: 29978/12

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

2013-05-07
DATE

SIGNATURE

In the matter between:

MARLBORO CRISIS COMMITTEE	First Applicant
OCCUPIERS OF STAND 799, MARLBORO (AS LISTED ON ANNEXURE MCC01)	Second Applicants
OCCUPIERS OF STAND 1008, MARLBORO (AS LISTED ON ANNEXURE MCC01)	Third Applicants

and

CITY OF JOHANNESBURG

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JUDGMENT

KGOMO, J:

INTRODUCTION

[1] On 8 August 2012 the applicants herein caused to be issued, served and filed this application in the Urgent Court, setting same down for hearing on 14 August 2012.

[2] The applicants sought an order:

2.1 That the matter be heard on an urgent basis and that non-compliance with the Rules of this Court relating to forms and service as provided for in Rule 6(12)(a) of the Rules of Court be condoned;

2.2 Ordering the respondent to restore the applicants' possession of the vacant land located at –

2.2.1 stand 799, Corner 3rd Avenue and 5th Street, Marlboro, Johannesburg; and

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2.2.2 the vacant stand at Corner 3rd Street and 4th Avenue, Marlboro, Johannesburg;

2.3 Ordering the respondent to construct for those individual applicants whose shelters were demolished and were unlawfully evicted on 2 and 3 August 2012, temporary habitable dwellings that afford shelter, privacy and amenities at least equivalent to those that were destroyed, and which are capable of being dismantled, at the site at which their previous shelters were demolished, within 72 (seventy two) hours of this order being granted;

2.4 Interdicting the respondent and all its employees from –

2.4.1 harassing or intimidating in any manner whatsoever any of the people who occupy the vacant pieces of land located at Stand 799, at Corner 3rd Avenue and 5th Street, Marlboro, Johannesburg; Stand 1008 at Corner 3rd Street and 4th Avenue, Marlboro, Johannesburg; and

2.4.2 demolishing any habitable structure of any person occupying the abovementioned vacant pieces of land located at or in Marlboro, Johannesburg or any other land within Marlboro, Johannesburg without an order of court;

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2.5 Ordering the respondent to return the goods and household appliances unlawfully removed and confiscated from the homes of the applicants during the aforesaid unlawful eviction;

2.6 In the alternative to 5, ordering the respondent to compensate each of the applicants in the amount of R1 500,00 for the replacement of goods and household appliances destroyed, or damaged as a result of the respondent's unlawful actions;

2.7 Ordering the respondent to immediately implement a compulsory education program within the Johannesburg Metropolitan Police Department dealing with the legal framework regulating evictions within the Republic of South Africa and the protection of the section 26 constitutional right to housing, and to report back to this Court in respect of the implementation of this order before 28 February 2013;

2.8 To the extent necessary, that the court make such orders as it deems fit or appropriate for the joinder and notification of the owners of the aforesaid properties;

2.9 Ordering the respondent to pay the cost of this application on a scale as between attorney and own client; and

2.10 For further and/or alternative relief.

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[3] On 14 August 2012 this application was stood down to 17 August 2012 and on that date, due to the need and/or necessity that proper opposing papers and/or interventions, if any, this matter be file or made was postponed to 29 August 2012 for finalisation.

[4] It is my view and finding that the requisite urgency is present in this matter and that same was not lost as a result of the above postponement.

THE PARTIES

[5] The first applicant, Marlboro Crisis Committee, is a committee, allegedly comprising of 12 people established by the Marlboro Community in 2002 in order to assist residents affected by numerous unlawful evictions taking place in the area.

[6] The first applicant is an unregistered organisation, said to be voluntary, established for a public purpose, and the income and property of which are not distributable to its members or office-bearers. No details of such income or where this group is operating from were furnished.

[7] The second applicants, the Occupiers of Stand 799 Marlboro, are the second to 116th applicants who occupy Erf 799 Marlboro. They are members of the community of allegedly homeless people who are squatting on a vacant piece of land which is situate at the corners of 5th Street and 3rd Avenue, Marlboro, also known commonly as Stand 799.

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[8] The third applicants, the Occupiers of Stand 1008 Marlboro, are the 117th to 131st applicants, being various occupants squatting on a vacant piece of land situate at the corners of 4th Avenue and 3rd Street, Marlboro, Johannesburg, also commonly known as Stand 985.

[9] The respondent, the City of Johannesburg is the local arm of the Government according to the applicants, which is vicariously liable for the actions which the latter categorise as unlawful as they are in charge or control of the Johannesburg Metropolitan Police Department ("*JMPD*") – a department of the Johannesburg Metropolitan Council, whose principal place of business, being also that of its legal services department, is situate at Metropolitan Centre, 3rd Floor, 158 Loveday Street, Braamfontein, Johannesburg.

[10] The applicants do not know who the owners are of the two erven or vacant lands that they have invaded or as squatting on.

[11] The respondent is opposing the application vehemently among others contesting the applicants' *locus standi* and mandate or authority to represent the unlawful occupiers as well as denying effecting any evictions.

[12] The respondent also disputes the chronology relative to the applicants' occupation of the land in issue, averring among others that they acted as per their mandate to police and enforce the laws and regulations against unlawful land-grabbers and trespassers.

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GENERAL BACKGROUND

[13] According to the applicants the land in issue here is privately owned land, the owners whereof are unknown. This fact is in direct conflict with the applicants' introductory remarks in their founding affidavit that it was initially occupied by 15 households with effect from the year 2005, who were paying rentals to the private owners. It is not clear how the applicants' affidavit could claim the above things while in the same breath they do not know who it was the early occupiers were paying rental to. Furthermore, the issue of the first occupation of the pieces of land by the lawful lessors or occupiers from 2005 contradicts the alleged formation of the first applicant during 2002.

[14] The applicants do not state who the first unlawful occupiers are amongst the present applicants and when their unlawful occupation started. The above re-inforce and lend credence to the respondent's contentions that the deponent to the applicants' founding affidavit is relying on hearsay evidence that has not been validated by people who have first-hand knowledge of the facts relied upon. I will come back to this aspect later.

[15] According to the applicants the initial lawful occupiers' rental fell through at some stage. A date is not mentioned. Their story remains hanging precariously, not touching ground with the present situation or *status quo*. However, if their version is anything to go by, the 15 lawful rental paying occupants were joined by other 24 households during the same year, i.e. 2005 and that total number of 39 households remained like that until 2011.

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[16] According to the applicants further, during 2011 an additional 9 households moved onto the property, increasing to 33 households by the end of 2011.

[17] The above figures do not make sense: If by the beginning of 2011 there were a total of 39 families on the property which grew by 9 to 48, the figure of a total of 33 families on the property by the end of 2011 does not tally. What makes matters worse is that the applicants do not state whether any of the 1st to 141st applicants are any of those occupants who were on the properties as at the end of 2011.

[18] The applicants went on to state that during 2012 another 50 new households moved onto the property. They are not sure what number moved onto the property because they say "*approximately 50 new households*".

[19] It is their further case that between March 2012 and June 2012 the number of unlawful occupiers had grown to 116 which was made up of people who had been evicted from neighbouring properties.

[20] In March 2011 (which in context could be a misnomer for March 2012) 10 families invaded a factory yard nearby within the lands in issue and approximately 50 families invaded a disused factory building located on Stand 1088 Marlboro. Once more the applicants are not specific; they talk about approximate figures and it is not stated whether these are part of the group before this Court today.

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[21] The applicants then continue with their confusing accounting or computations when they stated that as a result of ongoing evictions in the area the number of occupiers in the factory building increased to approximately 25 during the period March 2012 to July 2012. This figure contradicts the 50 given earlier that had already done so. The picture becomes more blurred when the applicant avers that these 25 unlawful factory dwellers also lived in 2-roomed corrugated iron and wood structures. It is not explained how they would live in those structures if they had invaded an unused factory.

[22] The indeterminate numbers of land-grabbers mentioned above does not tally with the allegation that the first applicant had all the time kept a register of all the land invaders. If that was the case, then exact figures and names would have been mentioned.

[23] The applicants' allegation and/or contention that the respondent even supplied the unlawful occupiers with three chemical toilets is refuted by the respondent as would be set out later below.

[24] In short, if the applicants' factual matrix and background is anything to go by, the unlawful occupiers' sojourn on the invaded land was condoned by the respondent who even supplied them with amenities and that the police regularly patrolled their area and the land invaders also participated in community policing *fora*, being party of local patrols with the same police they

(applicants) accuse of having acted unlawfully against them by evicting them from the properties they had invaded.

[25] This mystery deepens further when the applicant mention that their first evictions occurred during June 2012, the very month in which the alleged evictors supplied them with chemical toilets – a fact which if true would have presupposed that the respondent acknowledged and condoned their occupation of the two properties.

EVICTIONS versus LAW ENFORCEMENT

[26] The applicants categorise the action taken by Metro Police as evictions whereas the latter refer to it as law enforcement against land-grabbers or trespassers.

[27] It is common cause that the applicants or unlawful occupiers of the properties in issue here were removed from the properties by the respondent's employees on 20 June 2012. Their removal was accompanied by violence on the part of the unlawful occupiers but ultimately they were all removed and their shacks dismantled and removed. After the Metro Police had left, the occupiers re-grouped, rebuilt their shacks or structures and thus re-occupied the properties.

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[28] The recent action against them occurred on 2 August 2012 which is a pre-cursor to this application. The JMPD pounced on the unsuspecting unlawful occupiers of the above properties at 10h00 on this date and removed them from the properties. The removals took place on the two now known erven 799 and 1008 (or 985) Marlboro as well as from another stand which is situated at Corner 2nd Street and 4th Avenue, which had also been invaded in between. The operation was completed on 3 August 2012 on which date the rubble caused by the demolition of the squatters' shacks as well as other consequential debris was bulldozed and carted away in tipper trucks.

[29] During radio and television interviews conducted by the media houses on the day the JMPD mentioned among others that the occupiers were removed from the properties they had invaded as theirs was a criminal transgression of trespass and/or a contravention of the City's regulations and by-laws which they were obliged to police and enforce.

[30] In a nutshell the respondent's basis of opposition to the application is that –

30.1 The first applicant has no standing to bring this application;

30.2 The second and further applicants are not properly before this Court nor properly represented by their attorneys;

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30.3 Almost the entire application is based on hearsay submissions, especially those aspects that relate to which people were allegedly in possession of the two properties and for how long or from when, which allegations the respondent categorise as being demonstrably unreliable;

30.4 The denial and rebuttal by the respondent that the second and further applicants were ever in peaceful and undisturbed possession of the two properties, which denial according to the respondent was substantiated or corroborated by the allegations in the applicants' founding affidavits to the effect that most, if not all the applicants moved on to the properties during or after March 2012 as well as that their staying on the properties was, at all times, to their knowledge, precarious and always resisted by the respondent; has been left virtually unchallenged or if challenged, to no meaningful effect.

30.5 The applicants moved onto the property(ies) by way of a land-grab in or after May 2012; and

30.6 The occupation of the properties was patently unlawful having been unilaterally taken by the applicants without the consent of the land owners. As such their occupation amounted to the ongoing criminal offence of trespassing which the JMPD was legally entitled to prevent, and as such they acted and stopped same.

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FURTHER AFFIDAVITS AND ORAL ARGUMENT

[31] The parties were agreed that –

31.1 Prayer 1, i.e. urgency is appropriate;

31.2 The applicants were proceeding with prayers 2, 3, 4, 5 and 9 of the notice of motion; and

31.3 They (applicants) abandoned prayers 6, 7 and 8.

[32] The respondent also abandoned the challenge to the first applicant's mandate, *locus standi* and the applicants' *bona fide* and/or *locus standi* to prosecute this application.

[33] After the respondents had delivered their answering affidavit, the applicants filed a replying affidavit which proceeded to elaborate on the points set out in their founding affidavit, in the process casting aspersions on or to the respondent's case. This evoked the filing of an additional affidavit by the respondent. The applicants also sought leave to respond to this latest supplementary affidavit. In the interests of justice and equality as well as the finality of matters, especially one such as this which have been in the mass media for some time, I allowed them to do so, necessitating a further postponement so as to allow them the time and space to do so.

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[34] On the date of oral argument herein both sides handed in heads of argument for which I am indebted to them. However, the oral argument themselves in my view did not live up to expectations: Maybe I was led to aim too high after seeing the quality and extent of research depicted in the supplementary affidavits and the heads of argument. If the truth be told, I for one was not impressed by the quality of oral argument from both sides.

[35] Counsel for the applicants only argued around the effects of non-compliance with section 26(3) of the Constitution of the Republic of South Africa 1996 (Act 108 of 1996) as amended ("*the Constitution*"), especially the fact that the respondent's employees "*removed*" or "*evicted*" the applicants without a court order.

[36] I used the words "*removed*" and "*evicted*" guardedly and/or in parenthesis because the applicants contend there was an eviction whereas the respondent contends there was no eviction but a removal of land-grabbers and/or trespassers from the land unlawfully invaded, which was an ongoing criminal offence by people who had never been in peaceful and undisturbed possession of same.

[37] I have already alluded to several inconsistencies in the sequence of the applicants' coming onto the land in issue as well as the discrepancies in relation to the numbers *vis-à-vis* the first applicant's recounting of the chronology of things.

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[38] None of the applicants in this application were part of the original occupiers of the properties in issue here. Furthermore, the only two deponents of confirmatory affidavits of the applicants' affidavits who were part of the original occupiers are not part of those seeking restoration of possession herein, i.e. being part of the applicants.

[39] At best, the applicants cannot say when the initial or first "*evictions*" took place and when. This is in contrast to the respondent's case that at all times the applicants' security of tenure was never assured as they had been notified of their unlawful occupation of the properties and removed there fro in May 2012 and again on 3 August 2012 after they re-occupied it and rebuilt new structures thereon – they (respondent's) having embarked on an ongoing cleaning up operation aimed at dealing with people contravening laws, regulations and by-laws, which according was not an eviction.

[40] The applicants' counsel categorically stated in argument that this was an eviction wherein the PIE Act was applicable.

[41] The respondent brought to the fore the historical tensions that had prevailed over the above properties, which are bordering on Alexandra Township which tension dates as far back to the times when squatters would invade the properties of the original freehold property owners and even build structures within the demarcated yards of those freehold owners with impunity. In the present times, as has happened with the current unlawful occupiers, people have invaded factories, warehouses and vacant stands

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irrespective of whether they were demarcated residential, business or industrial.

[42] As a result of the above historical occurrences and tensions the respondent has had to constantly monitor the area to prevent land invasions from taking place.

[43] Most of the land invaders come from the self-same Alexandra Township or other areas bordering on Marlboro Industrial and Commercial precinct.

[44] The respondent in association with the Provincial Government of Gauteng has seen to the coming into being of the Alexandra Renewal Project which has taken over and oversees the investigation and implementation of present and future development of housing for residents of Johannesburg, with special emphasis for the people in and around Alexandra and surrounds. Some of the housing projects have already been completed, others are currently under construction and land is still being sought or negotiations are ongoing over specific land for use in such renewal projects. This Alexandra Renewal Project is a presidential project combining the resources of the respondent with those of the Gauteng Provincial Government as subsidised and/or supplemented by the Central Government grants for purposes of the provision of housing for the people.

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[45] Opportunistic persons or groups of persons forming themselves into amorphous bodies like the first applicant have sprung up around areas like Alexandra and surrounds taking advantage of people in need of accommodation or housing, promising them the top of the allocation queues, at a fee of course. Such bodies collect moneys from homeless people with promises of obtaining them sites or land for housing. These are parallel and unregistered structures with no visible bookkeeping or accountability practices which have a knack or tendency of being bottomless pits into which scarce and/or hard earned moneys of vulnerable people are poured. Somebody's vacant land or commercial or industrial property would be identified and people charged varying amounts for a plot or space thereat furtively. During the night structures would be erected on those invaded or grabbed properties and when the owners wake up the following morning they would be met with a sight of a whole city of corrugated, wooden or canvass structures where not a single structure existed the previous day. The occupiers would then band together and resist anybody's challenge to their occupation of the properties, calling upon the protection of our Constitution where homeless people should be protected against eviction, more often than not, as is the case here, demanding that they should only be removed from the areas they have invaded if and when the Municipality give them alternative accommodation. More often than not, the land-grabbers' resistance is accompanied by violence, as has also happened in this case where the unlawful occupiers used violence to resist the JMPD's law enforcement overtures and even burnt one of their vehicles and damaged others.

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[46] The respondent and the Alexandra Renewal Project view this strategy or course of action by the land-grabbers as a calculated move by the land invaders to jump the housing queue as most of them are people who would have been in such housing queues and most times, relatively down such queues.

[47] The respondent catalogued a trend in which its informants would observe the land grabs and erection of structures during the night. The first of these was reported to the respondent on 6 May 2012. It was taking place on Erf 799 Marlboro. Those invaders were challenged by JMPD and they dismantled their structures and left the site. On 17 May 2012 people re-invaded Erf 799 Marlboro. The JMPD warned them of the unlawfulness of their actions and the inevitability of action against them as what they did constituted criminal conduct that was punishable.

[48] After June 2012, the land-grabbers, emboldened by their earlier resistance which was given prominence by radio and TV stations, intensified their invasion of Erf 799, and even encroaching onto Erf 1008 Marlboro. As stated above, these land-grabs took place mostly at night. Enquiries revealed that a certain individual with the name of George, either on his own or in cahoots with others like him were charging people R3 000,00 for the privilege of being allocated a site or space at or in the invaded properties. The respondent suspects that a syndicate is involved in or behind these "*land allocations*" and consequent "*land-grabs*" which culminated in the mushrooming of the structures, which were put up without the consent or

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knowledge of the owners of the land and/or lawfully constituted structures that have been set up to oversee orderly settlement of the people.

[49] I cannot disagree with the above contentions when the peculiar circumstances prevailing in this matter are anything to go by, especially when the *modus operandi*, which is admitted by the applicants, is considered.

[50] I cannot equally disagree with the respondent's contention that this unlawful occupation of land impacts directly upon the planning for and provision of housing by the Alexandra Renewal Project and by extension, the Department of Local Government and Housing.

[51] It is common cause that the applicants have conceded that their actions were unlawful. Furthermore or worse still, the occupation of the sites in issue in this application for residential purposes contravenes the respondent's Town Planning Scheme. Erf 799 Marlboro is zoned: "*Special: For commercial purposes which shall mean the use of land or buildings for ... commercial or business activity other than houses ...*"

[52] In terms of section 33 of the Town Planning Scheme applicable to Marlboro, i.e. the Sandton Town Planning Scheme, what the applicants were and are doing is an offence and is criminally punishable.

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[53] The actions or conduct of the applicants in invading the properties in issue here have rendered the available water and sanitation infrastructure at the properties have become woefully inadequate for the area, creating a dangerous health hazard and impending disaster than can happen at any time as plagues can break out. These areas are not suited for residential purposes, let alone high density residential purposes that the invasions have precipitated.

[54] No planning or approval have been obtained or made for what occurred and none of the structures erected by the applicants had any building plans approved for them. This is a contravention of the National Building Regulations and Building Standards Act 1977 (Act 103 of 1977 (as amended). The erection of the structures is consequently a criminal offence, i.e. contravention of section 4(4) of the above Act.

[55] The JMPD's mandate and duties among others encompass policing and dealing with transgressions of the laws and by-laws within its area of operation, which includes Marlboro. The JMPD did take action in this instance by removing the land invaders and dismantling their structures and carting away whatever was worthy of being salvaged. The respondent has invited any person or instance that can identify any of the materials removed from the invaded land to come and identify same and if need be, take same away.

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[56] The applicants did not gainsay the respondent's contention that during June 2012 before any attempts were made to remove the land-grabbers from the erven or buildings they were occupying, several warnings were issued to the unlawful occupiers to stop what they were doing and dismantle and remove whatever structures they had set up or constructed there. They have equally not disputed the allegations by the respondent that on all those occasions the unlawful occupiers promised to stop what they were doing but silently disregarded those warnings and their undertakings, each time with more land invaders joining those who were on site. This activity encroached onto Erf 1008 and structures started mushrooming there also each night.

[57] According to the respondent its police and emergency services' actions on 2 August 2012 were only aimed at and related to those actions or structures which had recently sprung up on these stands.

[58] It is on these grounds that the respondent contend that the occupiers of those structures did not ever enjoy peaceful and undisturbed possession thereof, which aspect is a prerequisite and requirement on which for an action or application based on *mandament van spolie* can be founded.

[59] The uncontradicted contentions by the respondent that the removal of the structures on the land in issue and their occupiers had always been subject to resistance by the respondent consequently lends, in my view and finding, credence to the above contentions by the respondents.

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[60] The first applicant has accepted responsibility for managing, controlling and engineering the occupation of the properties by the 2nd to 141st applicants as well as the others, who according to the further affidavits filed herein, have been streaming onto them under cover of the night each day despite the constant and/or continuous efforts by the respondent's employees or agents to warn them off.

[61] The applicants agree that on 27 June 2012 they resisted the JMPD's efforts to dismantle the structures they had erected and/or remove them from the sites. There is evidence that on that occasion the JMPD were fired upon by people at an erf adjacent to Erf 799 using an R4 machine gun and 9 mm handguns. This was the date on which a JMPD vehicle was burnt down by people resisting action by JMPD. This occurred in the presence of the SAPS.

[62] No matter how one looks at the applicants' contentions, especially those that confirmed that from 20 June 2012 they had been busy re-constructing and/or rebuilding those structures that the JMPD had removed or demolished, the nett effect thereof is that the applicants have never been in peaceful and undisturbed possession.

[63] It is the applicants' case that they were removed or as they put it, despoiled or evicted unexpectedly without any warning. They pointed to some lay photographer's photos as being indicative of this. The respondent's reposte' hereon was that this was not the case. In addition to the warnings

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and pleadings already alluded to above the location of where the police vehicles were massed at was shown to have been some distance from where the properties in issue here were situated before their action. This, in my view, negates the contention by the applicants of a sudden, unexpected and unanticipated military-style pounce by the JMPD on an unsuspecting and innocent, peace-loving group of landless people who have nowhere to go.

[64] This aspect of "*landless people*" or people who have nowhere to go to in my view deserve to be scrutinised for a once-and-for-all dissection or attempt to lay same bare for posterity or going forward.

[65] When one peruses court papers including these in this application and also listen to ongoing and frequent comments by the so-called human rights activists and/or experts on such matters, one cannot help it but wonder where such a multitude of persons would have dropped from if they are really to be said to be homeless or destitute. More often than not, this group constitutes a cross section of young girl-mothers, old women and a multi or cross aged group of men. I have had the opportunity of seeing the type of people claiming to be the alleged or purported landless and despoiled persons when I was walking past the main entrance to this Court on my way to a pharmacy near the court building. It was a massive vibrant choir the members whereof, who fitted the description I have given hereinbefore, were singing and dancing vigorously, almost relisting the sight of any person dressed in black and white because when some counsel on their way into the court building came along crossing Pritchard Street and walking towards them, the singing or the song

being sung changed almost as if it was a well rehearsed thing because the song, almost in one fell swoop and in unison, metamorphed from a song about animals, birds or topical issues as normal songs do, to being a song with very crass and foul-worded diction. I believe the "*choir members*" did not know who I was because when they saw me emerging from the building in my black and white formal suit and tie which is but all I am allowed by my work to put on, I was also subjected to a sarcastic and insulting version in which judges of the High Court were named hideous names (insults) that are unprintable.

[66] I really felt pity for them and only wondered why they would do that which they were doing as a judge or counsel worthy of his or her profession or calling would not take such gestures to heart or seriously. There were some few very well-dressed young men who were ostensibly in charge of this predominantly female crowd or "*choir*", who in my crude assessment could have out-numbered males at a ratio of not less than 95:5.

[67] I can say it without any fear of contradiction that such singing and name-calling or crass- or crudeness did not play any part in any of the findings and decision(s) or positions I may have taken in this case.

[68] What struck my inner self is the realisation that some of the unlawful occupiers of these industrial or commercial properties may be unemployed or incapable of obtaining employment. The irony of the situation is that by invading and land-grabbing an industrial, business or commercial property,

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the suspected unemployed persons could be unwittingly be starting an evil circle or conundrum whereby new employment opportunities cannot be generated or such venues or property from or on or in which such employment opportunities could have been provided, would have been invaded and utilised for residential purposes.

[69] It would not be uncommon for such people to start complaining of the Government or the private sector's failure to provide jobs or job opportunity when they themselves would be occupying or having grabbed the areas or buildings from which such jobs and/or employment opportunities would or could have been provided or generated from.

[70] Some, if not most of the prayers sought by the applicants are in my considered view, not only populist orientated but could also be almost impossible to implement or execute if they are granted.

WHETHER OR NOT APPLIANTS HAVE MADE OUT A CASE

[71] The applicants herein seek an order that they be restored possession of two immovable properties in Marlboro, namely, Stand 799 and Stand 1008. Ancillary relief also sought is set out in prayers 3, 4, 5 and 9 of the notice of motion. I agree that the abandoned prayers 6, 7 and 8 would have been incompetent orders to grant.

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[72] It is common cause that in law, the relief sought by the applicants is premised upon the *mandament van spolie* and it was precipitated by events which occurred on 2 August 2012 and continued on 3 August 2012 when the JMPD embarked on w hat they (JMPD) calls a crime clean-up operation and the applicants call an eviction or despoliation.

[73] For the applicants to succeed with the relief sought by them premised upon the *mandament van spolie*, the applicants must establish, and they bear the *onus* in this regard, that at the time that they were deprived of possession of the immovable properties in question they were in peaceful and undisturbed possession of same.

See: *Mbangi and Others v Dobsonville City Council* 1991 (2) SA 330 (W).

Kgosana and Another v Otto 1991 (2) SA 113 (W).

Lobakeng IL & 46 Others v Emfuleni Local Municipality 2009/49466 (GSJ) unreported.

[74] It goes without saying that should the applicants fail to establish the above requirement, i.e. peaceful and undisturbed possession, they would then stand to fail in their application.

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[75] As already stated above, the applicants' occupation of the properties have been resisted by the respondent at every turn. I will not repeat the instances here.

[76] Flemming J dealt with this requirement comprehensively in the *Mbangi and Others v Dobsonville City Council* case (*supra*). At 337F-338D the learned judge put it as follows:

> *"It is my view that, the requirement of 'peaceful' and undisturbed possession was recognised to cater for the realities and to prevent the granting of the remedy from working injustice rather than operating in furtherance of a policy designed to discourage self-help. It is probably the diverse of that requirement which is reflected by the view that an own warding-off of spoliation is no longer possible only 'nadat die situasie gestabiliseer het'. Cf Van der Merwe, Sakereg at 145. I regard that as the correct yardstick. I disagree with Van der Merwe's evaluation insofar as the time factor is given dominance without at the same time evaluating the quality of the applicants' detention and the circumstances thereof, e.g. what the other party is continuing or attempting to do. The conduct of Ness was more readily observable by an outsider than the simultaneous continued manoeuvrings of the building owner, but that is no reason to regard the former as being of higher quality or as requiring interpretation by external appearances without simultaneous consideration of lack of acquiescence and attempts at counteraction of the owner ..."*

[77] In this case too, the manoeuvrings of the applicants when they invaded the lands was the process given more prominence in the reports that emanated all along. The respondent's actions in resisting the applicants' actions or conduct were not given the same prominence. However, it is my view and finding that the circumstances as unfolding pointed to the applicants' security of possession not having been assured.

[78] The learned judge proceeds to state as follows:

> *"... While resistance or counteraction persists, what have arisen may constitute some form of 'possession', especially in view of the wide signification of that word in the spoliation context, but it is not yet 'peaceful and undisturbed'. Whether self-defences is permissible or not pursuit or other counter-spoliation is justified, is a separate issue to the enquiry about whether an applicant is adequately in possession in the first place ...*
>
> *The applicant for spoliation requires possession which has become ensconced, as was decided in the Ness case. See also Sonnekus 1986 TSAR at 247. It would normally be evidenced (but not necessarily so) by a period of time during which the de facto possession has continued without interference. However, quite apart from evidential considerations, the complainant lacks protectable merit if the best he can prove is a (lawful or unlawful) self-help grab of possession to which there is continued resistance."*

[79] In this case, the respondent did not wait until a considerable time had elapsed before it engaged with the land invaders. There was thus interruption of whatever possession there was, making same not to be a peaceful and undisturbed one.

[80] As regards the type or amount of resistance may be required to interrupt possession in the context of *mandament van spolie* the learned judge continues as follows in the same judgment:

> *"The question necessarily arises what type and degree of resistance would cause the requirement (of peaceful and undisturbed possession) to be lacking. I doubt whether it is possible to define that in vaccuo, the reason why the requirement exists, cognisance of the remedy why the remedy exists, and also the lack reason of authority for a contrary view; point thereto that less than physical resistance is sufficient. It would be a sad state of the law indeed if only he who is able and willing to help himself by physical resistance or by intimidation or other threat is not dealt with as a spoliator, whilst the Court's assistance is given to him*

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who takes possession despite resistance in a form which pays heed to the undesirability of physical encounters and the proprieties of civilised behaviour. An inverted application of what was said in Muller v Muller 1915 TPD 28 at 30 with reference to the violence necessary for a spoliation order seems apposite:-

> *'...[N]essary ... is not force in the sense of overwhelming force ... all that a man need do is to protect – to object – and there is no necessity to him, to use force so as to lead to an affray.'"*

[81] I cannot disagree with the above quoted views. They are on all fours with the facts and circumstances in this application.

[82] The points are emphasised by the same learned judge De Klerk J in the *Kgosana* case (*supra*). At 116F-G the court held as follows:

> *"As regards the common law, if I were wrong thus far, I also respectfully agree with the learned Deputy Judge President, both as regards his statement of the law and the application thereof on comparable facts. I also agree with Mr Cloete that respondent's conduct constituted prompt, instanter and lawful measures against unlawful spoliation by people who were taking the law into their own hands. At the time their shacks were demolished they were not in peaceful and undisturbed possession of the respondent's ground. The position had not been stabilised and the applicants, as spoliators in the process of committing spoliation, cannot be heard to shout 'spoliation spoliation."*

[83] The above *dictum* by the learned Deputy Judge President rhymes with what happened in our application. That the JMPD's action constituted prompt, *instanter*, and lawful measures against unlawful spoliation of land by the applicants who were clearly taking the law into their own hands, jumping established queues or disregarding due process driven by bodes like the Alexandra Renewal Project, cannot be disputed or gainsaid. Similarly, as in

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that case, the applicants in this application were not yet in peaceful and undisturbed possession of the properties at the time their shacks or structures were demolished.

WHETHER COURT ORDER MUST FIRS BE OBTAINED

[84] The applicants' further contention is that even if the respondent felt justified in dealing with the applicants' invasion of the properties in issue here, they must first have obtained a court order to validate such an action. The respondent is contending to the contrary.

[85] The heading in *Kgosana and Others v Otto* 1991 (2) SA 113 (W) reads as follows:

> *"Land – Squatting – Prevention of illegal squatting – Prior ejectment order not required before owner entitled to demolish building or structure ... Nor is owner obliged to exhaust other remedies afforded by the Act before acting ..."*

[86] The above quotation is self-explanatory. In addition thereto, the JMPD is a statutory body with a clear duty and mandate to enforce law and order within its area of operation, which includes the area in issue here. Nothing in the law prevents them from doing so. On the contrary, if they stood by and watched while lawlessness started and escalated without taking action, they would be guilty of dereliction of duty. Even the "*super-democrats*" who stand at the rooftops and scream, "*murder*" when unlawful occupiers or invaders or

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grabbers of land belonging to others are removed from their ill-begotten spoils, would be at the throats of the police and the City Council if the JMPD did that – i.e. stood idle while contraventions of the laws and by-laws they are there to police and enforce, are taking place.

[87] It is thus my considered view and finding that the absence of a court order when the JMPD demolished the structures constructed by the applicants does not render their action or conduct actionable, objectionable and/or unlawful.

[88] In *Tswelopele Non-Profit Organisation and Others v City of Tshwane Metropolitan Municipality and Others* 2007 (6) SA 511 (SCA) the second to twenty-third appellants were unlawful occupiers who had been unlawfully evicted from their rudimentary homes without a court order by the Municipality through its employees and/or agents. During the eviction the materials used to construct their homes were burnt and many of their belongings destroyed. In an urgent application in the court *a quo* for an order based on *mandament van spolie* they failed to obtain relief on the grounds that since the materials that had been used to construct their shelters had been destroyed, the occupiers could not be restored to the possession of their homes. In the peculiar circumstances of that case, on appeal, the Supreme Court of Appeal ordered that the illegal occupiers' shelters be rebuilt but that the replacement materials used in the reconstruction should be such that they are capable of being moved or removed easily as their eviction was imminent if a court order was obtained.

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[89] The principles set out in the above case were used by the applicants to formulate their prayers in the notice of motion. This can be seen from the wording of the prayers themselves.

[90] The aspect that makes the above case distinguishable in our present application is that of unlawfulness. As I have already found, that aspect is absent from the action of the police. The applicants' counsel in my view tried hard to stretch this issue and elevate the absence of a court order to a point where that absence would amount to unlawfulness.

[91] Cameron JA put it in the above case that though the appellants did not abandon their contention that the *mandament van spolie* should be constitutionally adapted to afford them this relief, their primary submission was that a broader remedy should be developed under the Constitution.

[92] It is so that the Constitution respects and preserves the common law. I also agree that courts should synchronise the common law with the Bill of Rights. This, in my further view, is not a one-way process but must be reciprocated from both sides. The unlawful or illegal occupiers of property also ought to realise that the laws of the land need to be respected and observed.

[93] The applicants herein were consistent in disobeying, disregarding and/or showing the middle finger at the law enforcement authorities and those institutions of government and the community that are there to ensure orderly

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settlement of people as well as equitable distribution or demarcation of residential, commercial and industrial land.

[94] The applicants estimated the people having settled around the Marlboro properties at around 5 000 or thereabouts. What compounded their case is their admission that all these multitudes were being served by two or three chemical toilets. It is so that they also contended that some of their people made use of the toilet facilities at or in the surrounding factory buildings.

[95] The health hazard of such a situation would be under-estimated at everybody's risk. That the infrastructure mentioned above is woefully inadequate in the circumstances cannot be denied. The respondent has a duty or responsibility to protect the general populace from a health catastrophe that may be waiting to happen.

[96] Provisions of the law that are at odds with reality must either be developed or done away with.

[97] The question that must also be answered at this juncture is whether or not the time has not now arrived to deal with mushrooming community based bodies that ostensibly exploit residents' homelessness to line up their pockets in the process of leading them on a path to doom by urging or encouraging them to hi-jack buildings or land or invade other peoples' or government owned property or land.

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[98] In my view, that time is here.

[90] Nugent J in *Rikhotso v Northcliff Ceramics (Pty) Ltd* 1997 (1) SA 526 (W) held among others that a spoliation order cannot be granted if the property at issue has ceased to exist. The learned judge commented on the remedy of *mandament van spolie* having been received into our law as a possessory remedy, and not as a general remedy against unlawfulness. He observed further, that the issue of the *mandament van spolie* is a preliminary and provisional order. The assumption that underlies it is that the property in fact exists and may be awarded in due course to the properly entitled party. He concluded that since possession cannot be restored by substitution, the *mandament* could not be granted. The learned judge added the following in conclusion:

> "*It was submitted that the conclusion to which I have come would encourage the destruction of property in the course of spoliation. I do not think that is correct. I do not suggest that the law countenances wanton destruction, nor that it does not afford a remedy. Remedies to discourage such conduct exist in both civil and criminal law. My conclusion is only that the mandamus van spolie is not that remedy.*"

[91] Cameron JA (as he was then) held as follows in the *Tswelopele* case at 521D-F about the above or Nugent J's findings –

> "*[24] The doctrinal analysis in Rikhotso is in my view undoubtedly correct. While the mandament clearly enjoins breaches of the rule of law and serves as a disincentive to self-help, its object is the interim restoration of physical control and enjoyment of specified property – not its reconstructed equivalent. To insist*

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that the mandament be extended to mandatory substitution of the property in dispute would be to create a different and wider remedy than that received into South African law, one that would lose its possessory focus in favour of different objectives (including a peace-keeping function)."

[92] It is so that the rule of law is a founding value of the Constitution, pre-supposing that constitutional development of the common law might make it appropriate to adapt the *mandament van spolie* remedy to include reconstituted restoration in cases of destruction.

[93] In the same breath, it is my considered view and finding that the same considerations as set out above may and should be equally applicable and enabling to the courts of law to adapt the *mandament*, in the peculiar circumstances of each individual case as should be the case herein, to include measures to discourage would-be land-grabbers and/or potential illegal and/or unlawful occupiers of land from doing so.

[94] As stated above, the applicants' conduct and *modus operandi* have been discouraged at every turn, resulting in them not enjoying peaceful and undisturbed possession. As stated further, the applicants, egged on and/or encouraged by persons or bodies with vested and/or sinister motives or interests, showed the laws of the land and processes to ensure orderly settlement and planning of settlements the middle finger.

[95] I may not be entirely sure i

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f I am correct, however, it is my view that the applicants have been emboldened to act as they did by prevailing circumstances where they saw persons acting as they did hanging onto the properties they had illegally and unlawfully invaded despite vigorous opposition by their owners or controllers.

[96] As stated hereinbefore, the respondents were doing what was expected of them when they stopped mass invasion of industrial and commercial properties for residential purposes.

CONCLUSION

[97] As Kriegler J (as he was then) put it in *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) [1997] (7) BCLR 851 at 835G:

> "*... the harm caused by violating the Constitution is a harm to the society as a whole, even where the direct implications of the violation are highly paraxial. The rights violator not only harms a particular person, but impedes the fuller realisation of our constitutional promise.*"

[98] The applicants also violated the rights of landowners and transgressed laws and by-laws. Their conduct also impedes the fuller realisation of our constitutional promise.

[99] I also agree with Kriegler J in the *Fose* matter at 835G para [96] that –

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"Our object in remedying these kind of harm should, at least, be to vindicate the Constitution, and to deter its further infringement."

[100] It is so further, that a Constitution has as little or as much weight as the prevailing political culture affords it. As a consequence, it must be instilled in the minds and consciences of potential land-grabbers and unlawful or illegal occupiers, that landowners and contractors of space too are bearers of constitutional rights and that conduct violating those rights tramples, not only on them but on all.

[101] A remedy this Court should issue through its order should instil humility without humiliation, and should bear the instructional message that respect for the Constitution protects and enhances the rights of all. It may be a remedy special to the Constitution, whose engraftment on the *mandament* could constitute an unnecessary super fluidity.

See: *Tswelopele v City of Tshwane (supra)* at 522F-G.

COSTS

[102] The general rule is that costs follow the suit. I do not see or been persuaded that a different approach should be adopted in this case. Therefore the general rule regarding costs would apply.

ORDER

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[103] On 31 August 2012 I issued or handed down in court an extract of the order in this judgment. I repeat same hereunder:

103.1 The application herein is dismissed;

103.2 The applicants herein, especially the second to the 141st applicants as well as any other person(s) that may have invaded erf or Stand 799 situated at Corners of 3rd Avenue and 5th Streets, Marlboro, Johannesburg, and erf Stand 1008 (also known as Stand 985) situated at Corners 3rd Avenue and 5th Street, Marlboro, Johannesburg and/or another unidentified erf/stand situated at Corner 2nd Street and 4th Avenue, Marlboro, Johannesburg from which some of the applicants were also removed by the respondent's employees, are ordered, if they have not yet done so, to vacate the above properties with immediate effect.

103.3 The order in 103.2 above is also applicable to or on any other person(s) who occupy the above properties by virtue of any of the applicants' occupation thereof;

103.4 Should the applicants and/or any other occupier(s) of the abovementioned properties neglect, fail or refuse to vacate same forthwith, the respondent shall be entitled to do all that would be necessary to remove them or have them removed

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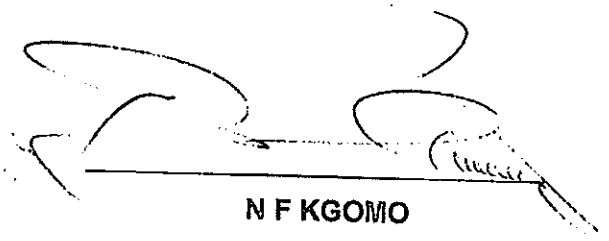
from the properties, and for that purpose this shall be its authority;

103.5 The applicants and/or all those that may have been occupying or intending to occupy the abovementioned properties as well as all or any other persons allegedly represented by the first applicant even though not listed on Annexure "ACC01" are interdicted, prevented and restrained from re-occupying or invading the above properties and/or erecting any structures on them;

103.6 This order supersedes and replaces the interim orders issued or granted by Kgomo J on 17 August 2012 and Moshidi J on 23 August 2012 respectively, which two orders shall be regarded as having been withdrawn and/or being of no further force and/or effect with immediate effect;

103.7 The applicants are ordered to pay the costs of this application jointly and severally, the one paying the other being absolved, which costs shall also include the costs reserved on 14 August 2012, 17 August 2012 and 23 August 2012.



N F KGOMO

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JUDGE OF THE SOUTH GAUTENG HIGH COURT, JOHANNESBURG

FOR THE APPLICANTS ASSISTED BY	MS M A DE WRANCE L SIBOGO
INSTRUCTED BY	LAWYERS FOR HUMAN RIGHTS
FOR THE RESPONDENT	ADV L HOLLANDER
INSTRUCTED BY	MOODIE & ROBERTSON BRAAMFONTEIN, JOHANNESBURG
DATE OF ARGUMENT	29 AUGUST 2012
DATE OF ORDER PENDING JUDGMENT	31 AUGUST 2012
DATE OF HANDING DOWN OF FULL JUDGMENT	7 SEPTEMBER 2012

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