REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG LOCAL DIVISION, PRETORIA

22/9/2016

CASE NO: 67856/14

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

22/9/2016 .....
DATE

.....
SIGNATURE

In the matter between:

TSHWANE UNIVERSITY TECHNOLOGY **Applicant**

and

ALL MEMBERS OF THE CENTRAL STUDENT REPRESENTATIVE COUNCIL OF THE APPLICANT **1st Respondent**

ALL MEMBERS OF THE PRETORIA LOCAL STUDENT REPRESENTATIVE COUNCIL OF THE APPLICANT **2nd Respondent**

ALL MEMBERS OF THE GARANKUWA LOCAL STUDENT REPRESENTATIVE COUNCIL OF THE APPLICANT **3rd Respondent**

ALL STUDENTS AND PERSONS RESIDING IN THE RESIDENCES OF THE APPLICANT'S PRETORIA WEST AND GARANKUWA CAMPUSES **4th Respondent**

J U D G M E N T

WENTZEL AJ

Introduction

1. This is an application that arose as a result of the closure of the residences at all of the applicant's campuses as a result of the violent student protests regarding the lack of NSFAS-funding that erupted during September 2014. During these protests, buildings were destroyed, cars were torched and students and workers were intimidated by militant students leading the protests.

2. Many of these students resided in student residences and it seems that to quell the protests and the violence, a decision was taken to obtain an urgent *ex parte* court order on 12 September 2014 to evict the students from its Pretoria West and Ga-Rankuwa campuses, which was, after the protests and violence had apparently died down, not acted upon. When the violence erupted again and it was feared it would spread to its other campuses, the applicant's Council took a decision on 20 September 2014 to close the residences at all of its campuses and issued a directive, by the distribution of leaflets and social media, that students vacate their residences by 5 pm that day and employed security guards to forcibly remove those student who failed to adhere to this directive. This decision left many students homeless and stranded unable to afford to return home.

3. The respondents contend that this amounted to an unlawful eviction of the students in breach of section 26(3) of the Constitution and a breach of the prior court order obtained on 12 September 2014 to evict the students on two of its campuses, its Pretoria West and Garankuwa campuses, provided that it afforded the evicted students an opportunity to sign an undertaking renouncing violence which would entitle them to return to their residences.

4. The applicant disputed this averring its decision to close all of its residences was not taken in in terms of the Court Order, but rather was an administrative action taken to protect the safety of its student body, staff and property. It avers that its decision did not amount to an "*eviction*" but rather an *"evacuation*" of the students in a state of emergency. It avers further that in taking the decision, it merely decided to bring the October vacation 10 days early and was thus not an eviction as the students would have been required to vacate the residences and return home in any event.

5. Mister Yster Dladla ("Dladla"), as President of the Central Student Representative Council at the time, the CSRC, rushed to court on 25 September 2014- represented by Lawyers for Human Rights- purporting to represent the students, and sought to intervene and anticipate the prior eviction order which had been granted in the form of a *rule nisi*. He also sought, by way of a counter-application,

inter alia, a declaratory order that the mass eviction of the students from the applicant's residences be declared unlawful.

6. I am told that at Court, the applicant's counsel undertook to allow the students to return to their residences should they sign the undertaking contemplated in terms of the prior eviction order. The matter was thereafter struck from the roll, I am told, both for lack of urgency and Dlaldla's lack of *locus standi* . The Court also apparently took the view that the applicant's actions had been justified in view of the violent and destructive nature of the protests.

7. Although I am told that leave to appeal this ruling was sought, I have not been told what the result hereof was. The question of Dladla's *locus standi* was then *ex post facto* cured when the respondents adopted a resolution confirming Dladla's mandate to represent the respondents. This issue was also resolved by this Court in related proceedings between the parties, dealt with by me more fully hereinafter, reported as *Tshwane University of Technology v Dladla* (8104/2014)[2015]ZAGPPHC). However, it is averred that Dladla is competent to act in his personal capacity in a class action by the students at all of the students who reside in residences at all of the applicant's campuses in the public interest in terms of section 38(d) of the Constitution and he persists in his application to do so.

8. It is common cause that by the time this matter was argued, the student protests had been resolved and all of the students had returned to their residences. As such there was no need for the respondents to persist with the relief sought in prayers 3 and 4 of their counter-application directing the applicant to restore possession and occupation to the residence students at its Shoshanguwe, Polokwane,Mbombela and eMalahleni campuses, which had not been covered by the 12 September 2014 Order and at its Pretoria West and Rarankuwa campuses, which had. As such, it was common cause that the spoliation proceedings had, since the launching of the counter-application, been rendered moot.

9. The respondents, however, persisted with prayers 2,5,6 and 7 of their counter-application:

9.1. granting Dladla leave to intervene;

9.2. declaring the mass eviction of the residence students of all of the applicant's campuses without notice and without affording the such students an opportunity to be heard, is unconstitutional, and that the applicant be interdicted and restrained from such further evictions without following a lawful course;

9.3. declaring the applicant in contempt of the *ex parte* order;

9.4. costs of the counter-application on the attorney and own client scale.

10. The respondents argued that these issues were not moot inasmuch as they remained entitled to an order discharging the *rule nisi* and dismissing the applicant's application for eviction with attorney and client costs as it had improperly been brought *ex parte* without disclosing material facts to the court and in breach of the principles enshrined in the Constitution. The respondents also aver that they is entitled to an Order declaring that in evicting the students from the Pretoria West and Ga-Rankuwa campuses, the applicants had acted, albeit only for a period of 5 days, in contempt of the explicit terms of the Court Order obtained on 12 September 2015 requiring it to afford the students at least at theses campuses the opportunity to return to their residences should they sign an undertaking renouncing violence. With regard to the other 4 campuses, it is averred that the applicant acted unlawfully in evicting the students without an Order of Court.

11. The respondent's however, go further: Whilst they do not request the court to make declaratory orders concerning the issues raised in its Rule 16 A notice[1], they nevertheless seek a declaratory order,

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[1] The respondent issued a Notice in terms of Rule 16A that it intended to raise a number of Constitutional issues including:

for the purpose of precedent, that the eviction on 20 September 2014 was unconstitutional and illegal. They also seeks a blanket interdict that the applicant be interdicted and restrained from further evictions of its students from any of the residences without following a lawful course.

MOOTNESS

12. It is trite that Courts do not pronounce on matters that are academic purely for the purpose of precedent.

13. The respondents, however, argue that where constitutional issues are at stake, this does not apply. A similar argument was recently

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1. The applicability of section 26(3) of the Constitution to university students who reside in university residences;

2. The constitutional tenability of obtaining an eviction order in the form of an interim order without notice to the persons who are to be evicted in terms of the said eviction order; and

3. Whether it is a requirement for a litigant who litigates on behalf of a class in terms of section 38(c) of the Constitution to be certified as litigating on behalf of the class, where the case is constitutional in nature, *id est* where said litigant directly relies on a right enshrined in the Constitution.

raised in this Court in *Comair Ltd v Minister of Public Enterprises and Others* 2016 (1) SA 1 (GP) which involved a decision by government to grant financial assistance to the beleaguered SAA (which was then insolvent) which the applicants sought to set aside and review declare to be unconstitutional and unlawful, *inter alia*, as it allowed it to unfairly compete with its competitors. It also sought an order akin to the blanket interdict in this case that

> "*the suspension of the setting-aside of the guarantee decision for a period of six months, during which time, to the extent that the government decides to grant any financial assistance to SAA, it is to do so in the light of the findings of this court's judgment.*"

14. In addition the applicant also sought to bind the future conduct of the government and sought"[*a*]*n order that if the ministers and the government contemplate granting any financial assistance to SAA during the two-year period contemplated in the guarantee —*

[5.4.1] such assistance must comply with government's DATP;

[5.4.2] they must file a proposal setting out the form that the financial assistance is intended to take, the procedure to be followed in providing that assistance and any conditions attaching thereto; and

[5.4.3] the court may, at Comair's instance, determine whether the proposal complies with the judgment and order of this court. "

15. Prior to the hearing of the matter, the government had taken a decision to perpetually extend this guarantee while the long-term turnabout strategy was finalised and implemented. As a result, the applicant's amended their notice of motion to attack this extended guarantee on a similar basis.

16. By the time the matter was heard, it was common cause that the first decision that Comair attacked, and sought to review and interdict, had expired and had been replaced. Accordingly the relief sought in prayer 1.1 of the amended notice of motion declaring that the decision to provide the initial guarantee was unconstitutional was moot — not only because the 2012 guarantee had expired by effluxion of time, but also because it had been replaced by the perpetual guarantee. Nevertheless, Comair persisted in seeking relief in regard thereto and raised three key questions, amongst them Constitutional issues which it asked the court to decide-

16.1. When is it lawful for government ministers to bind the fiscus by granting significant guarantees to state-owned companies?

16.2. In the light of the government's DATP, when, and in what manner, is it reasonable, rational and procedurally fair for the government to give financial assistance to state-owned airlines?

16.3. On the facts of this case, was it lawful and in accordance with the principles of just administrative action, the principle of legality, and the Bill of Rights, for SAA to be provided with a R5 billion guarantee?

17. Comair argued that even if prayer 1.1 of the amended notice of motion were technically moot, it would nevertheless be in the interests of justice for the court to determine the matter. It accepted that the case was moot if it no longer presented a live controversy, but sought to invoke issues of extended standing under s 38 of the Constitution to circumvent the argument advanced with regard to mootness.

18. In dealing with this, Fabricious J set out the legal principles pertaining to mootness which are of equal import to this case:

> "*[13] .....It was obvious that there is no live claim for restitution in the respect of the first guarantee. The order sought in prayer 1.1 was also neither forward- looking nor general in its application. See Director-General Department of Home Affairs and Another v Mukhamadiva 2014 (3) BCLR 306 (CC).*
>
> *[14] It is clear that the relevant principle is that courts should not decide matters that are abstract or academic, and which do not have any practical effect, either on the parties before the court or the public at large. Courts of law exist to settle concrete controversies and actual infringement of rights, and not to pronounce upon abstract questions, or give advice on differing contentions. The same principle has been stated to mean that one should rather not deal with vague concepts such as 'abstract', 'academic' and 'hypothetical' as yardsticks.*

The question rather ought to be a positive one, ie whether a judgment or order of court will have a practical effect, and not whether it will be of importance for a hypothetical future case. See Premier, Provinsie Mpumalanga, en 'n Ander v Groblersdalse Stadsraad 1998 (2) SA 1136 (SCA) at 1141E. In National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others 2000 (2) SA 1 (CC) (2000 (1) BCLR 39; [1999] ZACC 17) para 21 it was said that a matter is moot and not justiciable if it no longer presents an existing or live controversy. This seems to be the most practical and decisive question. Mr Gauntlett submitted that were prayer 1.1 of the amended notice of motion to be granted, there would be no practical effect. There was no utility in the order, and no benefit in pronouncing on any of the issues in relation to it. The controversy regarding the legality of the first decision would itself be resolved by adjudicating on the second decision.

[15] Also, the elaborate remedial relief sought (including the suspension of setting aside that which had already lapsed) cannot conceivably have any practical effect. It would be an elaborate academic exercise. I agree with this submission. Mr Unterhalter SC, on behalf of Comair, submitted that I need to take into account the so-called Oudekraal principle, ie the one in Oudekraal Estates (Pty) Ltd v City of Cape Town 2004 (6) SA 222 (SCA) ([2004] 3 All SA 1; [2004] ZASCA 48) para 31. The principle articulated in that judgment is that a successful challenge to a previous administrative decision does not automatically result in nullity of a subsequent administrative decision. The court will still have to determine whether the perpetual guarantee should be set aside in this particular context.

[16] The legal validity of the 2012 guarantee is not a precondition for the 2013 guarantee. Validity of the former does not bear on the latter. Neither the subsequent decision nor its empowering provision rests on the legal validity of the initial decision. The legal foundation for the second decision is s 70 of the PFMA, and not the existence of the first decision. The 2013 decision, which was subject to its own conditions, supplanted the 2012-guarantee decision. Comair also relied upon the interests of justice in this context, which Mr Gauntlett classified as the assertion of a backstop. The argument was flawed, because the fact that it has a bearing on the interests of justice does not militate in favour of entertaining prayer 1.1 in circumstances where this would

> *almost duplicate much of the judicial resources to be expended on determining prayer 1.2...*
>
> *[17] I agree with the contentions advanced by counsel for the first and second respondents. The attack on the issue of the first guarantee and the relief sought in that context are in my view moot in the sense that there would be no utility in the order, and no benefit in pronouncing on any of the issues in relation to it. Any order in this context would have no practical effect on either of the parties or others. I therefore do not intend dealing any further with any of the arguments advanced in respect of the original notice of motion, although I appreciate that there would be a lot of overlapping when I deal with the arguments pertaining to the extended guarantee".* (emphasis added).

19. I agree with this approach. It is not the function of the courts to make declaratory orders for precedent purposes, particularly almost 2 years after the events giving rise to the matter have been resolved and the students have been permitted to return to their residences. In this respect, I point out that heads of argument were filed in this matter during August 2015 and there is no explanation why the matter was not persisted with and why it is sought to persist with the matter, now yet another year later. The function of the Courts is to provide meaningful and effective justice to all, not to make political statements.

20. In the leading case of *Minister of Mineral Resources and Others v Sishen Iron Ore Co (Pty) Ltd and another* 2014 (2) SA 603 (CC) the Constitutional Court held that a case-

> *"is moot and therefore not justiciable if it no longer presents an existing or live controvercy which should exist if the court is to avoid giving advisory opinions on abtract propositions of law."*

21. The *rule nisi* granted on 12 September 2014 is no longer practically in effect and there is no purpose in the Court considering whether it should be discharged and the application dismissed save solely for determination of the question of costs, which are sought on the attorney and client scale. Similarly, the legality and constitutionality of the applicant's decision to close the residences on 20 September 2014 in the manner in remains a live issue only with regard to the question of costs.

22. I also do not believe that there is any basis for me interdicting the applicant from evicting the students without following a lawful course. This cannot be pronounced upon in a vacuum and I am not empowered to interdict a future hypothetical event. What would or would not amount to a lawful course would depend on the particular circumstances of each case and I am not prepared to bind further courts to the nightmare of having to interpret what was meant by such an order in the event of circumstances arising requiring that the residences be closed or students be removed from their residences.

23. To my mind, it is not the function of the courts to make blanket interdicts. What the respondents in a sense want is restraining

order to preclude any decisions to close the residences without a Court Order. It is a matter of law that this must be done lawfully and no Order declaring this is necessary. If this is done unlawfully in the future, the respondents will have recourse to the courts.

24. What remains only to consider for present purposes, therefore, is whether:

24.1. the *rule nisi* obtained on 12 September 2014 was improperly sought *ex parte* solely for the purposes of determining the question of costs;

24.2. the applicant acted unlawfully in closing the residences on 20 September 2016 without recourse to the courts solely for the purposes of costs;

24.3. in failing permit the students to return to their residences should they sign a disclaimer denouncing violence, the applicant acted in contempt of the *Court* Order obtained on 12 September 2014;

24.4. an order of attorney and client costs would be appropriate;

24.5. Dladla is entitled to intervene in his personal capacity in the public interest in terms of section 28(c) of the Constitution..

25. In so doing it is stressed that it is not incumbent on the courts to deal fully with the merits when they are considered only for the purposes of costs (*Jenkins v SA Boiler Makers, Iron & Steel Workers & Ship Builders Society* 1946 WLD 15; *Gans v Society for the Prevention of Cruelty to Animals* 1962 4 SA 543 (W) 545; *Gamlan Investments (Pty) Ltd v Trilion Cape (Pty) Ltd* 1996 3 SA 692 (C) 703I-704C; *First National Bank of Southern Africa Ltd t/a Wesbank v First East Cape Financing (Pty) Ltd*1999 4 SA 1073 (SE) 1079I-1080F.)

26. In saying this, however, I am mindful that I have been asked to find that section 26(3) of the Constitution is applicable to the eviction of students residing in residences requiring that they may not be evicted without a court order, which is an aspect that I will deal with below. Although I do not believe that it is necessary for me, in so doing, to grant any declaratory relief to this effect where this is no longer a live issue between the parties, I do intend to deal with this aspect in the course of my judgment in the public interest.

27. In *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development and Others* [2009] ZACC 8; 2009(7) BCLR 637 (CC) at para 40 it was indicated that even where an issue does not have immediate impact on the parties' positions, a court may deal with an issue if "*its immediate resolution will be in*

the public interest" . This is an approach also adopted by Van der Westhuizen J in *Zulu and Others v e Thekwini Municipality and Others* 2014 (4) SA 590 (CC) at [51]. Referring to the *Minister of Justice* case (supra) Van der Westhuizen J stated :

> " *This court has found that even when a decision lacks practical value to the parties before the Court, there are circumstances in which it may be in the interests of justice to determine a matter for broader public benefit.It has also on occasion noted that " the litigants before the Court should not be singled out for the grant of relief, but relief should be afforded to all people who are in the same situation as the litigants*". (footnotes omitted).

28. On this basis, Van der Westhuizen found that a decision by the Constitutional Court would benefit not only those in a similar situation to the shack dwellers who averred they had been evicted by the eThekwini Municipality (who had demolished their shacks and sought to relocated the residents without a Court Order allegedly because the land on which they were built was unstable and dangerous), but also the public at large.

29. In *Independent Electoral Commission v Langeberg Municipality* (CCT 49/00) [2001] ZACC 23; 2001 (3) SA 925 (CC); 2001 (9) BCLR 883 (CC) (7 June 2001), this Court, per Yacoob J and Madlanga AJ, held that:

> *"[T]he Court has discretion to decide issues on appeal even if they no longer present existing or live controversies. That discretion must be exercised according to what the interests of justice require. A prerequisite for the exercise of the discretion is that any order which the Court may make will have some practical effect either on the parties or on others. Other factors that may be relevant will include the nature and extent of the practical effect that any possible order might have, the importance of the issue, its complexity and the fullness or otherwise of the argument advanced."*

See also *Radio Pretoria v Chairperson, Independent Communications Authority of South Africa* [2004] ZACC 24; 2005 (4) SA 319 (CC) at para 22 and *Sv Bhulwana; S v Gwadiso* [1995] ZACC 11; 1996(1) SA 388 (CC) at para 32.

30. Similar considerations apply to the present matter. Although this is no longer a live issue between the parties, events have unfolded which have rendered this very much a live issue in the face of the violent student protests that have, during the course of my preparation of this judgment, again erupted at universities throughout the country. Indeed, it would seem that the month of September appears to be a key time for student protests: Since the student protests over NSFAS funding during September 2014 which sparked the current application, student protests again erupted over funding during September 2015 under the banner "*Fees Must Fall*" and have now again erupted in September 2016 following protests as a result of the intended fee hikes proposed by the universities with the students insisting that tertiary education should be "*Free For All*".

31. The current protests have become increasingly violent and I expect that issues will again arise regarding the safety and security of those students housed in student residences who may need to be "*evacuated*" and the question whether the violence could be dissipated by "*evicting*" those students involved in the violence as a way to get the instigators off campus.

32. As the question of free education is a complex political issue that it is not anticipated will be readily resolved, it is suspected that student protests will continue around this issue for many years to come until this issue is resolved. This has also not been, and will not be, the only issue that will incite student protests and it is expected that many further issues will arise that may spark violent protests. That being the case, the question whether students may be "*evacuated*" or "*evicted*" without a Court Order is a live issue not only to the parties presently before Court, but also to the many university students throughout the country who reside in residences as well as those in charge of the Universities that house them.

33. Bearing this in mind, I will deal with the issues between the parties *ad seriatim*.

Was the 12 September 2016 eviction order improperly sought *ex parte* ?

34. The respondents aver that the 12 September 2016 order was improperly sought *ex parte* and falls to be set aside both because :

34.1. material facts were disclosed; and

34.2. it is contrary to constitutional percepts that eviction orders be granted *ex parte*.

35. Again with regard to the latter contention, the remarks of Fabricius J in the *Comair matter* (*supra)* at paragraph [50] are apposite:

> *"Comair in this context relies on the provisions of s 9(1) and s 22 of the Constitution. Mr Gauntlett contended that because of the operation of the doctrine of avoidance and the principle of subsidiarity, this challenge does not properly arise. There is no doubt in our law that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is a course which should be followed. See S v Mhlungu and Others 1995 (3) SA 867 (CC) (1995 (2) SACR 277; 1995 (7) BCLR 793; [1995] ZACC 4) para 59; and Motsepe v Commissioner for Inland Revenue 1997 (2) SA 898 (CC) (1997 (6) BCLR 692) para 21. In New Clicks supra [21] para 437 the following was said F in this context:*
>
> > *'Where, as here, the Constitution requires Parliament to enact legislation to give effect to the constitutional rights guaranteed in the Constitution, and Parliament enacts such legislation, it will ordinarily G be impermissible for a litigant to found a cause of action directly on the Constitution without alleging that the statute in question is deficient in the remedies that it provides. Legislation enacted by Parliament to give effect to a constitutional right ought not to be ignored. And where a litigant founds a cause of action on such legislation, it is equally impermissible for a court to*

> *bypass the legislation and to decide the matter on the basis of the constitutional provision that is being given effect to by the legislation in question.'*
>
> *Accordingly, in relation to s 9 of the Constitution, applicant had to make out a case justiciable before this court in terms of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000. In relation to s 22, in the light of the pleadings, the applicable legislation would be the Competition Act 89 of 1998. I agree with this submission....."*

36. On this approach, should I be able to decide whether the 12 September 2016 Order was improperly sought and should be discharged and the application dismissed on the basis of the strict Rules pertaining to *ex parte* applications was breached, that should be done and it is not my function, for precedent purposes, to express a view on the constitutionality or otherwise of seeking eviction orders without notice unless this is a matter of public interest.

37. That being said, I am enjoined first to consider whether the applicant was entitled to approach the Court for an *ex parte* eviction order in this case.

38. In commenting on the requirements of good faith in *ex parte* applications, Erasmus, Superior Court Practice states at RS 2, 2016, D1-62

> *"Good faith is a sine qua non in ex parte applications. If any material facts are not disclosed, whether they be wilfully suppressed or negligently omitted, the court may on that*

> *ground alone dismiss an ex parte application. The court will also not hold itself bound by any order obtained under the consequent misapprehension of the true position. Among the factors which the court will take into account in the exercise of its discretion to grant or deny relief to a litigant who has been remiss in his duty to disclose, are: the extent to which the rule has been breached; the reasons for the non-disclosure; the extent to which the first court might have been influenced by proper disclosure; the consequences, from the point of doing justice between the parties, of denying relief to the applicant on the ex parte order; and the interest of innocent third parties such as minor children, for whom protection was sought in the ex parte application. "* (footnotes omitted)
>
> See also *MV Rizcun Trader v Manley Appledore Shipping Ltd 2000* (3) SA 776 C)

39. Should this principle be breached, the court will mark its displeasure by making a punitive order for costs. In *Schlesinger v Schlesinger* 1979 (4) SA 342 (W) an order obtained *ex parte* was set aside with costs on the scale as between attorney and client against the applicant for displaying a reckless disregard of a litigant's duty to a court to make a full and frank disclosure of all known facts that might influence the court in reaching a just conclusion.

40. The respondents aver that this duty was breached justifying a punitive order as to costs by the applicant in failing to disclose that it had been found to have illegally evicted its students during January that year and that not only had an anti- eviction order been granted against it and it had been ordered to immediately allow the students to return to their residences. It also failed to disclose that it

been called upon to show cause why it should not be found to have acted in contempt of that order and that Jansen J had granted Dladla an Order joining its vice-chancellor, registrar and deputy registrar on the grounds that it was evident that they had acted in contempt of the anti-eviction order and willfully chose not to examine their e mails so that they might disavow any knowledge of the Order which had been granted in its absence over the weekend. (See the unreported judgment of *Dladla v Tshwane University of Technology and Others* (8105/2014) [2015} ZAGPPHC 666)

41. These were matters that were highly relevant facts that should have been disclosed . In this respect it is stressed that even it transpires that the applicant is ultimately successful in this application, such non-disclosure may nevertherless warrant a punitive order of costs being made against it. *(Wilkies Continental Circus v De Raedts Circus* 1958 (2) SA 598 (SWA) at 604A–605B).

42. The respondents also aver that there was absolutely no basis for the applicant to have proceeded *ex parte*. This was because not only was the applicant fully aware that the respondents were represented and who represented them (which should also have been disclosed), but also because neither the urgency of the situation, nor the circumstances, justified such an order; there were absolutely no grounds for the averment that had notice been given

it would have defeated the purpose of the order (*Turquoise River Incorporated v McMenamin* 1992 (3) SA 653 (D) at 657D).

43. Whilst I accept that the situation was indeed urgent and the violence and destruction to property required that urgent measures be taken to curb the violence, I do not see how giving notice to the respondents' legal representatives and allowing them to be heard could have negated the relief sought.

44. Having regard to the strict requirements to secure an eviction under Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1988 (PIE), where an order for eviction is sought, this should only be sought without notice in cases of extreme urgency where there is no time to provide notice or, for some reason, if notice is given the aim of the Order will be thwarted. In such circumstances, a *rule nisi* should only be sought in the interim on the basis that notice will be given and the parties afforded a proper and expeditious opportunity to be heard *(Universal City Studios Inc v Network Video (Pty) Ltd* 1986 (2) SA 734 (A) at 753C). As a matter of principle, a person should not be evicted without notice and without being afforded an opportunity to be heard.

45. In this respect the comments of Van der Westhuizen J in the Constitutional Court in *Zulu v eThekwini Municipality and Others (supra)* from paragraph [45] are again apposite:

[45] At the very least, an eviction order could not lawfully have been issued without judicial determination that it was just and equitable to do so, considering all relevant circumstances and having allowed affected persons, especially the most vulnerable, to present evidence of their circumstances in a hearing. The order was issued without consideration of those persons whom it would impact, in obvious contravention of PIE and in direct violation of underlying constitutional rights. I would find that the interim order is unlawful and therefore unconstitutional on the basis that it negates the Madlala Village residents' rights (as well as those of unnamed others) under PIE and section 26(3) of the Constitution.

[46] Not for a moment do I doubt the seriousness of illegal land invasions. But serious too is the illegal eviction of vulnerable individuals with nowhere else to live. This was the motivation for the enactment of PIE and its protective measures which are intended to ensure due process and sufficient consideration of housing needs prior to eviction. As state organs, the respondents have failed in their constitutional obligations by repeatedly evicting (or, as the case may be, sanctioning the eviction of) the Madlala Village residents without an appropriate court order.

[47] It is not only desirable, but necessary, to reach the interim order because of the uncertainty concerning (a) future litigation in this case; (b) whether Jeffrey AJ's order will prevent further unlawful evictions arising from the interim order for all those potentially affected; and (c) the legality of orders of this type. It is true, as the main judgment points out, that, having been granted leave to intervene, the Madlala Village residents will be able to argue that the rule nisi should be discharged. This, however, does not necessarily mean that they will succeed, in which case they will again have to make a circuit through the courts. Even if they are successful, they may suffer – and have already suffered – undue prejudice from the delay….

[50] Furthermore, it is necessary that this Court establish legal certainty on orders like the interim order. This order was not an isolated or unique incident – it seems that other courts have issued similar orders, at least one of which has been found to be constitutionally problematic. Many people may well be affected by this Court's determination that it is unacceptable for court orders to sidestep the protections in PIE."

46. Having regard to this and the other comments of *Van der Westhuizen* which followed in paragraph [51] quoted above, I am fortified in my view that unless the exigency or urgency of the situation necessarily require that an eviction order be granted *ex parte*, such an order should only operate on an interim basis of short duration and, as a general rule, eviction orders should not be granted without notice.

47. The respondent's however, wish me to elevate this to a constitutional rule that, for the purposes of this application, it is not necessary for me to decide, nor should I decide unless it is an issue in the public interest. I don't believe that this case warrants my making such a finding.

48. For what it is worth, I believe that to elevate this general rule to a constitutional percept would be going too far and would not account for the myriad of situations where a Court may well find that to do so was appropriate in the circumstances. Section 26(3) of the Constitution does not provide that an eviction may not be sought without notice, only that persons may not be evicted without an order of court. Had the drafters of the Constitution wished to add a further *caveat* that such court order could not be obtained without notice to those sought to be evicted, it would have framed the section to provide that "*no one may be evicted from their home....*

without a court order made [on notice] after considering all the relevant circumstances." The fact that the court making such order is enjoined by the section to consider all the relevant circumstances, serves to confirm my view that the court approached would always have a discretion to decide, not only whether such Order should be granted, but also whether it could appropriately be granted without notice in the circumstances.

49. In the circumstances I do not accept that it would be unconstitutional for a court to ever grant such an order *ex parte*.

50. However, because I believe that an *ex parte* eviction order was improperly sought in the current circumstances, had the matter been a live issue, this alone would have entitled the respondents to have the *rule nisi* discharged and the application dismissed with attorney and client costs.

51. It is, therefor, not necessary for me to decide whether the requirements for interim relief- the balance of convenience and no adequate alternative remedy- were met.

The lawfulness of the decision taken to close the residences.

52. This issue is moot because the students have been permitted to return to their residences, the 2014 academic year has long gone,

as has the 2015 academic year. We are now well into the 2016 academic year and thus the respondents counter- application to seek a further anti-eviction order is entirely academic.

53. The respondents, however, essentially want their day in court and persist in seeking a declaratory that the eviction on 20 September 2014 by the applicant of the residence students at all of the applicant's campuses not covered by the 12 September 2014 Order was unconstitutional and illegal because an order of court was not sought or granted in respect thereto. As I have said, although I agree with Fabricius J that the courts time should be taken up in making declaratory orders sought only on the basis of principle, I am nevertheless enjoined to consider this issue for the purposes of costs and in view of the wider public interest of this issue.

54. In this respect I again refer to a judgment of Van der Westhuizen J in *Pheko and Others v Ekurheleni Metropolitan Municipality* 2012(2) SA 598 (CC) where he that although the question of mootness is important to the interests of justice, it is but one of the factors that must be taken into consideration in the overall balancing process. He held on the facts before him involving the eviction of squatters that:

> "I*[31] Indeed, if the applicants' rights were not infringed and are no longer threatened, or the applicants have no interest in*

the adjudication of the dispute, it will not be in the interests of justice to grant leave to appeal directly to this Court.

[32] It is beyond question that the interdictory relief sought will be of no consequence as the applicants have already been removed from Bapsfontein. Although the removal has taken place, this case still presents a live controversy regarding the lawfulness of the eviction. Generally, unlawful conduct is inimical to the rule of law and to the development of a society based on dignity, equality and freedom. Needless to say, the applicants have an interest in the adjudication of the constitutional issue at stake. The matter cannot therefore be said to be moot."

55. In deciding the issue before me, the cardinal question is whether the decision to summarily close the residences constituted an "*eviction*" in breach of section 26(3) of the Constitution which provides:

> " *No one may be evicted from their home…. without an order of court made after considering all the relevant circumstances."*

56. This requires an enquiry as to whether:

56.1. a student residence constitutes a "*home*" as contemplated in the section; and

56.2. the decision constituted an "*eviction*" or an "*evacuation*" as contended by the applicant .

57. If these requirements are met, it is common cause that in so far as the campuses not covered by the 12 September 2014 Order are concerned, no court order was obtained authorizing the applicant's conduct The applicant, however, disavows any reliance by it on the 12 September 2014 court order in "*evacuating*" the students, even from the Pretoria West and Garankuwa campuses, and state that this was done pursuant to the entirely separate and distinct administrative decision taken by its Council to close the residences for the October vacation some 10 days earlier than anticipated. It avers that this decision was necessary in view of its obligation as *locus parenthesis* to protect its student body as well as its staff and its property.

58. As an ancilliary to this argument, the applicant avers, relying on the principle enunciated in the *Oudekraal Estates (Pty) Ltd v The City of Cape Town and Others* (25/08) [2009] ZASCA 85; 2010 (1) SA 333 (SCA) (3 September 2009), that the respondent's counterclaim is ill-conceived and should the respondent's view this as being unlawful, its remedy was to seek to review the decision and set it aside.

59. I find the applicant's arguments in this respect to unsustainable; they amount to an *ex post facto* justification for a decision taken to close the residences in an emergency situation (for which I have a lot of sympathy) without a court order by characterizing what was

done as an administrative decision to "*evacuate*" the students from the residences.

60. Neither of these arguments assist the applicant: If the effect of the decision constituted an unlawful eviction, it is utterly irrelevant whether the applicant's actions were preceded by an administrative action or not. And, whether what was done constituted an "*evacuation*" and not an "*eviction*", I do not believe that the applicant was justified in so acting without a court order.

Is a student residence a "*home*"?

61. Much was made of the fact that in terms of the Rules and Regulations pertaining to the provision of accommodation to students in residences, they are required to vacate these residences and return home during the vacations. This is because the universities often run courses during the holidays for students who require accommodation.

62. This, however, does not apply to the September/October vacation and cannot afford any excuse for closing the residences on the pretext that by so doing, the applicant was simply anticipating the September/October vacation.

63. It also does not mean that these residences do not constitute a "*home*" for the students for some 10 months of the year within the meaning of section 26(3) of the Constitution.

64. In the leading case of *Barnett and Others v Minister of Land Affairs and Others* 2007 (6) SA 313 (SCA) at [38] onwards, it was stated:

> *"[38] This leads to the next question: can the cottages on the sites that were put up by the defendants for holiday purposes be said to be their homes, in the context of PIE? I think not. Though the concept 'home' is not easy to define and although I agree with the defendants' argument that one can conceivably have more than one home, the term does, in my view, require an element of regular occupation coupled with some degree of permanence. This is in accordance, I think, with the dictionary meanings of: 'the dwelling in which one habitually lives; the fixed residence of a family or household; and the seat of domestic life and interests' (see eg The Oxford English Dictionary 2ed Vol VII). It is also borne out, in my view, by the following statement in Beck v Scholz [1953] 1 QB 570 (CA) 575-6:*
>
> > *'The word 'home' itself is not easy of exact definition, but the question posed, and to be answered by ordinary common sense standards, is whether the particular premises are in the personal occupation of the tenant as the tenant's home, or, if the tenant has more than one home, as one of his homes. Occupation merely as a convenience for . . . occasional visits . . . would not, I think, according to the common sense of the matter, be occupation as a "home".'*
>
> *[39] Moreover, within the context of s 26(3) of the Constitution – and thus within the context of PIE – I believe that my understanding of what is meant by a 'home' is supported by Sachs J, speaking for the Constitutional Court, in Port Elizabeth Municipality v Various Occupiers 2005 (1) SA 217 (CC) para 17, where he said:*

> 'Section 26(3) evinces special constitutional regard for a person's place of abode. It acknowledges that a home is more than just a shelter from the elements. It is a zone of personal intimacy and family security. Often it will be the only relatively secure space of privacy and tranquillity in what (for poor people, in particular) is a turbulent and hostile world. Forced removal is a shock for any family, the more so for one that has established itself on a site that has become its familiar habitat.'
>
> *[40] These sentiments cannot, in my view, apply to holiday cottages erected for holiday purposes and visited occasionally over weekends and during vacations, albeit on a regular basis, by persons who have their habitual dwellings elsewhere. Thus I conclude that for purposes of PIE, the cottages concerned cannot be said to be the defendants' 'homes'."*

65. There can be little doubt that a student residence is not like holiday cottages and satisfy the requirement of a "*home*" as so defined. It is the place where they stay for the majority of the year; although they may not regard it from the point of view of their domicile as their permanent home, it is their home for the majority of the year.

66. It is utterly irrelevant whether the students have a right to student accommodation implying that they can be deprived of it simply by administrative action: the only issue is whether, having been afforded accommodation, they were unlawfully evicted therefrom without due process of law; PIE makes it clear that even illegal squatters cannot be evicted without due process. Although it is not contended that the student's occupation of the residences was unlawful, it is of some relevance to the argument that students do

not have a right to accommodation, that in determining whether there has been a spoliation, the lawfulness or otherwise of the person's occupation is irrelevant. This principle is simply that one may not take the law into one's own hands. This applies equally to the eviction of students involved in violent and unlawful student protests from the residences.

Was the effect of the implementation of the decision an "*eviction*" or an "*evacuation*"?

67. The applicant avers that in requiring the students immediately vacate their residences on less than 24 hours with the assistance of security guards (or bouncers as averred by the respondents) they were acting upon a decision to *"evacuate"* the students to protect them as their custodian in a time of emergency and imminent danger.

68. I do not dispute that the situation faced by the Council was a dire one. Buildings were being vandalized and burnt, cars were being set alight, students and staff were being intimidated and the campuses had been rendered ungovernable. The Council was required to take decisions and to act immediately to protect its property and its students and staff. It was felt that if the residences could be closed, where it was felt many of the rabble rousers were accommodated, were taken off campus, this may serve to quell the

violence. In the situation faced by the applicant, I have no doubt that this was a *bona fide* and rational decision, but the question is was it lawful. If it amounted to an eviction without an order of court, it was not.

69. The applicant has sought to get around this difficulty by characterising its decision as one to "*evacuate*" the students. But in *Pheko and Others v Ekurheleni Metropolitan Municipality* 2012(2) SA 598 (CC), the Constitutional Court set out the Municipalities contentions, which were somewhat similar to those advanced in this case at paragraph [20] ff as follows:

> *"[21]On the merits, the Municipality remains steadfast that it acted lawfully in "evacuating" the applicants from Bapsfontein under section 55 of the DMA. It contends that evacuation as a result of a "disaster" or "situation of emergency" is not an eviction within the contemplation of section 26(3) but a legitimate response to a crisis to save life or property. The "imminent" disaster, it is argued, occurring "surprisingly" or "unexpectedly", could not practically be dealt with by way of a court order.*
>
> *[21] The Municipality relies on City of Johannesburg v Rand Properties (Pty) Ltd and Others (Rand Properties) to justify the eviction of the occupiers without having complied with the relevant factors contemplated in section 26(3) of the Constitution. It sought to demonstrate that the removal is an administrative act requiring no order of court. The Municipality argues that section 26(3) has two parts: the first dealing with evictions that are subject to control by means of a court order and the second part dealing with legislation which permits an eviction but requires an eviction not to be arbitrary. It is argued that in interpreting section 26(3), one part cannot be subordinated to the other and that the section therefore permits legislation to authorise an eviction without a court order.*
>
> *[22] It is contended that the relocation was a temporary arrangement until further relocation "to either state subsidised houses . . . or to some other land". The demolition, it is contended,*

enabled the Municipality to carry out the directive and prevent the applicants from returning to Bapsfontein. Additionally, the Municipality argues that PIE does not apply because none of the applicants contend that their occupation of Bapsfontein was unlawful.

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70. Dealing with the facts before it the Court defined the issue relevant to this matter -

"[24] The key issue concerns whether the removal that occurred in this case was an evacuation under section 55 of the DMA as contended for by the Municipality. Related to this are questions of

the proper interpretation of the DMA and appropriate relief."

71. Dealing with this issue, Van Der Westhuizen held:

> *[36] Section 55(2)(d) of the DMA provides that evacuation is limited to cases where temporary action is necessary for the preservation of life. It provides:*
>
> > *"If a local state of disaster has been declared in terms of subsection (1), the municipal council concerned may, subject to subsection (3), make by-laws or issue directions, or authorise the issue of directions, concerning—*
> >
> > *(d) the evacuation to temporary shelters of all or part of the population from the disaster-stricken or threatened area if such action is necessary for the preservation of life". (Emphasis added.)*
>
> *[37] This section must be interpreted narrowly. A wide construction may adversely affect rights in section 26. The language used in section 55(2)(d) is critical. The text must be interpreted in the context of the DMA as a whole, taking into consideration whether its preamble and other relevant provisions support the envisaged construction.*
>
> *[38] Properly construed and read in conjunction with other provisions, including sections 55(1) and 2(1) of the DMA, section 55(2)(d) does not authorise eviction or demolition without an order of court. On its wording, the DMA deals with "evacuation". The word "evacuate" is generally used to describe what is done in a situation where people's lives are at risk as a result of impending "disaster". "Evacuate" means to "remove from a place of danger to a safer place." The people concerned therefore require immediate removal to a safe temporary shelter, away from the disaster area, in order to preserve their lives.*
>
> *[39] Section 55(2)(d) authorises the evacuation to temporary shelters for the preservation of life. This means that the DMA ordinarily applies only to temporary removal from a disaster stricken area to a temporary shelter. It implies that those evacuated may return to their homes, if possible. This is not the case here. Evacuation is not the equivalent of eviction, much less of a demolition. On the Municipality's own admission, no purpose would have been served by removing the applicants without demolishing their homes because they would otherwise have returned to Bapsfontein. Evidently, this is not what section 55(2)(d) sanctions.*

[40] An evacuation does not entail the demolition of peoples' homes or an indefinite removal. The DMA does not seek to achieve this. If the purpose of the DMA were to authorise demolition and eviction without an order of court, it would have said so. It does not. The forcible removal of the applicants amounts to an eviction, an indefinite removal from Bapsfontein. The deprivation is, in the circumstances, inimical to the right in section 26(3).

[41] It is true that the VGI report recommended that the residents of Bapsfontein be evacuated and relocated. The Municipality suggested that an unexpected or surprising disaster was imminent or simmering thus suggesting exigency. However, the facts do not suggest that there was any need for urgent evacuation at all. Conversely, the history of this matter shows that the Municipality never regarded the relocation of the applicants to be urgent to warrant drastic measures of unauthorised removal and demolition of shelters. This is fortified by the fact that Bapsfontein was identified as a hazardous area as early as 1986; its first sinkhole was identified in 2004; the first commissioned report was delivered in June 2005 and the second report in September 2005; no action was taken in response to these reports for four years after they were delivered, until 2009, when another report was commissioned and delivered; and only in 2010 did the Municipality finally start taking action to relocate the residents from Bapsfontein.

[42] The Municipality's powers following upon the declaration of a local state of disaster must be exercised only to the extent that it is strictly necessary for the purposes set out in section 55(3). This means that the powers concerned may not be used for purposes other than evacuation.

72. Returning to the facts of the present matter, whilst it may have been the intention that the students would be housed in the safe environment of their homes and it is stated that where students were unable to get home, arrangements were made to assist them, it must be accepted that many student found themselves stranded without notice with nowhere to stay and no financial means of returning home. It would only have been the privileged few who could have, without difficulty, simply returned to the safe environment of their homes.

73. It matters not that this was proposed as a temporary solution and it matters not that the eviction was not intended to be permanent although it must be borne in mind that it was stated that the "*evacuation*" was to be "*until further notice*"; the sole issue is whether the implementation of the decision constituted and "*eviction*" or an "*evacuation*".

74. In this respect, I do not accept that by not providing the students temporary alternative shelter this necessarily was not an "evacuation" as I believe that the Council was entitled to assume that the students would all be able to be housed in the safety of their homes, as they would during the holidays.

75. But, the applicant did not account for the fact that many of the students were not obliged to vacate the residences during the September/October vacation. Many were not intending nor had made plans to, nor could they afford to return home for the September/October vacation. It did not account for the fact that the students were not given sufficient notice of the need to evacuate them so that they could make alternative arrangements. And, even in the event of an emergency, the students did not have to manhandled out of the residences without the opportunity to collect their belongings. All in all, I believe that the "*evacuation*", if that is what it was, was badly handled without due regard, in particular, those students who had not been involved in the protests or the

violence. Even those who had been involved in the violence, could not simply be summarily told to evacuate the residences on but a few hours notice. The fact that they did not have "*clean hands*" did not entitle the applicant to take the law into its own hands.

76. In *Greyling v Estate Pretorius* supra 517, Price J stated that, if the courts do not enforce the mandament-

> *"we should soon found that the slender paradise our toil has gained for us of an ordered community had been lost and the dreadful 'reign of chaos and old night' would be upon us. The modern Montagues and Capulets . . . would soon make our streets and thoroughfares hideous with their disputes, their fighting and their brawls – turbulence and civil commotion would soon replace the law of order and decency*".

77. That being said, and with due sympathy for the predicament the applicant found itself in, it was fully aware that it could not simply "*evacuate*" the students and that is why it urgently sought a Court Order before it did so on 12 September 2014. There is absolutely no explanation why it took the view, some 8 days later, that this was not required and it could simply do so by administrative decision without recourse to the courts on the pretext that it was hereby evacuating and not evicting the students and merely advancing the impending vacation. I have already stated that this provided no excuse as the students were not anticipating that they be required to vacate their residences for this vacation, but more importantly, there is nothing to suggest what circumstances changed in those 8

days to turn the decision to require the students to vacate the residences from an "*eviction*" into an "*evacuation*" in the case of an emergency.

78. There can be little doubt that the urgent situation that prevailed that prompted the applicant to approach the court on 12 September 2014 without notice was not dissimilar to that faced by the applicant on 20 September 2014 when the violence again erupted. Yet it approached the court urgently before acting. I can see no reason why it did not again approach the Court, particularly in view of its insistence that it was not, in so acting, purporting to act in terms of the Court Order of 12 September 2014 (which in any event, applied only to two of its 6 campuses which it sought to "*evacuate*"). An urgent judge is available 24 hours a day and can be hauled out of his/her bed in the middle of night; there can seldom be so urgent a situation where it is not possible to seek and obtain a Court Order when required.

79. In this respect, I refer to Jansen J's unreported judgment in the joinder application to the contempt proceedings between Dladla and the applicant referred to above and in particular her remarks in paragraph [3] that the notice distributed by the applicant on 30 January 2014 to all students at its campuses to vacate their residences by 7.30 am on 31 January 2014 until further notice, amounted to a summary eviction of the students-

> *"without prior notice, thus breaching their basic constitutional rights to accommodation. It is important to emphasise that the mass-eviction took place, as stated, without a court order, allowing the TUT to act accordingly. It had ample opportunity to request such an order from the court but failed to do so."*

80. The learned judge also rejected the applicant's argument that the decision to require the students to vacate their residences was an administrative order. She stated at paragraph [52] that :

> *[52.... Our courts do not approach evictions as administrative actions which should be taken on review due to the drastic and unlawful nature of most eviction orders and the breach of the principle of legality "*

81. I thus, have little hesitation in finding that the applicant acted improperly in requiring the "*evacuation*" of the students without a court order.

Did the applicant act in contempt of the Court Order of 12 September 2014 in "evacuating" the students from the Pretoria West and Garankuwa campuses in not affording the students an opportunity to return to their residences should they sign a disclaimer renouncing violence?

82. I agree that the issue of contempt of an court order can never be purely academic; it is cardinal to the effective administration of justice that court orders are respected and obeyed and that litigants cannot escape the consequences of their contempt of an order on the basis that the issues behind the order have now become academic.

83. In *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA), Cameron JA (as he then was) stated the principle thus:

> [6] It is a crime unlawfully and intentionally to disobey a court order. This type of contempt of court is part of a broader offence, which can take many forms, but the essence of which lies in violating the dignity, repute or authority of the court. The offence has in general terms received a constitutional 'stamp of approval', since the rule of law – a founding value of the Constitution – 'requires that the dignity and authority of the courts, as well as their capacity to carry out their functions, should always be maintained'.

84. The question then arises whether in effecting the "*evacuation*" of the students, the applicant was in fact acting, at least in so far as the Pretoria West and Garankuwa campuses are concerned, in contempt of the 12 September 2014 Order which required that it could only evict those students who failed to sign a declaration that they renounced violence.

85. It is common cause that no such recourse was afforded to the students when they were "*evacuated*" and this was only tendered by the Council 5 days later when Dladla approached this court urgently to intervene and anticipate the return day of the *rule nisi* that had been granted. Although this remedied the contempt, if any, the respondents argue that "*contempt is contempt*", no matter for how short a period it continued for, and this court should sanction the applicant accordingly.

86. Although the Order of 12 September 2014 pertained only to the Pretoria West and Garankuwa campuses, I have little doubt that the applicant was well aware that should it wish to "*evacuate*" its students from its other residences, these same requirements would probably also apply.

87. In this respect, the applicant was in a somewhat catch- 22 situation where it had a Court order to evict students on 2 of its campuses in respect of which it was obliged to afford the students the right to return on signing an undertaking, which it did not do rendering it in contempt of the order, but no order in respect of its other campuses, rendering its eviction or "*evacuation*" of the students, unlawful .

88. I am mindful that the applicant insists that in '*evacuating*' the students, it did not purport to act in terms of the 12 September 2014 Court Order. But that fact of the matter is that with regard at least to the aforementioned campuses, it had sought the sanction of the courts to evict the students which had only been permitted on the basis that students be afforded the opportunity to return to their residences if they signed the required disclaimer, and this opportunity was not afforded to these students.

89. It was not for the applicant to choose if, and whether to enforce the Court Order. If circumstances had changed in that it now sought to

evacuate all of the students to protect their safety and not simply evict those who refused to renounce violence to quell the violence by getting the rabble rousers off campus, it should have approached the court to remove this condition on the basis that it was no longer appropriate and it needed, in the interests of safety, to get all of the students off campus. It matters not that the circumstances motivating the court order had changed. It was not for the applicant to choose whether the order was applicable or not.

90. But this in itself does not mean that the applicant acted in contempt of court. For this, it was incumbent on the respondents to provide evidence of willfulness and *mala fides*. I do not believe that there is any evidence of this. I believe that the applicant genuinely believed that the circumstances had changed justifying their evacuating all of the students from all of its campuses and although I do not believe that they were entitled to do this without a court order, it has not been established that the applicant believed that it was acting in terms of the 12 September 2014 Order- although I believe they should have realized that, having obtained such order, at least with regard to these campuses, they could not act except in terms of that Order.

91. It is, moreover, of no assistance to the applicant's that their contempt was short lived and was, after a period of only 5 days,

subsequently cured (See Jansen's judgment (*supra)* at paragraph [64] .)

92. *Lan v OR Tambo International Airport Department of Home Affairs Immigration Admissions, and Another* 2011 (3) SA 641 (GNP) it was held that:

> *"[71] However the question arises if a court can simply ignore the fact that a person for a specific period of time acted in contempt of a court order, and then thereafter, through much force and persuasion, changed his mind to then comply with the court order. Should such a person be regarded as not having committed the offence, should a court order be sought against him in that regard? I do not think so. Once the requirements of the offence have been established to have existed at a certain period in time, and once it is found that no valid offence has been raised in that regard, a positive finding should follow.*
>
> *[72] It must be kept in mind that contempt of court proceedings are not only directed towards the perpetrator, but are directed towards the protection of the courts, respect towards the courts and court orders, and the protection of the integrity of the court system. Non-compliance at a specific period in time cannot therefore simply be ignored because compliance did in fact occur at a later stage."*

93. I am mindful that the fact that the applicant's counsel tendered to allow students to return should they renounce violence as required by the 12 September 2014 Order (when Dladla approached the court to discharge the *rule nisi* and declare the applicants in contempt of court), may indicate that the applicant appreciated that, at least in so far as these campuses were concerned, it could not evict the students without affording this alternative to them and thus

may have willfully been in contempt of court. However, a finding of willfulness and mala fides on the applicant's part is a very serious finding that I cannot make on the evidence before me. It may well be that the applicant only appreciated this after the advice of its counsel when faced with this difficulty when contempt proceedings were brought and it did not, at the time of making the decision and "*evacuating*" the students, willfully act in contempt of court. In this respect, I believe that the current circumstances are somewhat different from those before Jansen J in considering Dladla's application to join the applicant's office bearers who she found had deliberately taken steps to avoid knowledge of the anti-eviction Order.

94. Although this issue was to have been decided at the extended return date during August 2016, this judgment has been reserved and I have not had the advantage of having had sight of this judgment when preparing my judgment. However, I do not believe that that judgment would affect my view that mala fides and willfulness not to comply with the 12 September 2014 has not been established in this matter.

Costs

95. Nevertheless, as I have said, it is my view that the applicant ought to have obtained a court order prior to requiring the students to

vacate their residences and it acted unlawfully in not doing so; for this it should be mulcted with costs. Because it flouted the rules of *bona fides* in approaching the court to evict the students at its Pretoria West and Garankuwa, I believe that these costs should be punitive costs.

Application for leave to intervene

96. Dladla seeks leave to intervene in these proceedings in his personal capacity on behalf of all of the students in residences at all of the applicant's campuses as a class action in the public interest as contemplated in section 38(c) of the Constitution. I do not see why he should do so. The first, second and third respondents have passed a resolution that he represent them and other than in his capacity as their representative as President of the Central Student Representative council, the CSRC, no public interest issues require that he be joined in his personal capacity to these proceedings; *a fortiori* as the proceedings are essentially moot and will have no practical effect.

97. This matter does not warrant a class action of the type envisaged by Cameron JA in *The Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government and another v Ngxuza and Others* (493/2000) [2001] ZASCA 85 (31 August 2001) where pensioners sought to secure the reinstatement *en masse* of

their cancelled state pensions through a class action in terms of section 38(c) of the Constitution He explained the purpose of a class action-

> "*In the type of class action at issue in this case, one or more claimants litigate against a defendant not only on their own behalf but on behalf of all other similar claimants. The most important feature of the class action is that other members of the class, although not formally and individually joined, benefit from, and are bound by, the outcome of the litigation unless they invoke prescribed procedures to opt out of it. The class action was until 1994 unknown to our law,*[L] *where the individual litigant's personal and direct interest in litigation defined the boundaries of the court's powers in it. If a claimant wished to participate in existing court proceedings, he or she had to become formally associated with them by compliance with the formalities of joinder. The difficulties the traditional approach to participation in legal process creates are well described in an analysis that appeared after the class action was nationally regularised in the United States through a federal rule of court*[8] *more than sixty years ago:*
>
> > "*The cardinal difficulty with joinder ... is that it presupposes the prospective plaintiffs' advancing en masse on the courts. In most situations such spontaneity cannot arise either because the various parties who have the common interest are isolated, scattered and utter strangers to each other. Thus while the necessity for group action through joinder clearly exists, the conditions for it do not. It may not be enough for society simply to set up courts and wait for litigants to bring their complaints — they may never come.*
> >
> > *What is needed, then, is something over and above the possibility of joinder. There must be some affirmative technique for bringing everyone into the case and for making recovery available to all. It is not so much a matter of permitting joinder as of ensuring it.*"
>
> *The class action cuts through these complexities. The issue between the members of the class and the defendant is tried*

once. The judgment binds all, and the benefits of its ruling accrue to all. The procedure has particular utility where a large group of plaintiffs each has a small claim that may be difficult or impossible to pursue individually…

It is precisely because so many in our country are in a "poor position to seek legal redress", and because the technicalities of legal procedure, including joinder, may unduly complicate the attainment of justice, that both the interim Constitution and the Constitution created the express entitlement that "anyone" asserting a right in the Bill of Rights could litigate "as a member of, or in the interest of, a group or class of persons".

98. Cameron JA went on to state:

"*It is the needs of such persons, who are most lacking in protective and assertive armour, that the Constitutional Court has repeatedly emphasised must animate our understanding of the Constitution's provisions. And it is against the background of their constitutional entitlements that we must interpret the class action provision in the Bill of Rights. Though expressly creating that action the Constitution does not state how it is to be developed and implemented. This it leaves to courts, which s 39(2) enjoins to promote the spirit, purport and object of the Bill of Rights when developing the common law, and upon which s 173 confers inherent power "to develop the common law, taking into account the interests of justice."*

99. Dealing with the he circumstances of this particular case, Cameron JA rejected the lower courts refusal to allow a class action stating that —

"*unlawful conduct by a party against a disparate body of claimants lacking access to individualised legal services, with small claims unsuitable for if not incapable of enforcement in isolation — should have led to the conclusion, in short order,*

that the applicants' assertion of authority to institute class action proceedings was unassailable".

100. He went on to stress that –

> *"First, this is no ordinary litigation. It is a class action. It is an innovation expressly mandated by the Constitution. We are enjoined by the Constitution to interpret the Bill of Rights, including its standing provisions, so as to "promote the values that underlie an open and democratic society based on human dignity, equality and freedom". As pointed out earlier we are also enjoined to develop the common law — which includes the common law of jurisdiction — so as to "promote the spirit, purport and objects of the Bill of Rights". This Court has in the past not been averse to developing the doctrines and principles of jurisdiction so as to ensure rational and equitable rules. In Roberts Construction Co Ltd v Willcox Bros (Pty) Ltd this Court held, applying the common law doctrine of cohesion of a cause of action (continentia causae), that where one court has jurisdiction over a part of a cause, considerations of convenience, justice and good sense justify its exercising jurisdiction over the whole cause…*
>
> *In any event, even if a strict approach would weigh against permitting inclusion of extra-jurisdictional applicants in a plaintiff class, it is plain that the Constitution requires adjustment of the relevant rules, along sensible and practical lines, to ensure the efficacy of the class action mechanism. As O'Regan J pointed out in Ferreira v Levin NO, the constitutional provisions on standing are a recognition of the particular responsibility the courts carry in a constitutional democracy to ensure that constitutional rights are honoured:*
>
> > *"This role requires that access to the courts in constitutional matters should not be precluded by rules of standing developed in a different constitutional environment in which a different model of adjudication predominated. In particular, it is important that it is not only those with vested interests who should be afforded standing in constitutional challenges, where remedies may have a wide impact."*

101. The entire class of students who reside on the Pretoria West and Garankuwa campuses have been cited as the fourth respondent. As I see it, the only basis for Dladla to intervene would be to widen this class to all students who reside at the applicant's other four campuses.

102. However, although the students at the other four campuses have not been identified as respondents and it is readily apparent that the matter before the court directly affects them as a notice to vacate the residences was sent to the students at all of the applicant's campuses and not only those cited as the fourth respondents, I do not see that justice or convenience requires that the students at all of the applicant's campuses be represented by Dlaldla in a class action. They are sufficiently represented by him in his capacity as President of the the CSRC which represents all of the students at all of the applicant's campuses which has been cited as the first respondent and there is, therefore, no need for him to independently represent these students. The SRC's of each of these individual campuses have been cited as the second and third respondents.

103. I therefore, do not think that there is any real purpose in joining the students who stay in residences at the other four campuses in a class action represented by Mr Dladla, or that justice will not be served if they are not joined. I also do not accept that it is in the public interest that they be so joined as contemplated in section 38(c) of the Constitution.

104. Although I accept the relevance of this judgment to all students residing in residences at all universities and not only TUT campuses, this is not the basis upon which Dladla seeks a class action as he seeks only to represent the class of students residing at the applicant's campuses. The fact that I have accepted that the issues that are essentially moot so far as the parties are concerned should be dealt with in the public interest, this does not require that all students residing at residences at all universities be joined in a class action in the event that similar orders to vacate the residences be issued to them. My judgment will neither bind nor entitle such students to any relief.

105. I thus do not believe that despite the fact that Dladla may have satisfied the broad requirements for a class action laid down by the Supreme Court of Appeal in the matter of *Children's Resource Centre Trust and Others v Pioneer Food (Pty) Ltd and Others* 2013 (2) SA 213 (SCA) , it would be either sensible or practical, or in the interests of justice or the public at large, for Dladla to be joined in

his personal capacity in these proceedings. As was stated in that case, -

> "*a class action is available in terms of section 38 of the Constitution if it is alleged that a right in the Bill of Rights has been infringed or threatened. It only applies directly to infringements or threats to rights in the Bill of Rights.*

106. A class action, therefore, does not apply where there is at this stage, no longer an infringement or threats to rights in the Bill of Rights to the students sought to be represented in a class action. There is no longer a live issue that justifies their inclusion in these proceedings and I thus decline to grant Dladla leave to intervene for the purposes of pursuing a class action.

Conclusion

107. Had the matter remained a live issue, I would have granted an Order discharging the *rule nisi* and dismissing the application but I am not prepared to do so where the Order will have no practical effect. I have already stated that I am not prepared to grant a blanket interdict.

108. In the circumstances, I am constrained only to make an order in the following terms:

108.1. Directing the applicant to pay the costs of the application and counter-application on the attorney and client scale.

S.M WENTZEL

ACTING JUDGE OF THE HIGH COURT, GAUTENG DIVISION, PRETORIA

Date heard: 3 June 2016

Date of the judgment: 23 September 2016

Attorney for the applicant: Jarvis Jacobs Raubenheimer Inc

Counsel for the applicant: SG Maritz

Attorney for the respondent: Lawyers for Human Rights

Counsel for the respondents: Donrich Jordaan