



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

Case No.: **7837/2020**

In the matter between:

**COMMUNITY OF HANGBERG  
GINOLA PHILLIPS**

First Applicant  
Second Applicant

and

**CITY OF CAPE TOWN  
MAYO DAN PLATO**

First Respondent  
Second Respondent

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**JUDGMENT DELIVERED ON 15 JULY 2020**

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**SALIE-HLOPHE, J:**

1] This application came before me on the urgent roll yesterday, 14<sup>th</sup> July 2020.  
Given the urgency of this matter, this judgment is of necessity brief.

2] The City of Cape Town ("the city") is the owner of erf 2844 Hout Bay ("the property"). On two occasions the City demolished a structure unlawfully erected at the property by the second applicant, Mr. Ginola Phillips. The structure, referred to as a "wendy house" on an open piece of land, situate in the midst of other wendy houses/structures in that area and which are occupied by local residents of the Hangberg Hout Bay area. The initial construction started in the first week of June, which took a few days to complete and during this time it was occupied by the applicant and his brother, or a housesitter to guard his property from theft.<sup>1</sup>

3] On Thursday 11<sup>th</sup> June 2020 he was alerted that officials of the City was breaking down the structure, he attended to the premises immediately however was not able to persuade the officers to cease the demolition. Unable to return to his mother's home due to reasons such as over-crowding exacerbated by the coronavirus pandemic he rebuilt the structure with the physical and financial/material support of members of the community. He managed to rebuild the dwelling within two days and took occupation thereof by 13<sup>th</sup> June 2020. He was in peaceful and undisturbed possession of the property when on Friday, 19<sup>th</sup> June 2020 officials from the City Council arrived at this place and in his presence, took photos thereof. Approximately a half an hour later, the officials returned and proceeded to demolish the structure.

4] It is the case of the applicant that he had been evicted from the property which he refers to as "*my place*" without any legal process having been resorted to and/or obtained and seeks restoration on the basis that he was spoliated of possession of his home and accordingly unlawfully evicted.

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<sup>1</sup> Record page 10 – paragraph 20

5] The City opposed the relief sought on the basis that the second applicant had no consent from the City to erect a structure on the property nor did he have any other right in law to do so. In an affidavit filed on behalf of the respondents, Ms. Riana Pretorius,<sup>2</sup> concedes that Mr. Phillips was quite clearly an unlawful occupier at the property as defined in the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, no. 19 of 1998 ("the PIE act"). The construction, however, was the subject of complaints on the basis that the erection was unlawful and the illegal mining of sand was causing subsidence of soil affecting property located higher up on the slope. The Anti-Land Invasion Unit served the second applicant a notice on 9 June 2020 to remove the structure and when he failed to do so the members of the said unit conducted a joint operation at the property together with members of the South African Police Services and the City's law enforcement officials when the structure was dismantled and removed. Notwithstanding the aforesaid notice, the second applicant re-erected the structure at the same place on the property which the City proceeded to demolish again on 19 June 2020.

6] The parties are clearly *ad idem* as to the background facts leading up to and including the demolition of the property. Furthermore, there is no dispute on the papers that the provisions of PIE do not apply, although counsel for the respondents argued at the hearing that the structure was not a home because Mr. Phillips did not sleep there all the time, that he had previously been resident at his mother's home, that the structure was partially built, that he built it having been informed it is unlawful to do so and that the respondent could not access the courts due to the Covid19 lockdown directives which restrained eviction proceedings. This argument is not apparent from the respondents' papers and it not only infringes on the principle of

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<sup>2</sup> Record page 41 Director of Informal Settlements and Backyarders



legality but certainly too is illogical. We are prevailing in the unchartered and unprecedented challenging times of the Covid 19 pandemic and which presents extreme hardships across our communities and the globe, but indeed most of all for our poorer communities who is the hardest affected by homelessness, unemployment and poverty to name but a few. Insulation against those hardships are appreciated by our government and reflective by the covid 19 regulations, pronouncements of our courts over the past few months and court directives, which have sought to eradicate the turmoil effects on our poorer communities. Pertinent to the matter at hand, are that evictions have been stayed both in terms of Section 36(1) of Alert Level 3 Regulations, made in terms of Section 27(2) of the Disaster Amendment Act of 2002 as well as the judicial directives.

7] The upshot of the opposition of by the respondents are that after issue and service of this application, they obliged by tendering alternative housing to the second respondent. In that way, it is argued, the second applicant's refusal to accept emergency housing situate at Oude Skip TRA together with an enhanced emergency kit to erect a structure, have access to shared water and sanitation services were unreasonable and amounts to being obstructive. In reply, the second applicant maintained that he was entitled to have the respondents rebuild the wooden structure at their costs, within 48 hours. At the hearing hereof, counsel for the applicants clarified that appropriate restoration was meant to be restoration at the same land with similar or better materials as that used since the demolition was done in a manner which completely destroyed the structure. Whilst they engaged in alternative/emergency housing discussions, same were done in good faith and ought not to be held to their prejudice in circumstances where they do not wish to accept the housing so offered.

8] The objectives of the mandament van spolie are: (a) to restore the possessions of the things previously possessed until the spoliation; (b) to put stop to unlawfully taking the law into own hands and (c) to protect the person who apparently has a possessory right in that it had enjoyed peaceful and undisturbed possession of the property and (d) prevent disturbance of public peace. Spoliation is the wrongful deprivation of another's right of possession. The aim of spoliation is to prevent of self-help. It seeks to prevent people from taking the law into their own hands. An applicant upon proof of two requirements is entitled to a mandament van spolie restoring the status quo ante. The first is proof that the applicant was in possession of the spoliated thing. The underlying cause or alleged legal basis for the possession is irrelevant. The second is the wrongful deprivation of possession. The fact that possession is wrongful or illegal is irrelevant, as that would go to the merits of the dispute.<sup>3</sup>

9] The PIE Act governs the eviction process in the event of a land invasion. Municipalities like the respondent in this case are bound by it. The process set out in the applicable legislation sets out the proper notice and processes of law that need be followed to allow a Court of law to decide on the just and equitability of the eviction that is sought. A number of fundamental constitutional rights such as the right to housing, dignity, the right against arbitrary deprivation of property and values enshrined in our Constitution recognises our unequal past. It further acknowledges the need to be conscious of past injustices which is so deeply rooted it continues to marginalise sectors of our society. These constitutional values and ethos in our

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<sup>3</sup> Ivanov v North West Gambling and Ors 2012 (6) SA 67 (SCA)

constitution form part of the cornerstone of our democracy. The PIE Act regulates eviction of unlawful occupation which is exactly the position relevant in this matter.

10] The actions of the respondents in repeatedly demolishing the home of Mr. Phillips is a sore and painful reflection of a failure to appreciate the plight of our poor communities, the hardships suffered and what can probably be described as objectifying the indigent as having no individual rights worthy of recognition. Mr. Phillips construction of his home together with being in peaceful and undisturbed possession thereof established his constitutional rights which have been zealously grabbed from him without care of his dignity and other enshrined values of our constitution, his rights in terms of our law and with his humanity simply having been commoditised. This demolition was indeed also inhumane, heartless and done with scant regard to his safety, security and health particularly in light of the Covid19 health pandemic. It bears mentioning that the challenges to government, municipalities, businesses and individuals alike in the face of the country and global pandemic of this consuming virus are overwhelming. The City as a municipality is strained and under pressure to service in accordance with its constitutional obligations, amongst others, to provide housing. However, they need to go about their affairs and utilise the manpower and infrastructure in a constitutional and lawful manner to achieve their goals. Trampling the bill of rights in its efforts to do so is not permitted. It follows that, in the absence of an eviction order and with that an order expressly stating that it is just and equitable to do so, demolitions of homes cannot be carried out lawfully and at present, during Alert Levels 3 and 4.

11] The respondents did not follow the procedure prescribed in the PIE Act. Put bluntly, they acted unlawfully. It is not without significance that there are other structures of a similar nature in the immediate surround where the home of the



second applicant was. Whilst the City claims that this property is on an environmentally protected sand dune,<sup>4</sup> there is no suggestion that the other structures were similarly causing harm. I find this inconceivable given that the structures are in very close proximity as per the case of informal settlement. It is not in dispute that the layout of the area is depicted correctly as per the photo depicted on record page 137. No similar action by the City was taken in terms of those structures, nor are any averments made by the respondents to that effect.

12] The second applicant seeks relief to have the structure re-erected. It is common cause that this was a wooden structure, also known as a wendy house capable of being reconstructed with ease as it does not require a concrete foundation. The reconstruction should not pose any difficulty to the respondents, in fact, two things are significant from the record:

- 12.1 They took photos prior to the demolition;
- 12.2 The City ably aided by an army of law enforcement officers saw and observed the structure in question upon unlawfully charging upon its demolition. In other words, they are fully au fait as to what it looked like and to the position it ought to be restored.

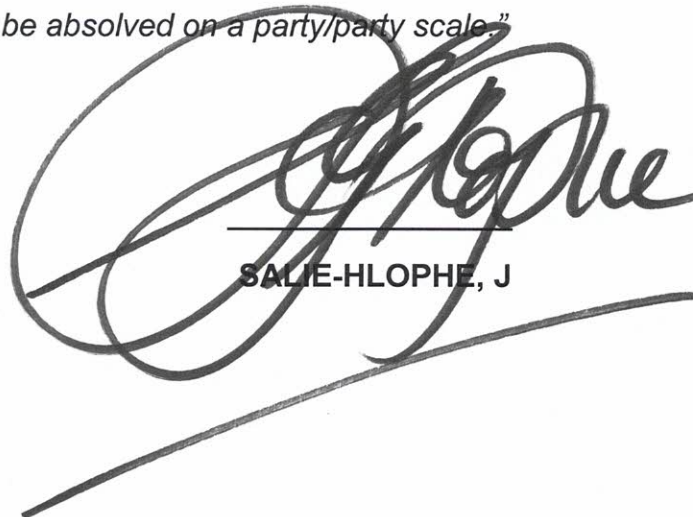
13] It is noteworthy that members of the Hangberg community support this application. To that end a petition is placed before the Court supported by 147 members of the community which illustrates the ubuntu of the community and the solidarity to the plight of housing. Other than alleging that they support the allegation, which support is noted by this Court, they do not seek relief or any redress from this Court.

14] In all circumstances of the case and for the reasons set out above, the application succeeds. Wherefore I make the following order:

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<sup>4</sup> Record page 43

- (i) *The actions and conduct of the first respondent in demolishing and/or dismantling the wendy house structure erected by second applicant in Karbonkel Road, Hangberg within the Hout Bay area on 11 and 19 June are unlawful and unconstitutional.*
- (ii) *The destruction and demolishing of second applicant's wendy house structure by the first respondent amounted to an eviction and violation of Section 36(1) of Alert Level 3 Regulations, made in terms of Section 27(2) of the Disaster Amendment Act of 2002.*
- (iii) *The respondents and/or its duly appointed officials are directed to rebuild a similar wooden structure of the same size and dimensions of the demolished structure of the second applicant as had been dismantled on 19 June 2020 within 48 hours from the granting of this order.*
- (iv) *The respondents shall file a completion and confirmation of handover to the second applicant of the structure report with an accompanying affidavit confirming compliance with paragraphs (iii) above to be placed before the Chief Registrar by email to [RDavid@judiciary.org.za](mailto:RDavid@judiciary.org.za) and this court's registrar [GMartin@judiciary.org.za](mailto:GMartin@judiciary.org.za) by 14h00 on Friday, 17 July 2020.*
- (v) *The respondents are ordered to pay the costs of this application jointly and severally, the one paying the other to be absolved on a party/party scale."*



SALIE-HLOPHE, J