THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 1337/2022

368/2023

In the matter between

THE CITY OF CAPE TOWN	**APPELLANT**
and	
THE SA HUMAN RIGHTS COMMISSION	**FIRST RESPONDENT**
THE HOUSING ASSEMBLY	**SECOND RESPONDENT**
BULELANI QOLANI	**THIRD RESPONDENT**
THE ECONOMIC FREEDOM FIGHTERS	**FOURTH RESPONDENT**
THE PERSONS WHO CURRENTLY OCCUPY ERF 544 PORTION, 1 EMFULENI	**FIFTH RESPONDENT**
ABAHLALI BASEMJONDOLO MOVEMENT	**AMICUS CURIAE**

Neutral citation: *City of Cape Town v The South African Human Rights Commission and Others* (1337/2022; 368/2023) [2024] ZASCA 110 (10 July 2024)

Coram: MOCUMIE, MOTHLE and MEYER JJA and KOEN and COPPIN AJJA

Heard: 07 MAY 2024

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Supreme Court of Appeal website, and release to

SAFLII. The date and time for hand-down is deemed to be 11h00 on 10 July 2024.

Summary: Property law – common law defence of counter-spoliation – ambit and requirements of counter-spoliation – whether the interpretation of counter-spoliation adopted by the high court is correct – whether, in the circumstances, the City had a right to counter-spoliate in light of the Bill of Rights, ss 10, 14*(c)* and 26 (3) of the Constitution of the Republic of South Africa.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Saldanha, Dolamo and Slingers JJ, sitting as a court of first instance):
The appeal is dismissed with costs, including the costs of two counsel where so employed.

JUDGMENT

Mocumie JA (Mothle JA, Meyer JA, and Koen and Coppin AJJA concurring):

[1] This appeal concerns the question whether a municipality, as a local sphere of government[1], can counter-spoliate when homeless people invade its unoccupied land. If so, under which circumstances can it justifiably do so without resorting to one of the available remedies under our law.[2] Furthermore, whether counter-spoliation requires court supervision. And if so, how or to what extent? The appeal is from the Western Cape Division of the High Court (the high court) with leave of the court *a quo*.

[2] The appeal has its genesis in the City of Cape Town (the City), removing many homeless people who had invaded several pieces of its unoccupied land. The removals took place between April and July 2020 without an order of court. The City's Anti-Land Invasion Unit (the ALIU) acting on behalf and on instructions of the City, demolished their homes, structures and or dwellings, commonly referred to as shacks, consisting of corrugated iron sheets, and others made of plastic sheets, cardboard boxes and wooden pallets. It also destroyed some of their belongings found inside those structures. Some people were injured in the process, while others were treated in the most undignified and humiliating manner.

[1] As contemplated in s 151 (1) of the Constitution of the Republic of South Africa,1996.
[2] *Mandament van spolie* or an ordinary interdict, or a remedy under the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998.

[3] On 8 July 2020, as a result of this conduct on the part of the City, the South African Human Rights Commission (the Commission), approached the high court for urgent interlocutory relief, on behalf of the homeless people. Relief was sought in two parts. Part A served before Meer and Allie JJ, who on 25 August 2020 interdicted the City from removing the land occupiers from the land, pending the finalisation of Part B, and directed that certain compensation be paid. In respect of the declaratory relief in Part B, the City sought to justify its conduct with reliance on the common law remedy of counter- spoliation, which, in certain circumstances may permit a party, *instanter*, to follow up and retrieve possession of that which it has been despoiled of. This is what is on appeal before this Court. The second to fourth respondents thereafter sought and obtained leave to intervene as interested parties in the proceedings. The Abahlali Basemjondolo Movement sought leave to join as *amicus curiae,* and although initially opposed by the City, their application was granted.

[4] The City was partially successful on appeal to this Court in respect of Part A in so far as the order for the payment of compensation was set aside. Part B was heard by a specially constituted court of three judges (Saldanha, Dolamo and Slingers JJ). In a written judgment delivered on 15 July 2022, the high court held as follows:

'159.1 **Prayer 1 of the amended notice of motion and Prayer 4.2 of the relief sought by the intervening applicants**

159.1.1 The conduct of the first respondent, the City on the 1st July 2020 is declared to have been both unlawful and unconstitutional in respect of the attempted demolition and eviction of Mr Bongani Qolani from the informal structure that he occupied at Empolweni;

159.1.2 The conduct of the City in the demolition of structures (and effective eviction of persons affected thereby), based on its incorrect interpretation and application of the common law defence of counter spoliation on erf 18332 Khayelitsha (the Empolweni/Entabeni site) in Khayelitsha is declared to have been both unlawful and unconstitutional;

159.1.3 The conduct of the first respondent, the City in respect of the demolition of structures (and the effective eviction of persons affected thereby) on land that belonged to the Hout Bay Development Trust on erf 5144 prior to it having obtained the permission from the Trust to lawfully conduct counter spoliation operations on the property belonging to the Trust is declared to have been both unlawful and unconstitutional;

159.1.4 The conduct of the first respondent, the City is declared to be both unlawful and unconstitutional in respect of the demolition of structures (and the effective eviction of persons

affected thereby) on erf 544, Portion Mfuleni prior to having obtained permission from Cape Nature on the 8 July 2020 to assist it with conducting lawful counter spoliation operations; and

159.1.5 The first respondent, the City is ordered to pay the costs of the three applicants and intervening applicants in respect of the relief in prayers, 1.1 to 1.4 inclusive including the costs of two counsel where so employed.

159.1.2 Prayer 2 of the amended notice of motion

159.1.2.1 The relief sought by the applicants and to the extent supported by the intervening applicants against the 4th ,5th and 6th respondents, the police respondents, is dismissed; and

159.2.2 No order as to costs is made in respect of the relief in prayer 2.1 of the amended notice of motion.

159.1.3. Prayer 3 of the amended notice of motion

159.1.3.1 The relief sought in terms of prayer 3 is covered by the order we make in respect of prayer 6 of the amended notice of motion.

159.1.4. Prayer 4 of the amended notice of motion

159.1.4.1 The relief sought in terms of prayer 4 of the amended notice of motion is covered by the order we make in respect of prayer 6 of the amended notice of motion.

159.1.5. Prayer 5 of the amended notice of motion

159.1.6. It is declared that the first respondent (the City)'s ALIU is not *per se* unlawful provided that, in discharging its mandate to guard the City's land against unlawful invasions, it acts lawfully.

159.1.7. Prayer 6 of the amended notice of motion

159.1.7.1 We reiterate that counter spoliation, properly interpreted and applied, is neither unconstitutional nor invalid. However, the APPLICATION of counter spoliation, incorrectly interpreted and applied by the City, is inconsistent with the Constitution and invalid insofar as it permits or authorises the eviction of persons from, and the demolition of, any informal dwelling, hut, shack, tent, or similar structure or any other form of temporary or permanent dwelling or shelter, whether occupied or unoccupied at the time of such eviction or demolition.

159.1.8. Prayer 7 of the amended notice of motion

159.1.8.1 The application to review and set aside the decision by the City to issue Tender No 3085/2019/20 and to the extent necessary, any decision to award and implement the tender, on the ground that it is unlawful, arbitrary and/or unreasonable, is dismissed.'

[5] The judgment of the high court has been reported *sub nom South African Human Rights Commission (SAHRC) and Others v City of Cape Town and Others*

(8631/2020).[3] It is accordingly not necessary for the facts or litigation history which has been set out therein to be repeated here.

[6] In its judgment, the high court, with reference to the '*instanter*' requirement of counter-spoliation, held that:

'A narrow interpretation and application of *instanter* is preferable because it is consistent with the common law and the constitutionally enshrined Rule of Law. The very label of counter spoliation is indicative that its objective is to resist spoliation and that it may be resorted to during the act of spoliation. Furthermore, the description of counter spoliation indicates that it must be part of the *res* gestae or a continuation of the spoliation - thus giving guidance to what is meant by *instanter.* Counter spoliation is no more than the resistance to the act of spoliation. Therefore, it follows that once the act of spoliation is completed and [the] spoliator has perfected possession, the window within which to invoke counter spoliation is closed.'[4]

[7] The high court deemed it unnecessary to decide the issue of the constitutionality of counter-spoliation, as initially sought by the Commission and the intervening parties. Before this Court, counsel agreed that although the Commission approached the high court on that basis (the constitutional attack), the Notice of Motion was amended substantially, and the issue had been narrowed down to whether the City satisfied the requirements of counter-spoliation in the circumstances. The appeal proceeds on that basis.

[8] The crisp issue therefore is whether the high court was correct to find that the City applied counter spoliation incorrectly? In other words, that the City had not acted *instanter* under the circumstances, and thus was not justified to have counter- spoliated under the prevailing circumstances, with the consequential damage to the unlawful occupiers' homes, structures, property and in some cases, their injuries, and the impairment of their dignity, especially in the case of Mr Qolani, the third respondent.

[9] This Court in *Tswelopele Non-Profit Organisation and Others v City of Tshwane*

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[3] *South African Human Rights Commission and Others v City of Cape Town and Others* [2022] ZAWCHC 173; [2022] 4 All SA 475 (WCC); 2022 (6) SA 508 (WCC).
[4] Ibid para 62.

Metropolitan Municipality,[5] when considering whether there was a need to reconsider the *mandament van spolie* and related remedies in the light of the provisions of the Constitution, stated the following, which remains good law:

'The Constitution preserves the common law, but requires the courts to synchronise it with the Bill of Rights. This entails that common law provisions at odds with the Constitution must either be developed or put at nought; but it does not mean that every common law mechanism, institution or doctrine needs constitutional overhaul; nor does it mean that where a remedy for a constitutional infraction is required, a common law figure with an analogous operation must necessarily be seized upon for its development. On the contrary, it may sometimes be best to leave a common law institution untouched, and to craft a new constitutional remedy entirely.'

[10] In *Silberberg and Schoeman's The Law of Property,*[5] the authors state that '[a]s a general rule, a possessor who has been unlawfully dispossessed cannot take the law into [their] hands to recover possession. Instead, [they] will have to make use of one of the remedies provided by law, for example the *mandament van spolie*.[6] But if the recovery is forthwith (*instanter*) in the sense of being still a part of the act of spoliation, then it is regarded as a mere continuation of the existing breach of the peace and is consequently condoned by the law. This is known as counter- spoliation (*contra spolie*).' It is thus an established principle that counter- spoliation is not a stand- alone remedy or defence and does not exist independently of a spoliation.

[11] As the authors explain, it is clear that counter-spoliation is only permissible where: (a) peaceful and undisturbed possession of the property has not yet been acquired, ie when the taking of possession is not yet complete; and (b) where the counter-spoliation would not establish a fresh breach of the peace. Once a spoliator has acquired possession of the property and the breach of the peace no longer exists, counter-spoliation is no longer permissible. The person who seeks to counter-spoliate, in this case the City, must show two requirements: (a) the (homeless) person was not in effective physical control of the property (the possessory element); and (b) thus, did not have the intention to derive some benefit from the possession (the *animus*

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[5] *Tswelopele Non-Profit Organisation and Others v City of Tshwane Metropolitan Municipality* [2007] ZASCA 70; [2007] SCA 70 (RSA); 2007 (6) SA 511 (SCA) para 20. (Citations omitted).
[5] G Muller et al *Silberberg and Schoeman's The Law of Property* 6 ed (2019) at 353.
[6] *Mandament van spolie* is a common law possessory remedy which is used to restore possession that was unlawfully lost. It means a person disposed of their possession must approach a court of law first with an application to restore their possession.

element).

[12] This means, if a homeless person enters the unoccupied land of a municipality with the intention to occupy it, the municipality may counter-spoliate before the person has put up any poles, lines, corrugated iron sheets, or any similar structure with or without furniture which point to effective physical control of the property occupied. If the municipality does not act immediately(*instanter*) before the stage of control with the required intention is achieved, then it cannot rely on counter-spoliation as it cannot take the law into its own hands. It will then have to seek relief from the court, for example by way of a *mandament van spolie,* an ordinary interdict, or pursue a remedy under the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE).

[13] In the seminal judgment of *Yeko v Qana* (*Yeko*),[7] this Court referred to:

'. . . [S]elf-help if it concerns *contra* spoliation which is *instanter* resorted to, thus forming part of *res gestae* in regard to the despoiler's appropriation of possession, as would be the immediate dispossession of a thief of stolen goods when he was caught *in flagrante delicto*. . . The very essence of the remedy against spoliation is that the possession enjoyed by the party who asks for the spoliation order must be established. As has so often been said by our Courts the possession which must be proved is not possession in the juridical sense: it may be enough if the holding by the applicant was with the intention of securing some benefit for himself.'

[14] To re-affirm that counter-spoliation remains part of our law, this Court in *Fischer v Ramahlele* (*Fischer*)[8] stated that:

'[L]and invasion is itself an act of spoliation. The Constitutional Court has recently reaffirmed that the remedy of the *mandament van spolie* supports the rule of law by preventing self- help. A person whose property is being despoiled is entitled *in certain circumstances* to resort to counter spoliation.' (Emphasis added).

[15] In *Residents of Setjwetla Informal Settlement v City of Johannesburg:*

[7] *Yeko v Qana* 1973 (4) SA 735 (A) at 379C-E.
[8] *Fischer and Another v Ramahlele and Others* [2014] ZASCA 88; 2014 (4) SA 614 (SCA); [2014] 3 All SA 395 (SCA) para 23.

Department of Housing, Region E,[9] the City of Johannesburg began to demolish the informal structures three days after the occupiers had taken possession of the land and commenced construction. The court found that the unlawful occupiers had acquired possession of the shack sites and that this possession was perfected. Therefore, the City of Johannesburg could not invoke counter-spoliation as a defence. The court reasoned that the occupiers had commenced constructing shacks on the respondent's land; they had driven poles into the ground; perhaps wrapped corrugated iron around some of those; and perhaps fixed roofing material on top of those. This implied further that the occupiers moved around on the land while they were constructing their structures and that their own movable assets were affixed with a measure of permanence, so that it could afford them effective protection against the elements.

[16] This judgment was criticised by academics for not addressing counter- spoliation pertinently,[10] and is of not much assistance on the issue before this Court. However, the underlying principle remains; once a person had brought material on the land to manifest their intention to derive some benefit from it, they may have manifested their peaceful and undisturbed possession of the land and the original breach of the peace would have been completed. In such instance, the *instanter* requirement of counter-spoliation would fail. If the City failed to act *instanter*, it could not thereafter successfully invoke counter-spoliation as a defence.

[17] Before us, counsel for the City submitted that the City was justified to counter unlawful invasions by removing invaders without any order of court: (i) where persons are in the process of seeking to unlawfully occupy land and it takes action to prevent them from gaining access to the targeted land; (ii) where persons have gained access to the land unlawfully and are in the process of erecting or completing structures on the land and it takes action to prevent structures being erected or completed on the land; and (iii) completed structures have been erected on the land and it is clear that

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[9] *Residents of Setjwetla Informal Settlement v City of Johannesburg: Department of Housing, Region E* [2016] ZAGPJHC 202; 2017 (2) SA 516 (GJ) paras 11, 12 and 15.

[10] J. Scott *'The precarious position of a landowner vis-à-vis unlawful occupiers: common-law remedies to the rescue?*' (2018) *TSAR* 2018:(1) 158 at 161. This view is also supported by Muller and Marais in their article: *'Reconsidering counter-spoliation as a common-law remedy in the eviction context in view of the single-system-of-law principle'* 2020 *TSAR* 2020:(1) 103 at 110.

such structures are unoccupied, and it takes steps to prevent the structures from being occupied.

[18] Counsel submitted further that this was the case because counter-spoliation has not been declared unconstitutional and referenced this to the judgment of this Court in *Fischer.* He submitted that to expect anything more means the City must follow the *mandament van spolie* route, or an application in terms of PIE; either under s 5 (the urgent application) or s 6, but that by the time the court grants the order, the invaders would have settled on the land. Then the prerequisites of PIE will fall into place. The City will be bound to, amongst others, first provide alternative accommodation for the unlawful occupiers and consult and negotiate, establish whether there are children and women who will be affected, and the many other requirements as provided for in s 4 of PIE. That is more onerous and the City cannot afford any of such options under its current budget. It has a long list of people waiting for houses for the next 70 years.

[19] He submitted that on the issue of the discretion to be exercised by the City's delegates who carry out the evictions; they do so in an as humane as possible manner; under trying and sometimes violent circumstances; and, the presumption must be that their power will not be abused. And the courts must accept that they do so, bearing in mind the warning the Constitutional Court issued in *Minister of Health and Another v New Clicks South Africa*,[11] that there was only limited scope for reviewing the exercise of delegated powers on the grounds of 'unreasonableness'.

[20] He contended that if this Court acknowledges that counter-spoliation remains part of our law and this should be the end of the matter. The next enquiry must then be, should the rule be applied *a priori* in each and every case regardless of the different circumstances as the high court did on these facts, or rather on a case-by-case basis. He contended that it should be on a case-by-case basis.

[21] Counsel for the Commission, and the second and third respondents, submitted that *Yeko* remains authority to date; that once the occupiers brought building material

[11] *Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others* [2005] ZACC 14; 2006 (2) SA 311 (CC); 2006 (1) BCLR 1 (CC) para 104.

onto the land and the City did not act *instanter*, the City could not thereafter invoke counter-spoliation.

[22] Counsel pointed out one instance, amongst many others which are not necessary to enumerate, that of Erf 5144 Kommetjie Township, Ocean View where the City was not the owner and thus did not have the right to 'evict' anyone from that piece of land. The occupiers had been on the land for over three months. Yet, the City's officials removed them without invoking PIE's strict requirements. Only thereafter did the City obtain the consent of the lawful owner, the Ocean View Development Trust, through its trustees, to have acted in the owner's stead. He contended that this anomaly pointed to the difficulty the City will always find itself in as it tends to leave this important function to junior officials to exercise a discretion, which involves balancing the socio-economic rights of vulnerable people in the position of the unlawful occupiers in this case *vis-a–vis* the City with all its resources. The City has provided no guidelines to these officials to ensure that they do not abuse their powers. The better option, so counsel contended, was to have the City and its officials acting under the supervision of the courts, when acting in land invasion cases.

[23] Counsel for the fourth and fifth respondent supported the submissions of the Commission and the other respondents. He submitted in his heads of argument, that although the constitutional attack was abandoned, the respondents maintained that the appeal was about what was a constitutionally appropriate response to what can be interpreted as the lawlessness of the previous regime, under the Prevention of Illegal Squatting Act 52 of 1951. This draconian piece of legislation which provided sweeping measures to control the movement of black people in and around urban areas, was long ousted in its entirety and replaced by progressive legislations. To allow structures to be removed forcibly would, he argued, allow the City to continue acting as local authorities of those times did prior to the dismantling of those draconian and humiliating laws.

[24] Counsel submitted that the approach the City wanted to adopt, that of 'trust us', cannot be correct. This 'trust us' approach meant that the City should be left on its own and without court supervision on how to respond to instances of unlawful occupation of land - even when an invasion had become completed and amounted to 'peaceful

and undisturbed' possession and/or a structure had become a home. That would be the result if the City was to continue with its 'demolitions by sight policy' where its ALIU demolishes what they determine, merely by sight, to be an unoccupied structure.

[25] Counsel argued that this approach is bedeviled by the wide exercise of arbitrariness in the decisions of the City. In any event, considering the volatility of every land invasion, where members of the ALIU and the land invaders clash, resultant disputes should be resolved by a court of law. The City cannot be left to be judge and executioner in its own case. Instead, a judicially supervised process of removal of structures would not only be appropriate, but constitutionally mandated, so the argument continued.

[26] He submitted that the affidavit of Mr Jason Clive Buchener (Mr Buchener), filed on behalf of the City, did not explain how the City determines what is an occupied or unoccupied structure, except by sight and in the subjective opinion of the ALIU staff. The City is adamant that its staff know what is unoccupied and what is occupied, because they receive training. However, it did not take the court into its confidence about what training it provides to them to determine whether a structure is occupied or not, and whether any due process is observed when the ALIU decides to demolish a structure.

[27] Counsel for the *amicus curiae (amicus)* accepted that counter-spoliation remains a lawful remedy, that is not unconstitutional, and, if applied strictly in accordance with the requirements set out in *Yeko*, there would be no need to either develop the common law or to declare it unconstitutional. He contended that by bringing building material onto the land and commencing construction of the informal structures, the land occupiers physically manifested their peaceful and undisturbed possession of the land and the original breach of the peace would have been completed and the *instanter* requirement of counter-spoliation would have lapsed. In other words, if the City or the despoiled failed to act *instanter,* they could not thereafter invoke counter-spoliation as a defence. Consequently, any act of dispossession from that stage would not be a defence against spoliation but would itself amount to an act of spoliation.

[28] Counsel for the *amicus* contended further that the judgment of the high court accords with the values underpinning the Constitution, the right to dignity and the right to housing. The Constitution makes no distinction between unlawful occupiers as defined in progressive legislation such as PIE, and land invaders. Such an approach would also take into account the socio-economic factors of the most vulnerable of society. This approach, they submitted, ensures that the City will in all cases operate within parameters determined by the judicial oversight of the courts, and not as the City deemed fit, or at the whim of junior officials who have no regard for the plight of marginalised people who have no resources to seek recourse from courts when the City imposes its might on them, as it did in respect of the evictions under consideration.

[29] This approach is consistent with the underlying rationale of the *mandament van spolie,* which is the prevention of self-help and the fostering of respect for the rule of law. It would also encourage the establishment and maintenance of a regulated society, as it limits the period and circumstances within which a party may take the law into his/her own hands.[13]

[30] Applying the above principles to these facts, the question for determination is, did the City satisfy the two requirements of counter-spoliation when the homeless people moved onto its unoccupied land between April and July 2020. In the founding affidavit of the Commission, deposed to by Mr Andrew Christoffel Nissen (Mr Nissen) dated 3 July 2020, he makes reference to what Mr Buchener, a senior field officer in the ALIU,[14] stated under oath. It is important to quote what Mr Buchener stated verbatim:

'The members of the ALIU were present from the moment the demolition of structures began. *Each structure was personally inspected by us before it was demolished*. Not a single structure was occupied. None of the unlawful occupiers including the applicants have the protection of section 26(3) of the Constitution of the Republic of South Africa, 1996, Act No 108 of 1996 ("*the Constitution*") and the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, No. 19 of 1998 ("*the PIE Act*") in so far as the property is concerned. *Some of the structures which were taken down by the contractor were complete and others were still in the process of being erected. Some just had frames while others lacked roofs, doors and/or*

[13] Op cit fn 9 above para 17.
[14] This was the same affidavit used in support of the City's opposition to the relief sought by Ms Nkuthazo Habile and others, in the urgent application brought in the high court.

windows. All of the structures which were taken down at the property by the contractor were either partially built or complete, but none were occupied. One could see that nobody occupied the structures or that it constituted a home. *We also saw people carrying items of furniture and placing it in structures while we were present at the property*. . .
The attempts to erect structures at the property on 8, 9, 11 and 12 April 2020 were part of an orchestrated land grab. The City was able to counter spoliate and this was the only means at its disposal to save the property from being unlawfully occupied. Any undertaking in the form requested by the applicants will result in the City not being able to counter spoliate. This is tantamount to giving the applicants free rein to unlawfully occupy the property while the City's hands are tied. Had the City not counter spoliated more land would have been lost to the City in addition to those properties described in the affidavit of Pretorius. The *structures demolished at the property did not constitute a home within the meaning of the PIE Act or section 26(3) of the Constitution*. . .

Paragraph 6 of this letter [a reference to a letter by the applicants' attorneys in that matter] makes the sweeping averment that "a demolition amounts to an eviction". The statement is not only nonsensical but not borne out by the facts of this matter. Several of the structures demolished by the City at the property were partially built, unfit for habitation and none of the structures were occupied. Self-evidently, no eviction took place. The deponent appears to conflate a demolition with an eviction. I reiterate that no evictions occurred at the property. The structures that were demolished were unoccupied and did not constitute anyone's home.

I have explained the presence of furniture or personal possessions at the property and these averments are denied. The fact that a structure may contain an item of furniture or personal possessions does not mean that it constitutes a home. It bears emphasis that land grabs occur very quickly. Unlawful occupiers often go to great lengths in an attempt to establish that a structure is occupied when in truth and in fact this is not the case. We saw furniture and other possessions being placed into structures while we were busy with the demolition of unoccupied structures on the above dates. These goods were later removed by the unlawful occupiers and appear on some of the pictures. This was clearly orchestrated to in an attempt to make out a case that an eviction had occurred. . .

It is denied that the structures demolished by the City at the property constituted homes. The City was entitled to counter spoliate when the property was unlawfully invaded on the said dates in April. It did not require an eviction order to do so.' (Emphasis added).

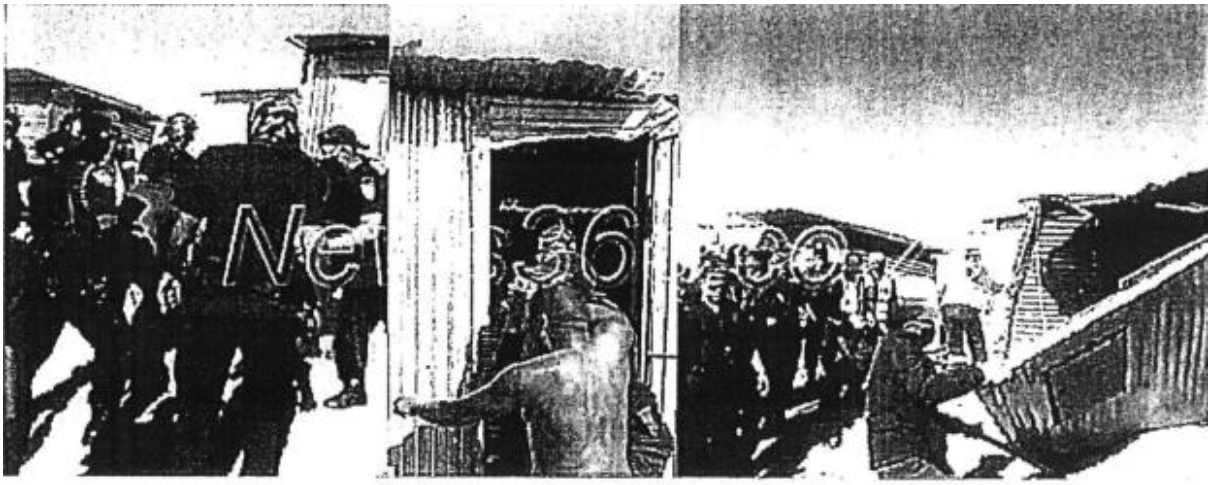
[31] From this excerpt, and on the City's own admission, there were structures already erected on the City's land upon the AILU's arrival on the land. They moved

onto the land to demolish them. This means the possessory element was already completed. The City did not know for how long those structures were there. There was no evidence that the alleged land invaders had just moved on to the land with some materials, but that they had not yet commenced any construction, did not occupy, or did not intend to occupy the structures found there. On the contrary, having regard to the extent of completion of some of the structures, as narrated, if not homes as contemplated in the PIE Act, the structures had assumed permanence and were of a nature consistent only with an intention to occupy permanently, and the invaders were therefore in peaceful possession.

[32] What is clear from Mr Buchener's affidavit is that the demolition by the AILU staff followed upon mere visual impression, in the exercise of their subjective discretion, with no reference to any objective guidelines, or the guidance of superiors perhaps more sensitive to the socio-economic circumstances of marginalised people. Despite finding people occupying some of the structures put up on the City's land, Mr Buchener and the ALIU staff still dismantled those structures.

[33] In Mr Buchener's own words, some of the structures were well-structured, had furniture, but were, in his opinion, 'unoccupied'. Other shacks that were demolished were partially constructed. In other instances, as in the case of Erf 5144 Kommetjie Township, Ocean View, as the City conceded, it was not the owner of the land from which it removed the homeless people. It only sought the owner's consent to act as it did after the removal, to justify its unlawful conduct. In another instance, some members of the police who assaulted some of the homeless people were subsequently internally disciplined. In the most glaring of the incidents, Mr Qolani was dragged naked out of his well-structured shack, contradicting Mr Buchener's sworn declaration that the structures that were demolished were all unoccupied.

[34] The picture below shows existing and complete structures being torn down. It leaves no doubt that the City did not act *instanter* in the captured circumstances. The occupants of the structures were removed from already erected structures, who, like Mr Qolani, regarded them as their homes.



[35] *Fischer*[16] made no definitive pronouncement on the constitutionality of counter- spoliation. This is recognised where the learned Justices Wallis and Theron, writing jointly for the unanimous Court, stated:

'The second issue raised the question of the relationship between PIE and the right of the lawful owner and possessor of land under both s 25(1) of the Constitution and by virtue of the *mandament van spolie*. There is a potential tension between the two, the resolution of which is by no means easy. In addition it raised the question of how local authorities may respond to conduct constituting a land invasion and the extent to which they or the police may intervene in such situations. Yet these issues were resolved without having been addressed in the papers and without any factual input as to the implications of a decision one way or the other from any party or an *amicus curiae*. There are many bodies that would be affected by or interested in its resolution and which would have been in a position to assist the court with information and legal submissions. That is evidenced by the fact that in this Court two bodies with conflicting interests and submissions intervened as *amici*, namely Abahlali Basemjondolo Movement SA, which was assisted by SERI Law Clinic, and the City of Johannesburg Metropolitan Municipality. Courts should not resolve issues of such public importance without affording all interested parties the opportunity to participate in the proceedings so as to ensure that the court is as well-informed as possible about the implications of its decision.

The court below appears to have been oblivious to these difficulties. It came to its decision without referring to any of them. That decision, as is apparent from the heads of argument furnished to us, was potentially far-reaching.'

[16] Op cit fn 8 above paras 21 and 22.

[36] From the above it is clear, as the high court correctly held, that the problem lies with the application of the principles of counter-spoliation by the City in the context of land incursions/invasions. The appropriateness of the time within which to counter spoliate, is left wholly within the discretion of the City's employees and agents. This is often capricious and arbitrary and cannot be legally countenanced. In *Ngomane and Others v City of Johannesburg Metropolitan Municipality*[17] this Court stated:

'What is clear however, is that the confiscation and destruction of the applicants' property was a patent, arbitrary deprivation thereof and a breach of their right to privacy enshrined in s 14*(c)* of the Constitution, 'which includes the right not to have … their possessions seized'.

Similarly, on the facts in this appeal, the conduct of the City's personnel did not only constitute a violation of the occupants' property rights in and to their belongings, but also disrespectful and demeaning. This obviously caused them distress and was a breach of their right to have their inherent dignity respected and protected.

[37] The City has a housing backlog which it must reduce in the next 70 years with a limited budget and an overwhelming demand for housing. That, however, cannot justify the City not satisfying the requirements of counter-spoliation if it wants to invoke same. In the event that the City does not act *instanter*, as in this instance, it should approach the courts to obtain remedies legally available to it. Furthermore, the City must invest in training and equipping the ALIU and its relevant personnel with sensitivity training, to recognise that people's rights should be respected and they should not be abused during removals.

[38] In sum, and to answer the questions postulated in the opening paragraph of this judgment, at the level of general principle - a municipality, might be able to successfully counter-spoliate when homeless people invade its unoccupied land in certain circumstances. It will be justified to do so, without resorting to the *mandament van spolie* or an interdict or under PIE, because counter-spoliation is not unconstitutional. It remains part of our law until determined otherwise. However, it must do so *instanter* within a narrow window period, during which counter-spoliation is legally permissible. The window closes and the recovery is no longer *instanter* when the despoiler's possession of the land is perfected. Thereafter, the City must not

[17] *Ngomane and Others v City of Johannesburg Metropolitan Municipality and Another* [2019] ZASCA 57; [2019] 3 All SA 69 (SCA); 2020 (1) SA 52 (SCA) para 21. (Citations omitted).

breach the right to privacy enshrined in s 14*(c)* of the Constitution, 'which includes the right of persons not to have their possessions seized without due process'. The conduct of the City's ALIU and relevant personnel (including the members of the SAPS and or SANDF under the instructions of the City) must also not be disrespectful and demeaning, but protective of the unfortunate and vulnerable people's rights to dignity,[18] which must accord with the spirit, purport and objects of the Bill of Rights. Section 26 (3) of the Constitution expressly grants everyone the right not to be evicted from their home, or have their home demolished, without an order of court made, after considering the relevant circumstances.

[39] I would be remiss if I do not state the following. When the matter commenced in the high court, the issue was raised whether it was not time in a constitutional democracy to look at the question whether counter-spoliation should continue to be permitted, considering its impact on various provisions of the Constitution. This is against the background of progressive legislation post 1994, which is relevant in this matter, such as PIE.

[40] Academics, including Professors Van der Walt, Muller and Marais and Boggenpoel[19] have written extensively on this subject. Amongst the proposals made is that the definition of s 1 of PIE be read down to include invaders under the term 'unlawful occupier(s)'. But that will have huge ramifications for other areas of the law, including property law in general, and cannot be done without input from other branches or agencies of the law, such as the Law Review Commission. It might also require an attack on the constitutionality of PIE, which was not pursued in this case. Ultimately the legislature may intervene of its own accord to, *inter alia*, change and adapt PIE accordingly. Since these aspects were not addressed before the high court, it would not be appropriate to determine them in this appeal. In the meantime, courts should deal with these matters on a case-by-case basis until those issues are properly raised and dealt with fully, fairly and pertinently.

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[18] Section 10 of the Constitution of the Republic of South Africa, 1996.
[19] A J van Der Walt *'Property and Constitution'* (2012) at 19 – 24; Muller and Marais op cit at 103 and Z T Boggenpoel *'Can the journey affect the destination? A single system of law approach to property remedies'* (2016) *SAJHR* 32 (1) at 71 – 86.

[41] Finally, the matter of costs. The *amicus* seeks costs on an attorney-and-client scale against the City for opposing its application for intervention. As a general rule costs follow the result or outcome. But a court may, in the exercise of its discretion, in light of all the relevant facts and circumstances, deviate from this trite principle after having heard the parties on the matter.

[42] The *amicus* applied to be joined to the proceedings before this Court on appeal. Ultimately *amici curiae* are there to assist the court and ordinarily are not awarded costs, as they are neither losers nor winners, bar exceptional circumstances, such as where malice is present.[20] The objection by the City to their joinder has not been shown to be malicious or otherwise improper. Thus, the threshold has not been met.

[43] In the result, the following order issues.
The appeal is dismissed with costs, including the costs of two counsel where so employed.

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B C MOCUMIE
JUDGE OF APPEAL

[20] *Hoffmann v South African Airways* [2000] ZACC 17; 2001 (1) SA 1; 2000 (11) BCLR 1211; [2000] 12 BLLR 1365 (CC) para 63.

Appearances

For the Appellant	S Rosenberg SC and M Adhikari and K Perumalsamy
Instructed by	Fairbridges Wertheim Becker, Cape Town McIntyre & Van der Post, Bloemfontein.
For the first, second and third Respondents	N Arendse SC and E Webber
Instructed by	Legal Resource Centre, Cape Town Webbers Attorneys, Bloemfontein.
For the fourth and fifth Respondents	T Ramogale and P Sokhela
Instructed by	Ian Levitt Attorneys, Johannesburg Lovius Block Inc, Bloemfontein.
For the *Amicus Curiae*	J Brickhill
Instructed by	Seri Law Clinic, Braamfontein Webbers Attorneys, Bloemfontein.