

IN THE HIGH COURT OF SOUTH AFRICA

DURBAN AND COAST LOCAL DIVISION

CASE NO: 1029/2008

In the matter between:

M S JACA	FIRST	APPLICANT
T MAGWAZA	SECOND	APPLICANT
N MGENCE	THIRD	APPLICANT
T NCHUNU	FOURTH	APPLICANT
Z NTULI	FIFTH	APPLICANT
T MKHIZE	SIXTH	APPLICANT

and

ETHEKWINI MUNICIPALITY

RESPONDENT

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RESPONDENT'S HEADS OF ARGUMENT

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Introduction

1. The Applicants seek a final interdict.

2. The Applicants set out a series of events describing the demolition of shacks in various stages of construction by the Respondent's Land Invasion Unit ("Unit") and alleged that the Unit threatened to demolish their shacks.
3. In paragraph 3 of the Applicants' heads of argument the Applicants submit that the issues for determination are:
  - a) whether the Applicants reasonably apprehended that their shacks would shortly be demolished;
  - and
  - b) whether the Applicants have a clear right not to have their shacks destroyed.
4. The Respondent has not placed in issue whether the Applicants' have a clear right. To the extent that there is any doubt the Respondent hereby accepts that the Applicants have the necessary right for the purposes of applying for an interdict Accordingly this is not an issue for determination.
5. Consequently the submissions in paragraphs 4 to 23 of the Applicants' heads are not relevant.

6. Whilst in general terms the Applicants are correct that the issue is whether the Applicants had a reasonable apprehension that their shacks would be demolished the facts of this case point to a more narrow enquiry namely, whether the Unit in fact threatened the Applicants that it wanted to destroy their shacks on the 24<sup>th</sup> August 2008. It follows that if this court finds that the threat was made the Applicants would satisfy the requirement of reasonably fearing harm.
7. In the founding papers the Applicants alleged that as a consequence of a threat made on the 23<sup>rd</sup> January 2008 by the Unit that their shacks would be demolished the following day they were obliged to obtain an interdict urgently on the morning of the 24<sup>th</sup> January 2008.
8. The Respondent disputes that the Unit made the alleged threat and explains what transpired on the 23<sup>rd</sup> January 2008.
9. The court hearing this application is accordingly required to determine:
  - (a) whether a final interdict can be granted on the papers; or
  - (b) if there is any dispute of fact, whether that dispute should be referred to the hearing of oral evidence.

10. In formulating our submissions we firstly set out the sequence of events to establish the contextual setting in which:
- a) the Applicants allege the threat was made;
  - and
  - b) the Respondent's explanation.

### Sequence of Events

#### August 2007

11. The Applicants alleged that as at August 2007, they together with twelve other families, added to their existing shacks or built new shacks in the settlement. **founding affidavit: Jaca, paragraph 16, page 8**

12. According to Coetzee the Unit visited the settlement. They noticed twelve newly built shacks which were occupied. **answering affidavit: Coetzee, paragraph 12, page 42**

#### November 2007

13. The Applicants alleged that in November 2007 the Unit arrived at the settlement, did not speak to anyone and marked each of the newly built shacks with an "X". **founding affidavit: Jaca, paragraph 17, page 9**

14. The Respondent states that in November 2007 Coetzee noticed that the existing numbering on the shacks had faded. He re-wrote the numbers and marked each of the twelve newly erected shacks with an "X". He explained that it was necessary for the housing section to distinguish the newly erected shacks from the pre-existing marked shacks.

**answering affidavit: Coetzee: paragraphs 14(a) and (b), page 43**

15<sup>th</sup> January 2008

15. The Applicants alleged that the Unit visited the settlement on the 15<sup>th</sup> January 2008. The Unit assured the Applicants that they need not worry about anything as it had just come to look at the shacks.

**founding affidavit: Jaca, paragraph 18, page 9.**

16. Coetzee states that on this visit he noticed two new structures which were completely built but not yet occupied as well as a structure previously marked "X" which had become vacant and a half built structure. He reported his observations to his superior.

**answering affidavit: Coetzee paragraph 15, page 43**

17<sup>th</sup> January 2008

17. The Applicants alleged that on the 17<sup>th</sup> January the Unit broke down three new shacks which had been marked with an "X". They failed to offer assistance to the families residing therein.

**founding affidavit: Jaca: paragraph 19, page 9**

18. The Respondent states that on that day the Unit demolished three unoccupied shacks and a half built structure.  
**answering affidavit: Coetzee paragraphs 16 & 17, pages 43 & 44**
19. The Applicants submit that Coetzee said he had no knowledge that the shacks were occupied or owned by members of the community.  
**applicants heads: paragraph 26**
20. On a proper consideration of paragraph 35 of Coetzee's affidavit it is clear that he does not state that he had no knowledge of the facts alleged. On the contrary he clearly denies same.
21. It is significant that the Applicants have failed to produce any confirmatory affidavits by the persons who were allegedly affected.
22. Coetzee had a telephonic discussion with an employee of the Legal Resources Centre at the request of one of the residents. Coetzee explained the Unit's actions.  
**answering affidavit: Coetzee, paragraph 18, page 44**

23. In paragraph 27 of the Applicants' heads the Applicants refer to the letter of the 18<sup>th</sup> January 2008. That letter called upon the Respondent to "explain its conduct" in respect of the three structures that were demolished (and in respect of which there exists a dispute whether the shacks were occupied or not).
24. It is worth noting that in the founding affidavit the Applicants allege that three new shacks marked "X" were demolished.  
founding affidavit: Jaca, paragraph 19, page 9
25. In the replying affidavit the Applicants again simply state that the shacks were torn down.  
replying affidavit: Jaca, paragraph 19, 20, 21, page 79
26. In the letter dated 18<sup>th</sup> January 2008 those representing the Applicants claim that the Unit demolished:  
"Structures which comprised additions to three shacks" and  
"These structures compromised (sic-) the additional living quarters of the existing shacks".
27. The impression created by the Applicants is that the shacks were free standing. On the other hand the letter "MSJ1" clearly suggests that three extensions of existing shack dwellers were demolished. This contradiction remains unexplained.

28. If the instructions given to their attorneys were correctly recorded then, one would have expected that the owners of the shacks which had been extended and were destroyed to have filed confirmatory affidavits.

23<sup>rd</sup> January 2008

29. The First Applicant alleged that matters came to a head on the 23<sup>rd</sup> January 2008 at approximately 10 o' clock when the Unit arrived at the settlement. According to the Applicants, Mr Mayweza, one of the members of the Unit advised the Applicants that the Unit would return the following day to demolish their shacks. **founding affidavit: Jaca, paragraphs 23 & 24, page 11**

30. This allegation must be weighed against the background that the Unit was aware at this stage that the occupants of the shacks were in communication with the Legal Resources Centre and that any attempt at demolition would have been resisted.

31. In a confirmatory affidavit the Second Applicant alleged that she had been advised on the 23<sup>rd</sup> January 2008 that the Unit intended to demolish her shack the following day. **confirmatory affidavit: Magwaza, paragraph 4, page 20**

32. The Third Applicant alleged that the Unit told the Applicants that they intended to demolish their shacks on 24<sup>th</sup> January 2008.



confirmatory affidavit: Mgenge, paragraph 3, page 23

33. The Fourth Applicant alleged that the Unit "indicated" that it intended to demolish his shack on the 24<sup>th</sup> January 2008.

confirmatory affidavit: Mchunu, paragraph 4, page 26

34. The Fifth Applicant did not refer directly to any threat made to her or the Applicants.

confirmatory affidavit: Ntuli, pages 28 - 30

35. The Sixth Applicant alleged that the Unit indicated that it intended demolishing his shack on 24th January 2008.

confirmatory affidavit: Mkhize, paragraph 4, page 32

36. Coetzee and Mayise (incorrectly referred to as "Mayweza" by the Applicants) deny making the alleged threat. They state that on the day in question they had spoken to a lady who was building an extension to her shack. They told her it was unlawful to do so and requested that she demolish it. They advised her that the Unit would return the following day to establish if she had in fact done so.  
answering affidavit: Coetzee, paragraph 38(e), page 56

37. It should be noted that in the founding affidavit the Applicants did not refer to any threat to demolish all the shacks marked with an "X". The allegation is that the Unit, without offering any explanation simply demolished three new shacks marked with an "X". There was no reference to any discussions having taken place.  
**founding affidavit: Jaca, paragraph 19, page 9**

**Approach to determining the application**

38. The general rule regarding the determination of opposed applications as set out in Plascon-Evans Paints Ltd vs Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A) is that a final order may be granted if those facts averred in the Applicant's affidavits which have been admitted by the Respondent taken together with the facts alleged by the Respondent justify such an order.

39. The Applicants' case is founded on a threat alleged to have been made on the 23<sup>rd</sup> January 2008. The Respondent has not only disputed that the Unit made such a threat but also offered a cogent explanation of what had transpired on that day which explanation cannot be rejected on the papers.

40. Accordingly the Applicant is not entitled to an order on the papers.

**Should the application be referred for the hearing of oral evidence?**

41. It is evident from the papers that:

(a) the Applicants claim that they are in occupation of shacks in the settlement;  
and

(b) the Respondent has stated unequivocally that it does not destroy occupied shacks and had no intention of destroying the Applicants' shacks.

42. As it is clear that the Applicants do not require the relief claimed to protect their rights no meaningful purpose can be served by referring this application for the hearing of oral evidence. On the contrary this court should adopt a practical and robust approach to finally disposing this application.

43. As the Respondent is an organ of state it plays a vital role in the provision of housing for the poor. This is a difficult task given the complexities of informal settlements and rampant land invasions. The Respondent has often been targeted unfairly regarding its efforts to provide adequate housing. Hence the Respondent considers itself duty bound to place all relevant facts before this court in protecting itself from unwarranted attacks and to dispel the false impression that it acts arbitrarily and insensitively.

44. The Respondent opposes the application not because it wants to destroy the Applicants' shacks but because the Applicants are not entitled in law to the relief on the basis that the alleged threat was never made by the Unit.

45. Significantly in their replying affidavit the Applicants do not dispute the explanation given by the Respondent regarding what transpired on the 23<sup>rd</sup> January 2008. answering affidavit: Coetzee, paragraphs 20 & 21 read with replying affidavit Jaca, paragraphs 26 & 27, pages 81 & 82
46. Indeed the Applicants admit that they did not know what the letter "X" signified. They assumed that by marking an "X" on the shacks the Unit intended to demolish them. replying affidavit: Jaca, paragraph 14, page 77
47. The Applicants case has be determined by the averments and evidence in the founding affidavit. The averments in the founding affidavit as well as in the affidavits in corroboration dealing with the threat are vague, inconsistent and lacking in material particularity to the extent that their veracity must be called into serious question.
48. The impression created in the founding affidavit was that the Unit somehow conveyed to the Applicants as a group that their shacks would be destroyed.
49. The confirmatory affidavits paint two different pictures. Whilst one lot appear to confirm that the threats were made to the Applicants as a group, the other creates the impression that the Unit threatened certain Applicants individually. paragraphs 29 - 35 supra

50. There is nothing in the founding affidavit to indicate precisely where in the settlement the alleged threat was issued and which of the shack dwellers were present.
51. If indeed the threat had been issued as alleged it would have been reasonable for the Applicants to have enquired from the Unit why it intended demolishing their shacks. At the very least the Applicants ought to have protested that their shacks were going to be demolished on such short notice. On the Applicants' version they did not raise these matters.
52. In his replying affidavit the First Applicant provided a version of the threat that did not appear in the founding affidavit. He claims that on the 23<sup>rd</sup> January the Unit advised "*the Applicants and other members of the settlement*" that they would destroy their shacks. To emphasize the alleged threat he continued: "*I was there on the day in question and I was told that the shacks marked with an "X" would be demolished on the following day together with the shack being built by Magwaza*".  
**replying affidavit: Jaca, paragraph 34, page 84**
53. Magwaza is the Second Applicant. In her confirmatory affidavit she does refer to the version provided by the First Applicant. She simply stated that the Unit advised her that it intended demolishing her shack on the following day.  
**paragraph 31 supra**

54. If there had been a bona fide omission in the founding affidavit a suitable explanation ought to have been forthcoming in the reply and a further confirmatory affidavit filed by the Second Applicant.

55. If indeed a threat had been made to demolish all the shacks marked with an "X" it is significant that no relief was sought by or on behalf of the others affected by the threat (and by the Applicants' own version there were others affected). This factor takes on an added dimension in the light of the First Applicant's allegation that he is the chairman of a committee representing all the shack dwellers in that settlement.

56. Similarly in his replying affidavit the First Applicant refers to a conversation on the 17<sup>th</sup> January 2008 between the Unit and the Second Applicant wherein he states that the Unit advised the Second Applicant "*in no uncertain terms*" that they would be returning "*shortly*" to demolish her house "*together with all the other shacks marked "X"*"  
replying affidavit: Jaca, paragraph 4, page 84

57. Again it is significant that this threat was not referred to in the founding affidavit. In any event no affidavit is filed by the Second Applicant corroborating this version.

58. If such a threat had in fact been made on the 17<sup>th</sup> January one would have expected the Applicants to have immediately launched interdict proceedings. They did not do so nor is there any explanation given as to why that was not done.
59. It is also significant that no reference is made to the alleged threat on the 17<sup>th</sup> January in the letter written by the Applicants' attorneys on the 18<sup>th</sup> January.  
**annexure MSJ 1 p15**
60. Despite the alleged threat it is common cause that the Second Applicant's shack had not been demolished although the Unit inspected the site on the 23<sup>rd</sup> and 24<sup>th</sup> January 2008.
61. The Respondent stated that on the 23<sup>rd</sup> January 2008 the Unit arrived at the site. They noticed a shack which had been demolished on the 17<sup>th</sup> January had been fully rebuilt. The shack was locked and the Unit was advised that the occupant was at work. Upon establishing that the shack was indeed occupied the Unit did not demolish it in accordance with the Respondent's policy of not demolishing occupied shacks.  
**answering affidavit: Coetzee, paragraph 20, page 45**
62. The Applicants contend that Coetzee's statement that the Unit had no intention to demolish the Applicants' shacks must be rejected because of the directive given to one of the shack dwellers.  
**applicants' heads: paragraph 31(a)**

63. The Applicants admit the Respondent's version set out by Coetzee in paragraph 20 of the answering affidavit that the Unit did not destroy the reconstructed shack. replying affidavit: Jaca, paragraph 26, page 81

64. The said admission casts serious doubt whether the Applicants ever believed that any shack which was occupied would be destroyed.

65. It is also common cause that the Unit had visited the settlement on the 24<sup>th</sup> January but the Unit in no way interfered with the shacks nor attempted to destroy them.

#### Conclusion

66. Viewed against the facts and circumstances set out above and having regard to the papers as a whole we submit that serious doubt must be cast on the Applicants' version that a threat was issued that their shacks would be destroyed.

67. We further submit that there is no prospect of oral evidence disturbing the balance of probabilities in favour of the Applicant.



68. In the circumstances the Respondent will seek an order that the rule granted herein on the 24<sup>th</sup> January 2008 be discharged and that the Applicants be directed to pay the costs of the application.

RESPONDENT'S COUNSEL  
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A.M. KWITSHANA

CHAMBERS  
DURBAN  
1 August 2008