IN THE HIGH COURT OF SOUTH AFRICA

DURBAN AND COAST LOCAL DIVISION

CASE NO.: 1020/2008

In the matter between :

M S JACA	**FIRST APPLICANT**
T MAGWAZA	**SECOND APPLICANT**
N MGENGE	**THIRD APPLICANT**
N MCHUNU	**FOURTH APPICANT**
Z NTULI	**FIFTH APPLICANT**
T MKHIZE	**SIXTH APPLICANT**

and

ETHEKWINI MUNICIPALITY	**RESPONDENT**

J U D G M E N T

Delivered on :
26 AUGUST 2008

MNGUNI AJ

[1] Applicants, residents of Annette Drive in Reservoir Hills, Durban brought, on urgent basis, this application seeking an order to interdict and restrain respondent and any person acting on behalf of the respondent, including all members of the Land Invasion Unit ("Unit"), from evicting the applicants or any other person residing with them, from their homes situated in Annett Drive, Reservoir Hills, Durban in KwaZulu-Natal, or from demolishing, breaking down, or attempting to break down their homes.

[2] The sequence of events leading to them to approach this court and bring this application, as told by them, are as follows :

2.1. In around August 2007, applicants and approximately 12 other families added on to their existing dwellings or build new shacks within Annette Drive settlement. This was necessitated by the fact that their existing dwellings had become too cramped and overcrowded and were thus forced to build extra housing to accommodate themselves and their families. As far as they were aware approximately 18 shacks were built during that time.

2.2. During November 2007, members of respondent's Unit attended at the settlement and they did not know why they came to their property but before leaving they marked each of the new shacks referred to above using a spray paint with an "X". This marking and the purpose thereof was never communicated to any of the members of the community nor the purpose of their visit.

2.3. On 15 January 2008, members of the Unit again attended at their property and this time they told them that they had come to look at the shacks and put them at ease by telling them that they need not worry.

2.4. Notwithstanding their advice, and without any warning on 17 January 2008, the Unit returned and proceeded to use saws to break down and demolish three of the new shacks which had been marked with an "X". They did not explain

why they were demolishing the shacks and did not offer any assistance or alternative accommodation to the families who had been residing in them.

2.5. The three shacks destroyed belonged to three families all of whom have between 2 and 4 young children with one family being a household headed by a woman. Those shacks are now completely destroyed and their previous owners and habitants have been left destitute.

2.6. After the demolition, they became deeply concerned that the Unit intended to also demolish their homes. As a result of this, they immediately travelled to Durban and visited the offices of their present attorneys of record wherein they consulted with their legal representative. On 18 January 2008, their attorneys despatched a faxed letter to respondent's City Manager which is annexure "MSJ1" of these papers. The said letter did not illicit any response from respondent (though respondent denies receipt of same).

2.7. On 23 January 2008, at approximately 10am the same members of the Unit attended at their shacks in Annette Drive. One of the officials of the Unit, "Mayise" had attended at their properties on each of the occasions referred to above. Mayise advised them that the Unit would be returning to their properties on Thursday, 24 January 2008 to demolish their shacks. They immediately contacted their legal representative and again travelled to Durban to consult with them about the matter. On 23 January 2008 another

faxed letter was prepared and transmitted to respondent on 23 January 2008. Again the said letter was never responded to (though respondent indicated that the letter was only transmitted on 24 January 2008 at 07h23).

2.8. On all of these occasions none of the officials of the Unit had ever presented them with any official orders or court order in terms of any legislation authorizing them to evict them from their houses or destroy or demolish their shacks.

[3] There is very little of significant that separates applicants' version from that of respondent. Briefly, respondent admits demolishing three "unoccupied" shacks as well as the half built structure but denies the utterances attributed to Mayise that on 23 January 2008 he stated that the Unit would return on 24 January 2008 to demolish shacks marked with an "X". Such demolition of "unoccupied" shacks did not take place pursuant to a court order. Respondent stated that when members of the Unit visited the area on 23 January 2008 to monitor it, they found one of the shacks that was demolished on 17 January 2008 fully rebuilt and occupied. However, it was locked and the neighbour advised that the occupant was at work. They left it, as it was the practice followed by respondent not to demolish occupied structures. On the other side of the settlement they found one of the unmarked shack they had demolished on 17 January 2008 being in a process of being built, however it had no roof. The half built structure that they had also demolished was then fully built into an extension of another shack. They found a woman who was still busy attending to it. Mr Coetzee spoke to her through an interpreter and reminded her that

she knew that she was not supposed to make an extension into an existing structure, to that she responded positively. Therefore, he instructed her to demolish the extension she was building and she agreed to do that. Before they could leave, Mr Mayise who works with him told her that we shall return the following day to check if she had done that.

[4] Respondent has not placed in issue whether applicants have a clear right for the purpose of applying for an interdict. The only issue which is to be decided by this court is, whether, on the balance of probabilities, applicants have succeeded to establish that they reasonably apprehended that their shacks would shortly be demolished.

[5] Applicants' Counsel submitted that the opinions of the parties on the issue are not decisive, the issue being a matter of inference, probability and circumstances which is decided by the court. He contends that as a matter of law a reasonable apprehension of an outcome is one which a reasonable applicant may entertain on being faced with certain facts and is not the one which will happen on a balance of probabilities, but one which applicant reasonably apprehends may happen judged objectively.

[6] In support of this contention, he found solace in **Free State Gold Areas Ltd vs Merriespruit (OFS) Gold Mining Co. Ltd & Ano 1961 (2) 505 (W) at 518 A-C** where it is stated:

> *"A reasonable apprehension of injury in my view is one which a reasonable man might entertain on being faced with certain facts. The applicant for an interdict has not got to*

establish that, on a balance or preponderance of probabilities flowing from the undisputed facts, injury will follow. If that is what a Court would have to find as established it would mean of course that the Court must find that injury will in fact result; it is on the application of that very test that a Court in a civil case makes findings of fact. And as I said above, it seems to me that if ***Innes, C.J.,*** *meant to hold that the onus on an applicant was to establish facts on which the Court could find on a balance of probabilities that injury would result, he would have said so. He found that the applicant had only to show that it was reasonable to apprehend that injury would result. That statement is binding upon me and it is upon that basis that I have examined the very complicated facts placed before me in this case."*

He concluded his submissions, on this aspect, by stating that, in the light of the test it is not the statements of intent of respondent's witnesses that must decide the issue, but the conduct of respondent's witnesses in relation to a reasonable apprehension held in the mind of applicants' witnesses.

[7] Respondent's Counsel contended that applicants rely on the test for reasonable apprehension as set out in the case of **Free State Gold Areas Ltd vs Merriespruit (OFS) Gold Mining Co. Ltd (Supra)**. Therefore, it is irrelevant whether they were under the impression that their shacks may be broken by the Unit. The Court must be satisfied, on the facts presented to it, that it was reasonable for them to apprehend that their shacks will/would be broken. Counsel urged me to look into the matter of **Minister of Law &**

Order vs Nordien 1987 (2) SA 894 at pages 897 to 989 in order to appreciate the application of the test and to draw similarities on facts with this matter. He submitted that the facts in **Nordien** may well be applied to the present application.

[8] His contention is that whatever apprehension that applicants may have entertained when some of the (unoccupied) shacks were broken there is overwhelming evidence that the Unit had no intention of destroying applicants' shacks.

[9] Despite dealing with the Court's approach to "reasonable apprehension" he persisted with his submission that applicants elected to bring their application as a consequence of an alleged threat directly issued. Accordingly, he submitted, applicants' case was not based on conduct from which inferences should be drawn that they would suffer injury. He went further and stated that at most all the conduct referred to merely constituted a background to the alleged threat have issued. Consequently, this Court will be correct in determining this issue by dealing with the sole issue whether on the probabilities the Unit did make the threat that the applicants' shacks would be destroyed.

[10] I have, during the course of this judgment, mentioned that applicants, through their attorneys, directed two letters to respondent dated 18 and 23 January 2008. The contents of these letters are, in my view, important in the determination of this matter. They record the concerns and facts which occupied applicants' minds when faced with the conduct of the Unit.

[11] None of these letters were responded to by respondent.

[12] As enunciated in Free State Gold Areas Ltd (supra) a reasonable apprehension of injury is one which a reasonable man might entertain on being faced with certain facts. In my view, such assessment and determination of such facts involve an objective analysis. Accordingly, to arrive at such conclusion, pattern of facts objectively judged in relation to circumstances of each particular case becomes important.

[13] I have, as urged by Respondent's Counsel, considered the facts in **Nordien's** case and compared them with the facts of this matter. Such comparison has led me to conclude that the two cases are distinguishable. I am fortified in my so concluding by the following remarks of **Hefer JA** in **Nordien's** case (supra) at **page 897** paragraphs B – E. "It is necessary to determine at the outset what precisely the applicants' case was. It is obvious that their real cause of complaint was not the fact of their unlawful detention nor the treatment which they received while being detained. As the learned Judge in the Court a quo said in her judgment, the assaults were past history which was relevant only to the question of possible future conduct. Nor was their real complaint the mere fact that threats had been uttered by the two policemen who conveyed them from the Brackenfell Police Station on 18 September. The threats related entirely to the laying of charges against the policemen who had perpetrated the assault and there would be no risk of reprisals unless and until charges were in fact laid. It was accordingly only when the applicants defied the threats by laying charges on 20 September that they become apprehensive of being

re-arrested and mal-treated again." The learned Judge of Appeal went further and stated at 898 G-I : "From this it follows that the applicants' case received no support from the incident on 21 September and the final question is whether on their remaining allegations they could reasonably have apprehended further harassment. The answer to this question is not far to be sought although they were allegedly fearful of the consequences of laying a charge, the applicants' did not feel themselves sufficiently restrained to do so. It is difficult to resist the impression, therefore, that they did not take the threats over-seriously."

[14] A final order can only be granted in motion proceedings if the facts stated by respondent together with admitted facts in applicants' affidavit justify the order, and this applies irrespective of where the onus lies. **(Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A)).** In **Soffiantini v Mould 1956 (4) SA 150 EDLD at 154 G-F, Judge President Price** stated :

> *"It is necessary to make a robust, common-sense approach to a dispute on motion as otherwise the effective functioning of the Court can be hamstrung and circumvented by the most simple and blatant stratagem. The Court must not hesitate to decide an issue of fact on affidavit merely because it may be difficult to do so. Justice can be defeated or seriously impeded and delayed by an over-fastidious approach to a dispute raised in affidavits."*

[15] I have set out pattern of facts which culminated to these proceedings. To my mind, such pattern of facts support and give credence to applicants' case. Having regard to the totality of facts

emerging from the entire case, on probabilities, I am satisfied that the Unit did make threat that applicants' shacks would be destroyed on 24 January 2008.

[16] Accordingly the application for final relief is granted with costs.

MNGUNI AJ

DATE OF HEARING :	**THURSDAY, 07TH AUGUST 2008**
DATE OF JUDGMENT :	**TUESDAY, 26TH AUGUST 2008**
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