IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

CASE NO: 120856/2023
(1) REPORTABLE: NO
(2) OF INTEREST TO OTHERS JUDGES: NO
(3) REVISED
04 December 2023

In the matter between:

THAPELO JOSIAH MOGOAI First Applicant

THE BURGERS PARK COMMUNITY 2ND to 25th Applicants

and

CITY OF TSHWANE METROPOLITAN MUNICIPALITY Respondent

JUDGMENT

NGALWANA AJ

[1] South Africa has become a veritable cesspool of lawlessness.

[2] Evidence of this is legion. People generally seem to do as they please without any fear of consequence, including arrest and successful prosecution. Media reports have in recent times carried stories about people stealing electrical cables right on the doorstep of a police station. The police, who are supposed to enforce the law, have themselves been at the receiving end of criminality. Others have themselves been implicated in the very criminality the tide of which they are supposed to stem.

An entire National Police Commissioner was convicted of corruption.[1] Legislators, who are supposed to pass laws by which we are all governed, have been accused of living high on the hog on salaries that hardly justify their lifestyle. An independent panel of jurists, led by a former Chief Justice, has found that the President, no less, *"may have committed"* a serious violation of section 96(2)(a) of the Constitution,[2] a serious violation of section 34(1) of PRECCA,[3] serious misconduct in that the President violated section 96(2)(b) of the Constitution by acting in a way that is inconsistent with his office, and serious misconduct in that the President violated section 96(2)(b) by exposing himself to a situation involving a conflict between his official responsibilities and his private business. There is even a suggestion that the President may be implicated in money laundering.[4] The Legislature, which is supposed to hold the President accountable, decided that these *prima facie* findings do not deserve further investigation. The President, under oath at a judicial commission of enquiry, characterised the ruling party as *"accused number one when it comes to corruption"*.[5] Yet South African voters, like fanatical club football supporters, continue to return the ruling party to power. Voters seem to have become numb to criminality. This is not a political statement. It is an observation on the cosy relationship that South Africans seem to have with criminality. The state of the nation seems to be one of endemic lawlessness.

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1 S v Selebi 2012 (1) SACR 209 (SCA); 2012 (1) SA 487 (SCA)

2 Which says members of cabinet, of which the President is one, may not undertake any paid work other than one for which they have been elected or appointed in public office.

3 The Prevention and Combating of Corrupt Practices Act, 2004, which enjoins all persons in positions of authority (such as a President) who know or ought reasonably to have known or suspected that another person has committed crimes including theft involving R100,000 or more to report such knowledge or suspicion to the Directorate for Priority Crime Investigation.

4 The Ngcobo Panel observed as follows in its **Report of the Section 89 Independent Panel Appointed to Conduct a Preliminary Enquiry on the Motion proposing a Section 89 Enquiry**, and concluded that the President has a case to answer for not reporting the theft of *"probably more than US$580,000"* in foreign currency that had been concealed in pieces of furniture at his Phalaphala farm to the DPCI as required by section 34(1) of PRECCA:

> "243. … One reason for forcing people to report theft of R100,000 or more is to stamp out money laundering or organized crime by forcing individuals to report theft of large sums of money that the owners of the money may be reluctant to report for fear of being called upon to account for the stolen money.
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> 244. A person who keeps huge sums of illicit money concealed at his or her house is unlikely to report the theft of such money for fear of being discovered that he or she is involved in money laundering. This would be too much to expect of human nature. For this reason, the legislature considered it prudent to require any person who has knowledge of the commission of the offence of theft to report it. If you happen to know or ought reasonably to have known or suspected that this money has been stolen from the owner, the law requires you report this theft so that the owner of the money can be called upon to explain the source of the money as well as why he or she did not report the theft.
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> 245. The owner of the money stolen is also required to report theft of his or her money. That you happen to be a victim of crime yourself, matters not. You must report the theft."

5 At the State Capture Commission on Wednesday 28 April 2021

[3] There is another dimension to the national state of lawlessness: the soft words South Africans tend to use to describe certain crimes, depending on the identity and station in life of the people who commit them. In his 1946 essay on *Politics and the English Language*, George Orwell succeeded in surgically peeling off the veneer of prosaic respectability from what passes for *"modern"* English to expose the ugly lies ignominiously hidden beneath. Mourning the perversion of the English language – ostensibly in the name of modernism but, in truth, with a view to obfuscating and deceiving – he observed that the decline of a language must ultimately have political and economic causes. That observation finds an austere ring of truth about it in the South African language of choice in describing certain crimes. Indeed, the great enemy of clear language is insincerity. For example, when senior company executives *"cook the books"*, the media has described it as *"accounting irregularities"* instead of calling it what it is: crime, and those who perpetrate it, criminals. When senior company executives violate the Public Finance Management Act, with considerably deleterious consequences for near-absent service delivery to ordinary South Africans, even lawyers have tended to characterise this criminality as *"irregularity"* instead of the crime that it is, and those who perpetrate it as criminals.

[4] It is little wonder, then, that people should feel justified in pitching a tent or similar structure on a sidewalk next to a public park, call it a *"home"*, and rush to court on an urgent basis to complain when the municipality removes their *"homes"*. They even demand that they be compensated for violating municipal by-laws, even after they have, on their own version, unlawfully reconstructed their makeshift homes. Can they be faulted for believing that if common criminals, legislators, the Executive, and law enforcement officers are seen getting away with far more serious criminality, that they too will get away with their lawlessness? Criminality?

[5] South Africa is supposed to be a constitutional democracy where everyone is supposed to enjoy equal protection and benefit of the law, and no one is supposed to suffer arbitrary deprivation of property. But in recent times it has become clear to all who care to observe, through an objective lens untainted by factional tint, that South Africa's fabled Constitution delivers much constitutionalism only in text and not in the lived experiences of millions of those who live here. This case exposes that soft underbelly spectacularly. It is not the first such case to do so and, dispiritingly, it is not the last. Elected public representatives at all three levels of government, who are

supposed to bring the lofty promise of the text of the Constitution to life for the benefit of everyone, have become numb to ephemeral public outrage and Judicial rebuke – even Judicial orders that are binding on them – safe in the knowledge that this too, as many before it, shall pass, and then it is on to the next vacuous election promise.

[6] Regrettably, urgent court is not a platform that is suited to developing the law or diving deeper into the root problem that lies hidden beneath the facts that serve before it. This case is significant less for what is pleaded and more for what is not. Considered contextually, it implicates not just the Respondent municipality and its endeavours to enforce municipal by-laws, as it must. It also implicates provincial and national departments responsible for human settlements, provincial and national treasury for budget allocation in respect of housing development, the home affairs department for its handling of immigration affairs, the national legislature for the kind of laws it produces to regulate the influx of immigrants, law enforcement officials for how they police and enforce municipal by-laws, and numerous other role players including the courts for the kind of orders they make in cases like these, setting precedent that may or may not result in sustainable solutions to immigration challenges.

[7] In this application the Applicants, a group of 26, want to be restored immediately to peaceful and undisturbed access to their makeshift homes, immediate return of their building materials and other movable assets, or reconstruction of their *"homes"*. In the alternative they demand that the South African state provide them with emergency temporary accommodation within 48 hours. They also want damages in the amount of R1,500 each *"in respect of the removal of their personal possessions"*. These *"homes"* – made largely of cardboard and plastic if the photographs attached to the pleadings are any indication – are constructed on sidewalks near a park in the country's capital, Pretoria.

[8] As I indicated to Counsel for the Applicants in open court, who conceded that the Applicants' occupation of the sidewalk is a violation of municipal by-laws, a court cannot grant an order that facilitates continued violation of municipal by-laws. On their own version, the Applicants have rebuilt their structures where they were removed. The deponent to the founding affidavit says: *"Having no alternative accommodation and having been rendered homeless, we were left with no choice*

but to rebuild our homes as we had nowhere to go". This renders urgency moot. The Applicants have taken the very relief they seek from this court into their own hands. No reasonable court should endorse lawlessness.

[9] But what is the alternative? That in my view is a question not for urgent court but for the court hearing the Part B application, in which the Applicants seek, among other things, an order directing the Respondent municipality *"to implement the Street Homelessness Policy for the City of Tshwane 2015 ... which includes … creating, developing and sustaining access to diverse housing options that are affordable, accessible and well-located"*.

[10] But what happens in the meantime? This court cannot turn a blind eye to lawlessness (criminality) and self-help that the Applicants have themselves brought to its attention. By occupying the sidewalk, in cardboard and plastic structures, they are acting in violation of municipal by-laws as their Counsel has rightly conceded. They cannot remain there. Where they go is a problem that the Respondent must resolve, working together with the various other governmental role-players some of which I have mentioned above. Housing is a national multi-departmental problem. The Constitution places an obligation on the state to *"take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of [the right of access to adequate housing"*. For this the Respondent points to a shelter at 2 Struben Street. But the Applicants say this shelter is *"not conducive to individuals to reside in"*. But then how is a sidewalk, with no ablution facilities, more conducive to human habitation?

[11] According to a media article attached to the Applicants' replying affidavit (the content of which has not been disputed by the Respondent in a further affidavit) the Respondent's spokesperson is quoted as saying the Respondent's plan is to shut down 2 Struben Street and relocate residents to alternative accommodation. He said, as recently as 28 November 2023, 2 Struben Street *"has been declared unsafe for the people to stay in and several homeless shelters have been identified to accommodate the homeless"*. In the result, the Respondent should be able, within a reasonably short space of time, to accommodate the Applicants in the shelters that its spokesperson is reported as saying it has already identified to accommodate the homeless. That is the order I intend to make.

[12] I have already found that this application is not urgent by reason of the Applicants, on their own version, having already taken the law into their hands by rebuilding their makeshift structures where they were removed. That really is the end the application. But striking the application off the roll solves nothing. The Applicants' desperate situation may beget desperate measures, as they have already demonstrated by rebuilding their unlawful structures in continued violation of municipal by-laws. The never-ending cycle of lawlessness may continue while elected representatives get a free pass to continue making more election promises of building *"a million houses"* they have no intention of keeping. For that reason, I am not inclined to strike the application off the roll, as that would contribute to the continuing cycle of lawlessness and the problem will serve again before another court without the needle having moved an inch. As section 34 of the Constitution makes clear, courts exist to ***resolve*** disputes between litigants by application of law, not to avoid disputes by doctrinal refuge.

[13] The Applicants say the Respondent requires a court order in order to enforce municipal by-laws. This needs addressing.

[14] I agree with Counsel for the Respondent that the right to housing is not absolute. It is subject to limitation by law of general application. Municipal by-laws are part of such law. The Respondent's by-laws relating to public amenities prohibit the erection of any shelter, house, shack or structure on public amenities with the intention to live in it. Any person who contravenes this by-law (or any of the many others in relation to health, indecent behaviour, liquor, food and fires) is guilty of a criminal offence and may, on conviction, be liable to a fine of up to R10 000 or a term of imprisonment of up to 12 months. Sidewalks are a public amenity as refined. The Respondent has the power to enforce these by-laws without the need first to approach a court for a court order. If the Respondent or its officials needed to obtain a court order with a view to enforcing a by-law every time a by-law is violated, then the by-laws would be redundant.

[15] In the final analysis, the Applicants, who say they have rebuilt their *"homes"* in a public amenity, cannot remain there in violation of the law. This must be called what it is – criminality. Breaking the law is a criminal act regardless of who breaks it. It does not become less so just because the person breaking it is a billionaire or a homeless immigrant.

[16] But the Respondent must be held to its promise of providing alternative accommodation that it says it has already identified. To that end, I propose issuing an interim order directing the Respondent to provide alternative accommodation for the Applicants that is conducive to human habitation within 48 hours of the date of this order. The Constitution affords that right to the Applicants within the Respondent's available resources. I have already cited a media article (not disputed by the Respondent) that the Respondent has already identified homeless shelters in which to accommodate the homeless. It does have available resources to accommodate the Applicants.

[17] Such are the bizarre circumstances of this case that the Applicants have, despite breaking the law, and continuing brazenly to do so, nonetheless been successful in securing something resembling their alternative relief in paragraph 4 of the notice of motion. This is more a function of pragmatism and, ironically, the vindication of the rule of law in what is supposed to be a constitutional democracy than the merits of their case.

[18] In my view, it would not be in the interests of justice to strike this application for lack of urgency. A preferable outcome is one that holds elected representative to their promise, and one which the text of the Constitution itself makes. Correspondingly with South African voters maturing to the level of holding their elected representatives to the promises they make, it behoves the courts to step in, in accordance with the oath of office of all judicial officers, and *"uphold and protect the Constitution and the human rights entrenched in it, and … administer justice to all persons alike without fear, favour or prejudice, in accordance with the Constitution and the law"*. It is in the fulfilment of that oath of office that I make the order that I propose to make.

[19] This court cannot interdict the Respondent municipality from enforcing municipal by-laws. If the Applicants' prized belongings should go missing in the process of the enforcement of the law by authorities, there are remedies in law for that, about which their lawyers will no doubt advise them.

[20] No proper case has been made out for *"emergency constitutional damages"*.

[21] The Applicants have asked for leave to approach this court for their Part B application on the same papers, duly supplemented. I have no difficulty with that. But there has to be a time period within which the Part B application must be launched, otherwise the interim relief I propose may turn out to have final effect. In the circumstances, I think it fair to both parties that the interim order I propose should pend the launching of the Part B application, failing which it will lapse.

Order

In the result, I make the following order:

1. Pending the outcome of Part B application contemplated by the Applicants, the Respondent is directed to provide to the Applicants, within 48 hours of this order, alternative accommodation that it says it has already identified, and that alternative accommodation must be fit for human habitation.

2. The Applicants are granted leave to approach this court on the same papers, duly supplemented, for the determination of Part B of the notice of motion within two months of this order and no later than Tuesday 6 February 2024.

3. The costs in this application shall be stand over for determination at the hearing of Part B of the notice of motion.

4. Should the Applicants fail to launch its contemplated Part B proceedings within the time period stipulated in paragraph 2 of this order, the relief granted in paragraph 1 of this order shall lapse.

V NGALWANA
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

Delivered: This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 04 December 2023.

Date of hearing: 30 November 2023
Date of judgment: 04 December 2023

Appearances:

Attorneys for the Applicants:	Lawyers for Human Rights, Pretoria
Counsel for the Applicants:	Z Mahamba (060 941 2925)
Attorneys for Respondent:	Ncube Inc
Counsel for Respondent:	SG Zwane