THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

1.1 Case : 303/2006
REPORTABLE

In the appeal between:

TSWELOPELE NON-PROFIT ORGANISATION First appellant
AND 23 OTHERS Second and further appellants

and

CITY OF TSHWANE METROPOLITAN MUNICIPALITY
First respondent
MINISTER OF HOME AFFAIRS Second respondent
MINISTER OF SAFETY AND SECURITY Third respondent

Before: Scott JA, Cameron JA, Nugent JA, Maya JA, Snyders AJA
Heard: Friday 11 May 2007
Judgment: Wednesday 30 May 2007

Unlawful eviction – constitutional remedies – development of suitable remedy – unnecessary to develop mandament van spolie – court ordering governmental agencies that unlawfully destroyed shacks to

construct habitable temporary shelters for those affected

Neutral citation: Tswelopele Non-Profit Organisation v City of Tshwane Metropolitan Municipality [2007] SCA 70 (RSA)

JUDGMENT

CAMERON JA:

[1] In the early hours of Friday morning 31 March 2006, about one hundred persons were evicted from their homes on a vacant piece of land in the Pretoria suburb of Garsfontein. Officials from three governmental agencies in a joint operation expelled them from the rudimentary shelters they had erected. The pieces of plastic and other waste materials they had salvaged from surrounding building sites to construct their homes were put to the torch. Many of their belongings were destroyed. Sixteen immigrants without South African documentation were arrested and later deported.

[2] The operation was carried out by officials from the nature conservation division of the Tshwane metropolitan municipality (Tshwane) (first respondent), the immigration control office of the Department of Home Affairs (Home Affairs) (second respondent), and the South African Police Services (SAPS) (third respondent),

accompanied by members of the Garsfontein community policing forum.[1] Even though the Constitution provides that 'No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances',[2] and even though the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 ('PIE') decrees that 'No person may evict an unlawful occupier except on the authority of an order of a competent court',[3] there was no court order. The eviction violated the law and the Constitution.

[3] This led the first appellant – a registered non-profit organisation[4] committed to the upliftment of homeless and destitute people in the Moreleta Park area (Tswelopele ('Progress')) – to bring an urgent application ten days later in the Pretoria High Court. Twenty three named residents who had been evicted (the occupiers) joined the proceedings as applicants. In the founding affidavit, Tswelopele's treasurer, Mr Colin Wilfred Dredge, a

[1] Section 18(1) of the South African Police Service Act 68 of 1995 requires the SAPS to 'liaise with the community through community police forums' established at police stations which are 'broadly representative of the local community' (s 19(1)).

[2] Bill of Rights s 26(3).

[3] PIE s 8(1). Section 8(3) provides that contravention of ss (1) is an offence on conviction of which the offender is liable to a fine or imprisonment not exceeding two years, or both.

[4] Registered under the Nonprofit Organisations Act 71 of 1997.

chartered accountant living in Moreleta Park (which borders on Garsfontein), described what he saw after receiving a call from distressed occupiers. Dwellings in which they had been living peaceably for at least eighteen months had been destroyed. In the wake of the police, Tshwane employees were burning shacks and cutting down trees. When challenged, officials from all three government agencies refused to show him authorisation under a court order. Indeed, he says, he was threatened with arrest for obstructing the police in the execution of their duties.

[4] In the face of this, Tswelopele sought an order directing the three respondents to restore the possession of the occupiers before all else (ante omnia), and in the interim to provide them with temporary shelter. The notice of motion also sought costs and further or alternative relief. The founding affidavit couched its claim for relief under the common law mandament van spolie: but it also expressly invoked the occupiers' procedural protections under PIE and their rights under sections 25[5] and 26(3)[6] of the Bill of Rights.

[5] Constitution s 25(1) provides that 'No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property'.

[6] Constitution s 26(3): 'No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.'

[5] In answer, Tshwane protested that its officials were there merely 'to eradicate alien vegetation' (even while admitting that its nature conservation division was not responsible for the site), and that they did so believing that the police 'were acting lawfully'. Home Affairs said it participated solely 'to identify non-documented illegal immigrants'. The Garsfontein police station acting commander, senior superintendent John Tinyiko Masia – who admitted planning the action with the other governmental agencies – described it as but a 'crime fighting operation'. He and Home Affairs (though contradicted in this by Tshwane's deponent) denied that any dwellings were destroyed or dwellers evicted. Instead, they said, the occupiers left 'voluntarily', leaving their waste materials behind to be cleared.

[6] Jordaan J dismissed the application. He held, following *Rikhotso v Northcliff Ceramics*[7] (which concluded that the mandament van spolie is a remedy for the restoration of possession, not for the making of reparation), that because the officials had destroyed the materials used in the construction of the dwellings, the occupiers could not be restored to the possession of their homes. The

[7] 1997 (1) SA 526 (W), where Nugent J held that 'a spoliation order cannot be granted if the property in issue has ceased to exist' (535A-B).

court could therefore not grant the relief they sought.

[7] But Jordaan J declined to order costs against the applicants, not only because they were impecunious, but because the governmental agencies had acted unlawfully and had not been frank with the court. Even applying the respondent-friendly test for determining factual disputes on opposing affidavits, he rejected the officials' account of what had happened as 'ostensibly improbable and untruthful'.

[8] When Jordaan J granted the occupiers leave to appeal, these conflicts portended acrimonious appellate proceedings. But that was not to be. Before this Court, all three respondents significantly adjusted their approach. Mr Bruinders for Tshwane acknowledged that the city had participated in an unlawful eviction. And at the outset of his argument Mr Tokota for Home Affairs and the SAPS recorded an unambiguous apology for what had occurred, which he described as 'unlawful' and 'unacceptable'. This administers some belated but not insignificant balm to the injury inflicted, since in the place of unsustainable denials and evasion it substitutes a willingness to accept constitutional accountability. And it enables this Court to

focus on the principal issue – which is what relief, if any, the occupiers were entitled to obtain.

[9] But first it is necessary to consider the respondents' contention that the occupiers' appeal has become perempted.

Has the appeal become perempted?

[10] Peremption of the right to challenge a judicial decision occurs when the losing litigant acquiesces in an adverse judgment. But before this can happen, the court must be satisfied that the loser has acquiesced unequivocally in the judgment.[8] The losing party's conduct must 'point indubitably and necessarily to the conclusion that he does not intend to attack the judgment': so the conduct relied on must be 'unequivocal and must be inconsistent with any intention to appeal' (*Dabner v South African Railways and Harbours* 1920 AD 583 at 594, per Innes CJ).

[11] The respondents based their contention on these facts:

(a) After the unlawful eviction, the occupiers returned to the site (the respondents had after all denied that they had been evicted). But this merely triggered a second joint SAPS/Tshwane operation

[8] In *Hlatshwayo v Mare and Deas* 1912 AD 232 at 241 [some editions, and the reprints since 1921, have the judgment at page 242 and the citation at page 253], which concerned not an appeal, but the losing party's right to challenge a judgment granted by default, Solomon J stated that it was of 'the utmost importance' that the court 'should be clearly satisfied that there has been acquiescence in a judgment before it decides to debar any party' from challenging a judgment.

four weeks later, in which the occupiers' shacks were again demolished.

(b) Tswelopele again went to court. It brought a second urgent application – joined this time by one named occupier, Ms Seke Esther Malefo, who was also an applicant in these proceedings, and further unnamed occupiers, who were cited collectively as the third applicant.
(c) On the afternoon of 19 May 2006, Bertelsmann J heard oral evidence. After Tswelopele had led some evidence, which was cross-examined on behalf of the SAPS, the matter stood down. The parties then entered into a settlement agreement, which Bertelsmann J made an order of court.
(d) The order provided that 'the occupants as at 20h00 on 19 May 2006 of a vacant piece of land on the corner of De Ville Bois Mareuil and Garsfontein Roads, Moreleta Park' were to be 'moved to be accommodated at the Garsfontein Police Station' and that the officers responsible for the police station 'will take an inventory of all those people'. On Monday 22 May 2006, Tshwane was to 'move the people to a homeless people shelter' in Struben Street, Pretoria and to 'register them on their housing subsidy programme'. Pending finalisation of the housing subsidy application, the occupiers would without charge 'be accommodated in the homeless people shelter'. In the meantime, the SAPS undertook 'not to harass and/or victimise [them] in any manner whatsoever, during the period of accommodation'. The respondents were ordered to pay the applicants' costs.
(e) Later, fifty named persons with South African identity numbers were accommodated in the Struben Street shelter. Of these, fifteen survived screening and were enrolled to receive assistance from Tshwane's housing subsidy programme.

[12] On these facts the contention that Tswelopele and the occupiers abandoned the appeal cannot succeed. This is because there is a misfit between the parties to the two proceedings, and the relief sought in each does not match.

[13] First, the list of verified applicants in the present proceedings

does not coincide fully with those named or identified at any stage of the proceedings before Bertelsmann J. Of the twenty three individual applicants in this matter, only one was a named applicant in the second proceedings, and at most nine are listed amongst those accommodated in the Struben Street shelter. And we were informed from the Bar that only five were ultimately successful in their applications for housing subsidies. At the very least, it cannot be said that those of the present appellants who did not associate themselves with or benefit from the order in the second proceedings abandoned their right to appeal.

[14] But, second, even those who did identify with or benefit from the second proceedings did not in my view abandon their challenge to the outcome of the first. The relief sought and obtained before Bertelsmann J was temporary shelter, assistance with housing subsidy applications, and an undertaking against harassment. In the first proceedings, though the appellants also sought interim temporary shelter, the core of the relief Jordaan J refused was restoration of possession – that is, the reconstruction of the destroyed dwellings. Accepting the former did not entail abandoning the claim to the latter. Far from acquiescing in the

judgment of Jordaan J, it is plain that Tswelopele and the individual applicants continued to challenge its refusal to grant their central claim. The appeal has therefore not become peremptied.

Remedy

[15] That the wanton destruction of the occupiers' dwellings violated the Constitution was not disputed. What must be owned is how far-reaching and damaging the breach was. The governmental agencies violated not merely the fundamental warrant against unauthorised eviction,[9] but (given the implicit menace with which the eviction was carried out) the occupiers' right to personal security[10] and their right to privacy.[11] It infringed not only the occupiers' property rights in their materials and belongings,[12] but trampled on their feelings and affronted their social standing. For to be hounded unheralded from the privacy and shelter of one's home, even in the most reduced circumstances, is a painful and

[9] Bill of Rights s 26(3).

[10] Bill of Rights s 12(1): 'Everyone has the right to freedom and security of the person, which includes the right – … (b) to be free from all forms of violence from either public or private sources'.

[11] Bill of Rights s 14: 'Everyone has the right to privacy, which includes the right not to have – (a) their person or their home searched; (b) their property searched; (c) their possessions seized; …'

[12] Bill of Rights s 25(1): 'No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.'

humiliating indignity.

[16] And it is not for nothing that the constitutional entrenchment of the right to dignity emphasises that 'everyone' has inherent dignity, which must be respected and protected.[13] Historically, police actions against the most vulnerable in this country had a distinctive racial trajectory: white police abusing blacks. The racial element may have disappeared, but what has not changed is the exposure of the most vulnerable in society to police power and their vulnerability to its abuse. Reading comparable case reports from the decades preceding these events,[14] it is impossible not to endorse appellant's counsel's submission that in its lack of respect for the poor and the vulnerable, and in the official hubris displayed, what happened displays a repetition of the worst of the pre-constitutional past.

[17] This places intense focus on the question of remedy, for though the Constitution speaks through its norms and principles, it acts through the relief granted under it. And if the Constitution is to be more than merely rhetoric, cases such as this demand an

[13] Bill of Rights s 10: 'Everyone has inherent dignity and the right to have their dignity respected and protected.'

[14] Including *Fredericks and another v Stellenbosch Divisional Council* 1977 (3) SA 113 (C), *George Municipality v Vena* 1989 (2) SA 263 (A) (substantially affirming 1987 (4) SA 29 (C)), and *Administrator, Cape v Ntshwaqela* 1990 (1) SA 705 (A).

effective remedy,[15] since (in the oft-cited words of Ackermann J in *Fose v Minister of Safety and Security*[16]) 'without effective remedies for breach, the values underlying and the right entrenched in the Constitution cannot properly be upheld or enhanced':

> 'Particularly in a country where so few have the means to enforce their rights through the courts, it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated.'

[18] The claimant in *Fose* was held not to be entitled to a specially crafted constitutional remedy for police assaults (namely punitive damages), since the ordinary remedies for his injury (the usual measure of damages) sufficed. This case is different. Though the respondents urged us to find that the occupiers should be left to their ordinary remedies, it is evident that none of them suffices:

(a) *Damages*: Jordaan J rightly observed that 'at least some of the respondents are liable in an action for damages'. But there are two problems with this. The first is: damages for what? The scraps of building and waste materials the occupiers used to

[15] Bill of Rights s 38: 'Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. …' Section 7(4) of the interim Constitution also afforded a right to 'appropriate relief'.

[16] 1997 (3) SA 786 (CC) para 69.

construct their dwellings have a minimal market value, and the damages they may recover, even for their destroyed domestic effects, will probably be pitifully small. Some may be able to sue for iniuria (for the invasion of their privacy and the indignity suffered in the eviction). and claim more substantial damages, but only after trial proceedings that could stretch long years into the future – which is the second problem.

(b) *Criminal charges*: Jordaan J also noted that the respondents' conduct contravened s 8(1) of PIE,[17] which is a criminal offence. A prosecution could have both instructional and inhibitory effect, but it would provide no material benefit to the occupiers. And will it happen? Tswelopele on a previous occasion of harassment (by a private security company) took the trouble to lodge criminal charges at the Garsfontein police station. Although eight months had passed when the respondents' affidavits were filed, the acting station commander had no knowledge of the matter or of its progress. This is no good portent.

(c) *Interdict*: Tswelopele conceded that a suitably crafted interdict could put a stop to what could be argued to be a pattern of unlawful conduct, particularly by the Garsfontein community police forum; but an interdict is future-directed: it does not meet the occupiers' salvage claim, which would address their present wants by remedying a past injustice.

(d) *Joining the Grootboom emergency relief and housing queue*: In *Government of the Republic of South Africa v Grootboom*,[18] the Constitutional Court held that the Constitution requires the State to devise and implement within its available resources a comprehensive and co-ordinated program progressively to realise the right of access to adequate housing in s 26(2) of the Bill of Rights – and that the program must include reasonable measures 'to provide relief for people who have no access to land, no roof over their heads, and

[17] Set out in para 2 above.

[18] 2001 (1) SA 46 (CC) para 99.

who are living in intolerable conditions or crisis situations'. The respondents contended that we should issue an order – such as that Bertelsmann J issued – that embodies this entitlement. Those occupiers entitled to emergency relief (or '*Grootboom* relief') and thereafter to a housing subsidy will no doubt be grateful for the activation of this aid. But countrywide the need is enormous; and the queues are long; and it was common cause during argument that unlawful demolition of one's home gives no claim to priority. The occupiers want relief in relation to their destroyed shelters now, as well as the promise of further aid in due course.

[19] As counsel for the appellants pointed out, effective relief must be speedy, and it must address the consequences of the breach of their rights. The only way to achieve these aims is to vindicate the occupiers' salvage claim, and to require the respondents to re-create their shelters. The remaining question is the best route to that result.

Mandament van spolie?

[20] Though the appellants did not abandon their contention that the mandament van spolie should be constitutionally adapted to afford them this relief, their primary submission was that a broader remedy should be developed under the Constitution. In this case, their approach to the common law is correct. The Constitution preserves the common law,[19] but requires the courts

[19] Bill of Rights s 39(3): 'The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.'

to synchronise it with the Bill of Rights.[20] This entails that common law provisions at odds with the Constitution must either be developed[21] or put at nought;[22] 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.

[21] It is true that the mandament offered the occupiers an alluring template for the relief they crave. The remedy originated in the canon law,[23] and found its way thence into Roman Dutch law and modern South African law.[24] Under it, anyone illicitly deprived of

[20] Bill of Rights s 8(3)(a) ('When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2) [which makes such a provision binding on natural and juristic persons 'if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of the duty imposed by the right'] a court – (a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right'); and s 39(2) ('When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights').

[21] As with the common law definition of marriage: *Fourie v Minister of Home Affairs*2005 (3) SA 429 (SCA) and *Minister of Home Affairs v Fourie*2006 (1) SA 524 (CC).

[22] Constitution Chapter 1, 'Founding Provisions', s 2: 'This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.'

[23] DG Kleyn, 'Possession' in Reinhard Zimmermann and Daniel Visser (eds), *Southern Cross – Civil Law and Common Law in South Africa* (1996) pages 835-846.

[24] CG van der Merwe, 'Possession' in WA Joubert, The Law of South Africa vol 27 (first reissue 2002), paras 263-277.

property is entitled to be restored to possession before anything else is debated or decided (*spoliatus ante omnia restituendus est*). Even an unlawful possessor – a fraud, a thief or a robber – is entitled to the mandament's protection. The principle is that illicit deprivation must be remedied before the courts will decide competing claims to the object or property.

[22] The mandament's obvious rule of law dimension gave rise to a debate between academic experts as to whether its primary rationale was to protect possession, or to preserve order (and thus to discourage self-help). The practical focus of the debate was the question that presented itself here: is the mandament available when the spoliator (or someone else) has destroyed the property sought to be restored? Some pre-constitutional authority supported using the mandament to make the spoliator reconstruct what he had destroyed. In *Jones v Claremont Municipality*,[25] the court ordered a public authority to restore (ie, reconstruct) a fence it had illegally destroyed: Buchanan ACJ regarded the municipality's conduct as 'very high-handed', and said that 'by ordering them to restore this fence I wish to mark my sense of the impropriety of a public body taking the law into its

[25] (1908) 25 SC 651.

own hands'.[26] And in *Fredericks and another v Stellenbosch Divisional Council*,[27] where the council demolished squatters' corrugated-iron homes 'in flagrant contempt of the law',[28] Diemont J issued an order requiring it to 're-erect' the applicants' homes immediately.[29] This entailed 'recreating shelters of approximately similar size and efficacy'.[30] He considered that the order 'should create no practical problems':

'If the original sheets of corrugated iron cannot be found or if they have been so damaged by the bulldozer that they cannot now be used there is no reason why other sheets of iron of similar size and quality should not be used.' [31]

[23] But the heavy,[32] albeit not universal,[33] preponderance of

[26] (1908) 25 SC 651at 654-655.
[27] 1977 (3) SA 113 (C).
[28] 1977 (3) SA 113 (C) 116D-E.
[29] 1977 (3) SA 113 (C) 115B-C.
[30] 1977 (3) SA 113 (C) 118A.
[31]1977 (3) SA 113 (C) 117H.
[32] The debate is summarised and the authorities analysed in MJ de Waal *Die Moontlikheid van Besitsherstel as Wesenselement vir die Aanwending van die Mandament van Spolie* [the possibility of restoration of possession as essential element for the application of the mandament van spolie] (University of Stellenbosch, master's thesis, June 1982) pages 88-113; and DG Kleyn, *Die Mandament van Spolie in die Suid-Afrikaanse Reg* [the mandament van spolie in South African law] (University of Pretoria, doctoral thesis, January 1986), pages 396-406, both of whom, and the heavy preponderance of the authors they discuss, regard *Fredericks* as alien to the proper terrain of the mandament.
[33] MD Blecher 'Spoliation and the Demolition of Legal Rights' (1978) 95 *South African Law Journal* 8-16 (who pointed out at page 13 that legislative reaction to *Fredericks* 'was swift and harsh' – Parliament amended the Prevention of Illegal Squatting Act 52 of 1951 to permit a land owner or local authority or government officials to remove structures erected without consent without any prior notice of whatever nature); AJ van der Walt '*Naidoo v Moodley* 1982 (4) SA 82 (T) – Mandament van Spolie' (1983) 46 *THR-HR* 237-240 and 'Nog eens *Naidoo v Moodley* – 'n

academic commentators disfavoured the way the mandament was extended in *Fredericks*, and in *Rikhotso v Northcliff Ceramics (Pty) Ltd*[34] Nugent J held that a spoliation order cannot be granted if the property at issue has ceased to exist: the mandament has been received into our law as a possessory remedy, and not as a general remedy against unlawfulness. He observed that the issue of the mandament is a preliminary and provisional order, so that the assumption that underlies it is that the property in fact exists and may be awarded in due course to the properly entitled party. Since possession can not be restored by substitution, the mandament could not be granted.[35] Nugent J concluded:

'It was submitted that the conclusion to which I have come would encourage the destruction of property in the course of spoliation. I do not think that is correct. I do not suggest that the law countenances wanton destruction, nor that it does not afford a remedy. Remedies to discourage such conduct exist in both the civil and the criminal law. My conclusion is only that the

Repliek' (1984) 47 *THR-HR* 429-439.

[34] 1997 (1) SA 526 (W).

[35] 1997 (1) SA 526 (W) 532H-535B. Nugent J accepted at 535C that different considerations may arise in cases of partial destruction, 'leaving a substantial part of the property intact', and in *Ierse Trog CC v Sultra Trading CC 1997 (4) SA 131 (C) Foxcroft J granted the mandament even though the situation there demanded 'rebuilding and a degree of substitution of materials' (136G-H).*

mandament van spolie is not that remedy.'[36]

[24] The doctrinal analysis in *Rikhotso* is in my view undoubtedly correct. While the mandament clearly enjoins breaches of the rule of law and serves as a disincentive to self-help, its object is the interim restoration of physical control and enjoyment of specified property – not its reconstituted equivalent. To insist that the mandament be extended to mandatory substitution of the property in dispute would be to create a different and wider remedy than that received into South African law, one that would lose its possessory focus in favour of different objectives (including a peace-keeping function).

[25] It is correct, as Mr Budlender for the appellants emphasised, that the rule of law is a founding value of the Constitution.[37] This would suggest that constitutional development of the common law might make it appropriate to adapt the mandament to include reconstituted restoration in cases of destruction. And counsel is certainly correct in submitting that the absence of a remedy mandating substitution of unlawfully destroyed property could create a perverse incentive for those taking the law into their own

[36] 1997 (1) SA 526 (W) at 535B-C.

[37] Constitution s 1: 'The Republic of South Africa is one sovereign democratic state founded on the following values: … (c) Supremacy of the Constitution and the rule of law.'

hands to destroy the disputed property, rather than leaving it substantially intact.

[26] But as already indicated, I do not think that formulating an appropriate constitutional remedy in this case requires us to seize upon a common law analogy and force it to perform a constitutional function. For there is a further dimension to the case, which takes the matter beyond even a developmentally enhanced mandament: the relief we give must vindicate the Constitution. As Kriegler J noted in *Fose*, 'the harm caused by violating the Constitution is a harm to the society as a whole, even where the direct implications of the violation are highly parochial. The rights violator not only harms a particular person, but impedes the fuller realisation of our constitutional promise':[38]

'Our object in remedying these kinds of harms should, at least, be to vindicate the Constitution, and to deter its further infringement'.[39]

[27] Vindication, Kriegler J noted, 'recognises that a Constitution has as little or as much weight as the prevailing political culture affords it'.[40] Essentially, the remedy we grant should aim to instil

[38] *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) para 95.
[39] *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) para 96.
[40] *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) para 96.

recognition on the part of the governmental agencies that participated in the unlawful operation that the occupiers, too, are bearers of constitutional rights, and that official conduct violating those rights tramples not only on them but on all. The remedy should instil humility without humiliation, and should bear the instructional message that respect for the Constitution protects and enhances the rights of all. It is a remedy special to the Constitution, whose engraftment on the mandament would constitute an unnecessary superfluity.

[28] The occupiers must therefore get their shelters back. Placing them on the list for emergency *Grootboom* assistance will not attain the simultaneously constitutional and individual objectives that re-construction of their shelters will achieve. The respondents should, jointly and severally, be ordered to reconstruct them. And, since the materials belonging to the occupiers have been destroyed, they should be replaced with materials that afford habitable shelters. But because the occupiers are avowedly unlawful occupiers, who are vulnerable to a properly obtained eviction order under PIE, the structures to be erected must be capable of being dismantled.

Order

1. The appeal succeeds with costs, including the costs of two counsel.

2. The order of the court below is set aside.
3. In its place, there is substituted:
‘(a) The application succeeds with costs, which are to be paid jointly and severally by the respondents.
(b) The respondents are ordered, jointly and severally, to construct for those individual applicants who were evicted on 31 March 2006, and who still require them, temporary habitable dwellings that afford shelter, privacy and amenities at least equivalent to those that were destroyed, and which are capable of being dismantled, at the site at which their previous shelters were demolished.’

E CAMERON
JUDGE OF APPEAL

CONCUR:
SCOTT JA
NUGENT JA
MAYA JA
SNYDERS AJA