

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

**Case No.: 79931/2019**

In the matter between:

**BROOKLYN AND EASTERN AREAS CITIZENS' ASSOCIATION      1<sup>st</sup> APPLICANT**

**WATERKLOOF HOMEOWNERS' ASSOCIATION      2<sup>nd</sup> APPLICANT**

And

**THE UNKNOWN PROTESTORS      1<sup>ST</sup> RESPONDENT**

**THE CITY OF TSHWANE METROPOLITAN MUNICIPALITY      2<sup>ND</sup> RESPONDENT**

**THE MINISTER OF HOME AFFAIRS      3<sup>RD</sup> RESPONDENT**

**THE MINISTER OF POLICE      4<sup>th</sup> RESPONDENT**

**THE STATION COMMANDER BROOKLYN POLICE STATION      5<sup>th</sup> RESPONDENT**

**UNHCR REGIONAL OFFICE FOR SOUTHERN AFRICA      6<sup>th</sup> RESPONDENT**

**FILING NOTICE**

**KINDLY TAKE NOTICE** that the 3<sup>RD</sup> Respondent files herewith their Answering Affidavit.

**SIGNED at PRETORIA on the 07<sup>th</sup> day of NOVEMBER 2019.**



**RU MUKATUNI( nee MABASA)**

**3<sup>rd</sup> RESPONDENT'S ATTORNEYS**

Attorney with Right of Appearance in  
the High Court in terms of the  
provisions of Sec 4 (2) of Act 62 of  
1995.

**THE STATE ATTORNEY PRETORIA**

**SALU BUILDING**

**316 THABO SEHUME STREET**

**CNR THABO SEHUME & FRANCIS**

BAARD STREETS  
PRIVATE BAG X91  
PRETORIA  
**REF: 6801/2019/Z90**  
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**ENQ: MRS MUKATUNI RU**

**TO:** THE REGISTRAR OF THE ABOVE HONOURABLE COURT  
**PRETORIA**

**AND TO: COUZYN HERTZOG & HORAK ATTORNEYS**

ATTORNEYS FOR THE APPLICANT

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NIUWE MUCKLENEUK

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**REF: MR D vd LINDE**

**AND TO: THE CITY OF TSHWANE METROPOLITAN MUNICIPALITY**

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**AND TO: THE MINISTER OF POLICE**

THE 4<sup>th</sup> RESPONDENT

**C/O THE STATE ATTORNEY PRETORIA**

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**ENQ: MRS MUKATUNI RU**

**AND TO: THE STATION COMMANDER BROOKLYN POLICE STATION**

THE 5<sup>th</sup> RESPONDENT

**C/O THE STATE ATTORNEY PRETORIA**

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**IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, PRETORIA**

**CASE NO. 79931/19**

In the matter between:

**BROOKLYN AND EASTERN AREAS CITIZENS' ASSOCIATION**                      First Applicant

**WATERKLOOF HOMEOWNERS' ASSOCIATION**                                      Second Applicant

and

**THE UNKNOWN PROTESTORS**    First Respondent

**THE CITY OF TSHWANE METROPOLITAN MUNICIPALITY**                      Second Respondent

**THE MINISTER OF HOME AFFAIRS**    Third Respondent

**THE MINISTER OF POLICE**    Fourth Respondent

**THE STATION COMMANDER BROOKLYN POLICE STATION**                      Fifth Respondent

**UNHCR REGIONAL OFFICE FOR SOUTHERN AFRICA**                                      Sixth Respondent

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**THIRD RESPONDENT'S ANSWERING AFFIDAVIT**

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I, the undersigned,

**RICHARD STOLTZ**

do hereby make oath and state that:

1. I am the Acting Deputy Director General : Immigration ("ADDG") in the employ of the Department of Home Affairs ("DHA").
2. I am duly authorized to depose to this affidavit on behalf of the third respondent ("Minister of Home Affairs") and by virtue of my position, I am competent to depose to this affidavit.
3. Save where otherwise indicated, the facts to which I depose are based on my personal knowledge and are to the best of my belief, both true and correct. To the extent that I rely on the facts which are not within my personal knowledge, I verily believe them to be true and correct. To the extent that I make submissions in respect of law, I am guided by the advice of my legal representatives in this matter and make submissions in reliance on such advice.
4. In the course of my employment duties, I deal with immigration and refugee issues.
5. **SERVICE ON THE MINISTER OF HOME AFFAIRS**
  - 5.1. The application was served on the State Attorney on 25 October 2019 at 13h00pm.
  - 5.2. The matter was allocated to Unity Mukatuni of the State Attorney (Pretoria) on 28 October 2019. On 29 October 2019 she caused an email correspondence to be sent to the DHA.

- 5.3. The Acting Head of Litigation, Mr Tsietsi Sebelemetja allocated the matter to Mr Carswell Buthane who took leave without giving instructions to the State Attorney to brief counsel or oppose the application.
- 5.4. The matter was brought to the attention of Ms Banyamme Seboga on 5 November 2019 who located the file in Mr Carswell's Buthane office and briefed counsel. She had to rush to Court with counsel in order to request the Court to afford the Minister of Home Affairs to consider the matter and formulate the stance of the DHA.
- 5.5. By agreement between the parties, the matter was stood down to afford the parties an opportunity to formulate an appropriate draft order. The relief sought against the Minister of Home Affairs has far-reaching consequences. This Court is urged to afford the Minister of Home Affairs to participate in order that the issues are ventilated on full facts.
- 5.6. I therefore seek the indulgence of the Court and the other parties to file this answering affidavit. I accept that the DHA ought to have served and file the answering affidavit on time.
- 5.7. In view of the time constraints, I do not intend to deal with all the allegations contained in the applicants' founding papers. I will also deal with some of the allegations contained in the answering affidavit filed on behalf of the second respondent ("City of Tshwane"). This is necessitated by the fact that the City of Tshwane adopted a wrong attitude that this matter involves legislation administered by the DHA. This is most unfortunate. The Minister

of Home Affairs reserves the right to file a supplementary affidavit, should the need arise.

**6. WHO ARE THE FIRST RESPONDENTS?**

- 6.1. The applicants presume that the unknown persons are either foreign nationals or refugees<sup>1</sup>.
- 6.2. The City of Tshwane concludes the unknown persons are “*foreign nationals*” liable to be dealt with in terms of certain international instruments, the Immigration Act and Refugees Act.
- 6.3. There is no factual basis for the assumptions and conclusions of the applicants and the City of Tshwane. In any event, there is ample evidence available in the public domain showing that the unknown persons are refugees entitled to enjoy certain rights and protections. I annex hereto newspaper articles marked “RS1” and “RS2”.
- 6.4. Whilst the Immigration Act empowers the immigration officers to deal with illegal immigrants and the Refugees Act accommodates refugees and affords them certain rights and privileges. None of the Acts promote unlawful activities either by asylum seekers, refugees or illegal foreigners. Any person, being a refugee or citizen is bound by the laws of the country. In case of any violation, the law is expected to take its course. Those charged with the responsibility to enforce such laws are expected to take

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<sup>1</sup> Para 19 of the founding affidavit.

appropriate steps. In this case, the South African Police Service ("SAPS") and the City of Tshwane.

**7. ORDERS SOUGHT AGAINST THE MINISTER OF HOME AFFAIRS ARE INCOMPETENT**

- 7.1. Prayer 5 of the Notice of Motion cannot be granted against the Minister of Home Affairs. The DHA has no Legal capacity nor resources to embark on the process of identification of the unknown persons and *"enforce the immigration laws of the RSA"*
- 7.2. Furthermore, no factual basis has been laid for such an order to be made. Such an order cannot be made based on assumptions and wrong conclusions about the status of the unknown persons.
- 7.3. Prayer 6 cannot be granted against the Minister of Home Affairs. The DHA has no legislative mandate to provide *"suitable and safe intermediary accommodation"* to the unknown persons. The Lindela Repatriation Holding Facility is set up for illegal immigrants arrested and awaiting deportation.
- 7.4. Neither the applicants nor the City of Tshwane are alleging with a measure of certainty that the unknown persons are indeed illegal immigrants. Even if it were accepted that such persons enjoy the protection under the refugee regime, they cannot be held in the custody of the DHA as the applicants and the City of Tshwane seem to suggest.



- 7.5. There are a number of authorities, including that of the Constitutional Court to the effect that detained illegal immigrants and refugees enjoy rights enshrined in the Bill of Rights. Legal argument will be presented during the hearing of the matter.

8. **SERVICE OF THE APPLICATION**

- 8.1. Whilst the applicants are entitled to seek an interim relief in the form *rule nisi*, this does not entitle the applicants to proceed without any notification to the affected persons.
- 8.2. The Sheriff could have been authorized to take steps to bring the application to the attention of the effected persons. Failure to do so is fatal to this application.
- 8.3. If indeed, it is proven that such unknown persons are either refugees or illegal foreigners they remain a vulnerable group who required intervention by the Court to ensure that the unknown persons are made aware of the proceedings. In appropriate circumstances the Court could facilitate the appointment of an *amicus* to assist the unknown persons.
- 8.4. I am advised that in the peculiar circumstances of this case, the steps alluded to above would be most appropriate.

## 9. INTER-GOVERNMENTAL RELATIONS

9.1. There is a hurdle on the path of this Court in granting the orders against the Minister of Home Affairs, City of Tshwane and Minister of Police. The Minister of Home Affairs and City of Tshwane have adopted diametrically opposed positions amounting to an intergovernmental dispute.

9.2. Section 40 (1) of the Constitution therefore aptly describes the spheres of government as "*distinctive, inter-dependent and interrelated*". "*Distinctiveness*" relates to the autonomy which each sphere has in respect of powers and functions. The Constitution delineates specific powers and functions to the national, provincial and local spheres of government, as equal partners in governance<sup>2</sup>. In exercising these powers and functions however, the spheres remain subject and accountable to the Constitution which creates a system of "*checks and balances*" to ensure compliance with this standard<sup>3</sup>. "*Interrelatedness*" therefore describes the regulatory relationship between the spheres, as manifested in the national and provincial governments' supervisory powers of regulation, monitoring and intervention.

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<sup>2</sup> In this regard the final Constitution saw a change in the status and role of local government within the decentralized governance model adopted by the new South African government. In *City of Cape Town and Another v Robertson and Another* 2005 (3) BCLR 199 (CC) at para 60 the Court held that: "A municipality under the Constitution is not a mere creature of statute otherwise moribund save if imbued with power by provincial or patina. Legislation. A municipality enjoys "*original*" and constitutionally entrenched powers, functions, rights and duties that may be qualified or constrained by law and only to the extent the Constitution permits. Now the conduct of a municipality is not always invalid only for the reason that no legislation authorizes it. Its power may derive from the Constitution or from legislation of a competent authority or from its own laws."

<sup>3</sup> Section 41(1)9d) Constitution.

- 9.3. Section 41(3) of the Constitution provides that *"an organ of state involved in an intergovernmental dispute must make every reasonable effort to settle the dispute by means of mechanisms and procedures provided for that purpose, and must exhaust all other remedies before it approaches a court to resolve the dispute."*
- 9.4. In the **First Certification** case, the Constitutional Court held that, this provision not only binds spheres of governments but *"binds all departments of state and administrations in the national, provincial or local spheres of government"*. Importantly the Court held that its implications are that *"disputes should where possible be resolved at a political level rather than through adversarial litigation."*<sup>4</sup>
- 9.5. Section 40 of the Intergovernmental Relations Framework Act incorporates the obligations imposed by section 41 of the Constitution. Subsection 40(1) of the IGR Framework Act implores all organs of state to *"avoid intergovernmental disputes when exercising their statutory powers or performing their statutory functions."* In essence, organs of state are required to take a proactive approach by conducting their affairs in a manner that avoids or discourages disputes. This obligation gives effect to the spirit and text of section 41(1) of the Constitution relating to co-operative governance. This section also implicitly encourages compliance with the

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In re: **Certification of the Constitution of the Republic of South Africa, 1996** [1996] (10) BCLR 1253 (CC) at para 291.

other structures established by the IGR Framework Act, which have the goal of facilitating cooperative governance.

- 9.6. Likewise, section 40(2) of the IGR Framework Act restates the obligation contained in section 41(3) of the Constitution, requiring organs of state to make all reasonable effort to settle disputes before approaching a court.
- 9.7. The mechanism contained in the sections that follow section 40 are designed to allow the parties to comply with this obligation. However, the Constitution is ultimately the source of the obligation and these particular provisions must be interpreted in light of that overarching constitutional obligation.
- 9.8. In **uThukela District Municipality and Others v President of the Republic and Others**<sup>5</sup>, the Court commented on the stringency with which it views the efforts by organs of state to avoid litigation, in that:

*The obligation to settle disputes is an important aspect of co-operative government, which lies at the heart of chapter 3 of the Constitution. If this court is not satisfied that the obligation has been duly performed, it will rarely grant direct access to organs of State involved in litigation with one another.<sup>6</sup>*

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<sup>5</sup> 2003 (1) SA 678 (CC).

<sup>6</sup> **uThukela District Municipality and Others v President of the Republic and Others** 2003 (1) SA678 (CC) at para 33.

- 9.9. In **National Gambling Board v Premier, KwaZulu-Natal and Others**<sup>7</sup>, the Court commented on the obligation which it places on parties to proactively engage creative solutions to settle a dispute in that:

*"...organs of State's obligations to avoid litigation entails much more than an effort to settle a pending court case. It requires of the organ of State to re-evaluate the need ...to consider alternative possibilities and compromises and to do so with the regard to the expert advice the other organs of State have obtained<sup>8</sup>."*

- 9.10. The High Court, in **Ngqushwa Local Municipality v MEC for Housing, Local Government & Traditional Affairs**, made it plain the consequences of "*rushing*" into litigation and the wasted costs of such actions and held that:

*"The injunction against rushing off to court is aimed at ensuring the effective flow of communication and co-operation between the different spheres of government in order to enhance service delivery and to prevent the squandering of taxpayers' money on avoidable litigation"<sup>9</sup>.*

- 9.11. Further limitations on the application of the IGR Framework Act are contained in the definition of intergovernmental disputes. Section 1 of the Act defines an intergovernmental dispute as:

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<sup>7</sup> 2002 (2) SA 715 (CC).

<sup>8</sup> **National Gambling Board v Premier, KwaZulu-Natal and Others** 2002 (2) SA 715 (CC) at para 36.

<sup>9</sup> **Ngqushwa Local Municipality v MEC for Housing, Local Government & Traditional Affairs** [2005] JOL 14776 (CK).

*“(1) a dispute between different governments or between organs of state from different governments concerning a matter-*

*(a) arising from —*

*(i) a statutory power or function assigned to any of the parties; or*

*(ii) an agreement between the parties regarding the implementation of a statutory power or function;  
and*

*(b) which is justiciable in a court of law,*

*and includes any dispute between parties regarding a related matter.”*

10. It is clear from the above exposition that the hands of this Court are tied where intergovernmental disputes exist. The appropriate approach is to afford the organs of state an opportunity to resolve their disputes outside Court.

11. I now proceed to deal with the affidavit of Johanna Jacoba de Villiers (“De Villiers”).

11.1. All the allegations contained in the founding affidavit are denied in so far as they are inconsistent with the allegations contained in this affidavit

11.2. Furthermore, to the extent that De Villiers allege that the Minister of Home Affairs has certain statutory duties, in the peculiar facts of this case, it is denied.

12. **AD PRAGRAPHS 69.3, 79.1, 79.2 AND 80:**

12.1. The allegations contained in these paragraphs are denied.

12.2. There is no factual basis for the alleged statutory duties. Furthermore, the Minister of Home Affairs has no statutory duties to provide "*shelter*" as alleged.

12.3. There is no statutory duty to identify the unknown persons imposed on the Minister of Home Affairs in terms of any law. More particularly in that the applicants' case is based on conjecture and speculative evidence.

12.4. Furthermore, the Minister of Home Affairs has not refused to perform his statutory duties in clear cases of violations of any laws administered by him.

12.5. I have already demonstrated that the orders sought are impractical and will have no practical consequences. Argument will be addressed in this regard during the hearing of the matter.

12.6. I must also indicate that the letter dated 21 October 2019 was never received by the Minister of Home Affairs (Annexure "I").

12.7. I now proceed to deal with the affidavit deposed by Khazamela Jan Baloyi on behalf of the City of Tshwane.

12.8. The affidavit of City of Tshwane is based on speculative evidence that the unknown persons are foreign nationals. It is therefore suggested that the City of Tshwane has nothing to do with the unknown persons. This suggestion is only wrong in law but the City of Tshwane has failed to adduce any evidence to support these allegations.

13. **AD PARAGRAPH 1.2:**

I note the allegations in this paragraph and accept that the deponent has the skills and statutory powers deal; with the unknown persons.

14. **AD PARAGRPHAS 2, 3 AND 4:**

14.1. The allegations contained in these paragraphs are irrelevant for the purposes of dealing with the current legal quagmire.

14.2. I deny that the appropriate order is as suggested in paragraph 3.29. This is a clear case of the City of Tshwane attempting to shirk its statutory duties and responsibilities. It is most unfortunate that these allegations are being made with no due regard to provisions of section 41 of the Constitution.

14.3. If the City of Tshwane wished to raise the issues, it ought to have engage with the Minister of Home affairs or the DHA before approaching the Court with a potential intergovernmental dispute.



14.4. I therefore request that the orders against the Minister of Home Affairs be dismissed with costs, including the costs of two counsel.

\_\_\_\_\_  
**DEPONENT**

**SIGNED AND SWORN BEFORE ME AT \_\_\_\_\_ ON THIS THE  
\_\_\_\_ DAY OF NOVEMBER 2019 BY THE DEPONENT WHO HAS  
ACKNOWLEDGED THAT HE KNOWS AND UNDERSTANDS THE CONTENTS  
OF THIS AFFIDAVIT; THAT HE HAS NO OBJECTION TO TAKING THE  
PRESCRIBED OATH AND THAT HE CONSIDERS THE PRESCRIBED OATH TO  
BE BINDING ON HIS CONSCIENCE.**

\_\_\_\_\_  
**COMMISSIONER OF OATH**

**NAME:** \_\_\_\_\_  
**CAPACITY:** \_\_\_\_\_  
**ADDRESS :** \_\_\_\_\_  
**AREA:** \_\_\_\_\_

