Squatter rights – is the municipality entitled to demolish informal settlements?

It is no secret that there are thousands, if not millions, of destitute people in South Africa who are homeless. This unfortunate situation often leads to them setting up structures on either public or private land where they can stay. In response, the owner of that land sometimes demolishes those structures and chases the homeless person off their property. This response from the landowner usually constitutes spoliation, which means "taking the law into your own hands." The unlawful occupier would be entitled to obtain a court order against the landowner to restore his or her possession of the property pending the outcome of an eviction application. Landowners almost always ask the question: why can I not chase unlawful occupiers off my property without a court order?

The Constitution guarantees everyone the right of access to adequate housing. This right is limited in section 26(2) of the Constitution, which provides that although the state must take reasonable legislative measures to give this right to everyone, it should be done within the available resources of the state. In section 26(3), the Constitution further also provides that no person may be evicted from their home or have their home demolished without an order of court. The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act ("PIE") is the primary legislation in South Africa that governs the process of evicting unlawful occupiers from a property. In essence, the PIE Act gives effect to each person's fundamental rights as provided for in section 26 of the Constitution, specifically the right not the be evicted arbitrarily. An eviction order can only be granted after a court has considered all relevant circumstances of a particular case. As a result, a landowner, whether it is the state or a private individual, cannot evict people or demolish their structures without first obtaining a court order to that effect.

In a recent judgment delivered by the Western Cape High Court, the court dealt a blow to the City of Cape Town, which evicted unlawful occupiers from public land in a manner reminiscent of the brutal forced removals during Apartheid. The city defended their actions by relying on counter-spoliation. The defence of counter-spoliation provides a landowner with the right to immediately retake possession

of the land in question, without a court order, when unlawful occupiers attempt to occupy the land. However, the defence of counter-spoliation is only available to a landowner who immediately acts when an unlawful occupier attempts to take possession of a property. As soon as the unlawful occupier has taken possession of the property and sets up structures, counter-spoliation is no longer available to the landowner, who must then obtain a court order before evicting the unlawful occupiers. In the matter before the Western Cape High Court, the city brutally removed the occupants from the property and demolished their structures after the occupiers took possession and erected structures. As such, the city did not act immediately when the occupiers attempted to take possession of the land, and therefore, the city could not rely on counter-spoliation as a defence. In this matter, the city should have obtained a court order authorising the eviction and demolition of the structures, which they failed to do.

Because counter-spoliation essentially amounts to evicting occupiers without a court order, it can, without a doubt, be abused by landowners to circumvent the costly and time-consuming process of obtaining an eviction order. Due to its potential to infringe the fundamental rights of the unlawful occupiers, the defence of counter-spoliation would thus only be available to landowners in limited circumstances. The most important aspect of a valid defence of counter-spoliation is that the landowner must act immediately when the unlawful occupation is in the process of taking place, failing which reliance on this defence would be unsuccessful.

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