CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 42/12
[2013] ZACC 1

In the matter between:

PONTSHO DOREEN MOTSWAGAE	First Applicant
FOURTEEN OTHERS	Second to Fifteenth Applicants
and	
RUSTENBURG LOCAL MUNICIPALITY	First Respondent
PROMPTIQUE TR 9 CC	Second Respondent
together with	
LAWYERS FOR HUMAN RIGHTS	Amicus Curiae

Heard on : 27 November 2012

Decided on : 7 February 2013

JUDGMENT

YACOOB J (Mogoeng CJ, Moseneke DCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Nkabinde J, Skweyiya J, Van der Westhuizen J and Zondo J concurring):

Introduction

[1] This case started as an application for an interdict in the North West High Court, Mahikeng (High Court). The application was brought because the Rustenburg Local Municipality (municipality) authorised construction work on property occupied by the first applicant. This involved excavation of land by the use of a bulldozer right next to the outer wall of the first applicant's home, exposing the foundations of the building. The question before us is whether the municipality acted lawfully in authorising this work on the property without obtaining a court order for the eviction of the applicants.

Background

[2] The fifteen applicants occupy homes on certain land owned by the North West Province. The buildings are dilapidated and a renewal programme in respect of those buildings has been in the process of being devised and implemented since 2004. It is not disputed that the plan the municipality has for the development of housing on the land on which the applicants live cannot be executed unless all their homes are first demolished. Various meetings were held between representatives of the municipality and the representatives of the community residing on the land earmarked for redevelopment in order to obtain the consent of the community. Ultimately there was no consensus in the sense that a few people disagreed with the development. They also refused the municipality's offer of alternative accommodation.

[3] The applicants ultimately secured the services of an attorney to represent their interests and there followed correspondence between the attorney and the municipality in which they stated their opposing positions. After that correspondence and on 19 April 2009 a service provider[1] employed by the municipality to do the work in respect of the development of the property brought a bulldozer onto the property and excavated land immediately adjacent to an outer wall of the house occupied by the first applicant. The first applicant and other applicants protested and asked the service provider to replace the excavated soil. A photograph taken, after some refilling had been done by the service provider at the request of the applicants, shows a deep excavation with what appears to be the foundation of the house exposed. This demonstrates that the excavation was much worse before some refilling had occurred. Despite these protests the contractor returned to the home of the first applicant and began excavation work again on 26 May 2009. This led to the application for the interdict in the High Court, aimed effectively at prohibiting the respondents from unlawfully disturbing or interfering with the applicants' peaceful possession of their homes.

[4] The municipality counter-applied for an order restraining the applicants from obstructing the contractor in the execution of its duties pursuant to its agreement with the municipality. The municipality relied principally on its obligation to provide

[1] Promptique TR 9 CC, the second respondent who did not participate in the proceedings.

housing in terms of the Constitution,[2] the provisions of the national Housing Act,[3] as well as certain provisions of the National Housing Code.[4] In effect, the municipality's case was that it was constitutionally obliged to do what it did.

[5] The High Court held that the applicants had no clear right to interdict the construction activities because their right to privacy and to remain in the structures in the meantime had not been affected; that the applicants would not suffer irreparable harm because their right to privacy and to remain in their homes would be preserved; and that, in any event, the applicants ought to have objected to the decision to redevelop the land occupied by them when that decision had been taken by the municipality. The High Court therefore refused the interdict. The High Court did however grant the counter-application. The order reads:

> "[i] The main application is dismissed with costs.
>
> [ii] An order is granted in terms of paragraphs 2, 3 and 4 of the counter-application."

[6] After both the High Court and the Supreme Court of Appeal refused the applicants leave to appeal, they applied to this Court for leave to appeal. In addition to challenging the correctness of the decision of the High Court, the applicants advanced a novel argument. They contended that their homes were referred to as

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[2] Section 26 of the Constitution in relevant part provides:

> "(1) Everyone has the right to have access to adequate housing.
>
> (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right."

[3] 107 of 1997.

[4] Available at: http://www.dhs.gov.za/Content/The%20Housing%20Code%202009/index.htm, accessed on 5 February 2013.

hostels precisely because they, as single women, did not qualify to own any houses under the apartheid Black housing regime; that had they been men, they would probably have owned the houses. They said that they should be regarded as owners. Lawyers for Human Rights, who were admitted as amicus curiae, supported the applicants' position, contending that the applicants' insecure tenure should have been upgraded. The applicants also contended that the respondents had failed to comply with certain provisions of the National Housing Code in the process of the redevelopment. It is unnecessary to go into these arguments in the light of the way in which the issues subsequently developed.

[7] After the parties had filed argument, the Chief Justice issued directions[5] requiring argument on the following issues:

> "[W]hether:
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> (a) section 26(3) of the Constitution or any other law confers on the applicants any right not to be disturbed in the peaceful occupation and possession of their home without a court order;
> (b) the premises they occupy can properly be regarded as their homes within the meaning of section 26(3) of the Constitution;
> (c) the conduct authorised and caused by the first respondent has resulted and is likely to result in unlawful interference with the right of the applicants who occupy or possess their homes peacefully; and
> (d) the conduct authorised and caused by the first respondent can be regarded as reasonable absent any order of court ejecting the applicants from the property concerned."

[5] 5 November 2012.

[8] Predictably, the applicants answered the first three questions in the affirmative and contended that the conduct of the municipality in authorising the construction cannot be regarded as constitutionally compliant absent a court order. The municipality on the other hand, while it accepts without qualification that the accommodation in which the applicants reside is their homes, denies that it acted improperly in any way. It emphasises that it is performing its duties in terms of sections 26(1) and (2) of the Constitution and denies that section 26(3) has anything to do with disturbance of peaceful occupation.

[9] The application for leave to appeal is now considered against this background.

Leave to appeal

[10] Leave to appeal must be granted if the application raises a constitutional matter and it is in the interests of justice to do so. This case raises the constitutional question whether section 26(3) protects the undisturbed occupation of everyone's homes absent a court order. It also raises the issue whether the municipality has acted constitutionally, lawfully and reasonably. Moreover, these are important constitutional matters and, as this judgment shows, the applicants have prospects of success. Leave to appeal must therefore be granted.

Merits

[11] Section 26 provides:

> "(1) Everyone has the right to have access to adequate housing.

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.

(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."

[12] The first question to be answered is whether section 26(3) of the Constitution is sufficiently wide to ensure protection of the applicants in their occupation of their homes. In my view, it does. Its provisions would be pointless and afford no protection at all if municipalities and other owners were permitted to disturb occupiers in their peaceful occupation of their homes without a court order. Section 26(3), by necessary implication, guarantees to any occupier peaceful and undisturbed occupation of their homes unless a court order authorises interference. The idea that owners are able to do so without offending the provisions of section 26(3) need simply be stated to be rejected. The underlying point is that an eviction does not have to consist solely in the expulsion of someone from their home. It can also consist in the attenuation or obliteration of the incidents of occupation.[6] We can now concern

[6] Article 17.1 of the International Covenant on Civil and Political Rights (ICCPR) provides that "[n]o one shall be subjected to arbitrary or unlawful interference with his . . . home". The ICCPR was adopted on 19 December 1966 and it entered into force on 23 March 1976. South Africa signed the ICCPR on 3 October 1994 and ratified it on 10 December 1998. Article 11.1 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) recognises the right of everyone "to an adequate standard of living for himself and his family, including adequate food, clothing and housing". The ICESCR was adopted on 16 December 1966 and it entered into force on 3 January 1976. South Africa signed the ICESCR on 3 October 1994 but has not yet ratified it.

The United Nations Committee on Economic, Social and Cultural Rights (CESCR) in General Comment 7 on forced evictions, with reference to Article 11.1 of the ICESCR and Article 17.1 of the ICCPR, states that the right to housing includes the "right to be protected against 'arbitrary or unlawful interference' with one's home" (Committee on Economic, Social and Cultural Rights, "General Comment 7: The Right to Adequate Housing (Art.11.1): Forced Evictions" Sixteenth Session, 20 May 1997, E/1998/22 at para 8). Further, the CESCR in General Comment 4 on the right to adequate housing states that the right to housing should be seen as the "right to live somewhere in security, peace and dignity" (Committee on Economic, Social and Cultural Rights, "General Comment 4: The Right to Adequate Housing (Art.11.1 of the Covenant)" Sixth Session, 13 December 1991, E/1992/23 at para 7). See also *City of Tshwane Metropolitan Municipality v Mamelodi Hostel Residents Association and Others* [2011] ZASCA 227 available at http://www.saflii.org/cgi-

ourselves with the question whether the municipality has acted lawfully in all the circumstances.

[13] The work authorised by the municipality did, in my view, interfere with the applicants' peaceful and undisturbed occupation of their homes. And what is more, the interference is by no means slight. I have already said that the applicants attach photos to their papers showing the extent of the works. The intrusion was plainly so significant a disturbance to the applicants' occupation that it constituted a form of eviction. It is serious and, in our constitutional era, unacceptable.

[14] The municipality's defence is that it has a servitudinal right to enter property to perform work related to the provision of public services. The argument that a municipality can lawfully enter upon property on which a home is situated to carry out its duty, absent urgency or other exceptional circumstances, in the face of the objection of the home occupier without a court order is just wrong. For one thing, the common law requires that a servitude be exercised *civiliter modo*, that is respectfully and with due caution.[7] Patently this would not include non-consensual bulldozing. Indeed, it would be no more than the sanctioning of self-help and the encouragement of the municipality to take the law into its own hands. Our society is based on the rule of law and the rule of law does not authorise self-help.[8] There is little difference

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bin/disp.pl?file=za/cases/ZASCA/2011/227.html&query=mamelodi hostel, accessed on 31 January 2013 and *Kenny v Preen* [1962] 3 All ER 814.

[7] *Badenhorst v Joubert* 1920 TPD 100 at 106 and *LAWSA* (2012) vol 24 at para 544.

[8] See for example *Chief Lesapo v North West Agricultural Bank and Another* [1999] ZACC 16; 2000 (1) SA 409 (CC); 1999 (12) BCLR 1420 (CC) at paras 17-8.

between a municipality forcibly entering upon a property to do its work and a person forcibly extracting a debt from another. Indeed, the municipality as an organ of state has the duty to protect its citizens in their homes rather than to invade their homes.[9]

[15] And the municipality knew that it was interfering with the rights of people to occupy their homes peacefully. This is demonstrated conclusively by the fact that the municipality has consistently (and even in the High Court) offered those people affected by the development, including the applicants, alternative accommodation. The municipality would not have offered alternative accommodation unless it had concluded that the offer was reasonably necessary in the circumstances. And the offer would be reasonable if, and only if, the particular development would have affected the applicants' peaceful and undisturbed occupation of their homes.

[16] It is probable, as a matter of inference from the offer of alternative accommodation together with the deliberate interference with peaceful occupation of their homes, that the municipality sought to achieve the eviction of the applicants through the back door. This is not permissible.

[17] It is trite that the municipality must act reasonably at every stage in the process of providing housing to people within its jurisdiction. Unconstitutional conduct cannot, by definition, qualify as reasonable conduct.

[9] Id.

[18] The course of action the municipality ought to have adopted was to secure the eviction of the applicants from their homes before carrying on with intrusive and objectionable construction work on the properties on which their homes were situated. The interdict should therefore have been granted. The applicants had a clear right not to be disturbed in the peaceful occupation of their homes; they were suffering irreparable harm; and no alternative remedy was available to them.

Costs

[19] There is no reason why the municipality ought not to pay the costs of the applicants in the High Court, in the Supreme Court of Appeal and in this Court.

Order

[20] The following order is made:

1. Leave to appeal is granted.
2. The appeal is upheld.
3. The order of the North West High Court, Mahikeng issued under case number 1413/2009 is set aside.
4. The first and second respondents, and all persons acting under their authority, are interdicted and restrained from performing or causing to be performed any construction work on the properties on which the applicants' homes are situated, without the applicants' written consent or a court order.

5. The Rustenburg Local Municipality must pay the applicants' costs in the North West High Court, Mahikeng, the Supreme Court of Appeal and in this Court, including the costs of two counsel, where employed.

For the Applicants:	Advocate N J van Niewenhuizen SC and Advocate M O'Sullivan instructed by the Legal Resources Centre.
For the First Respondent:	Advocate L Putter and Advocate N Rajab-Budlender instructed by Van Velden-Duffey Attorneys.
For the Amicus Curiae:	Advocate C R Jansen and Advocate G Snyman instructed by Lawyers for Human Rights.