CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 25/11
[2011] ZACC 35

In the matter between:

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| OCCUPIERS OF PORTION R25 OF THE FARM MOOIPLAATS 355 JR | Applicants |
| and | |
| GOLDEN THREAD LIMITED | First Respondent |
| CITY OF TSHWANE METROPOLITAN MUNICIPALITY | Second Respondent |
| MINISTER FOR HUMAN SETTLEMENTS | Third Respondent |
| MEMBER OF THE EXECUTIVE COUNCIL FOR LOCAL GOVERNMENT AND HOUSING, GAUTENG | Fourth Respondent |

Heard on : 13 September 2011

Decided on : 7 December 2011

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JUDGMENT

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YACOOB J:

*Introduction*

[1] The applicants are about 170 families who unlawfully occupy certain land[1] (land) within the City of Tshwane Metropolitan Municipality (City) owned by the first respondent[2] (Golden Thread). They seek leave to appeal against the judgment of the North Gauteng High Court[3] which ordered their eviction. Broadly, the applicants contest the correctness of the conclusion of the High Court that the eviction order was just and equitable within the meaning of section 4(6) of the PIE Act.[4] We can evaluate this conclusion only if we grant leave to appeal.

[2] The City was joined before the High Court and has also made submissions to this Court. The Member of the Executive Council for Local Government and Housing, Gauteng (MEC), and the Minister for Human Settlements (Minister) were joined as respondents in and at the instance of this Court. Affidavits filed on behalf of the Minister and the MEC took the same stance. Written argument was filed on behalf of the MEC alone.

*Leave to appeal*

[3] This Court may grant leave to appeal only if the case raises constitutional issues and only if it is in the interests of justice to do so. The application for leave to appeal to the Supreme Court of Appeal was dismissed both by the High Court and the

[1] Remainder of Portion 25 of the farm Mooiplaats 355 JR.

[2] Golden Thread Limited.

[3] *Golden Thread Limited v People who intend invading Portion R25 of the farm Mooiplaats 355JR Tshwane, Gauteng and Others*, [2010] ZAGPPHC 262;Case No. 3492/2010, 2 March 2010, unreported.

[4] Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998.

Supreme Court of Appeal. The PIE Act was passed to give effect to section 26(3) of the Constitution[5] with the result that its interpretation and application raise a constitutional matter. In addition, it is in the interests of justice to grant leave to appeal for two inter-related reasons: there are prospects of success and the homelessness of a large number of families is at stake. The only issue before us is whether the High Court was correct that the eviction of these families was just and equitable. This is an important issue. Leave to appeal will be granted.

*Inappropriate citation*

[4] It is necessary, before addressing the issue at the crux of this case, to refer to a matter that is cause for considerable concern. Golden Thread cited two groups of respondents before the High Court. The applicants before us were the second group of respondents before the High Court. The first two respondents joined in the case before the High Court were cited respectively as "[t]he people who intend invading Portion 25 of the Farm Mooiplaats 355/JR, Tshwane, Gauteng" and "[t]he people who invaded Portion 25 of the Farm Mooiplaats 355/JR, Tshwane, Gauteng".[6] This description of human beings is less than satisfactory and cannot pass without comment. It detracts from the humanity of the occupiers, is emotive and judgmental

[5] Section 26(3) provides:

> "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."

[6] This description of the parties is also resorted to in the North Gauteng High Court, Pretoria in the matter of *PPC Aggregate Quarries (Pty) Ltd v The people who intend invading the Remaining Extent of the Farm Skurweplaas 353, J.R., Tshwane, Gauteng and Others* Case No. 12289/2010, North Gauteng, High Court Pretoria, 24 March 2010, unreported. Reasons for the order are dated 5 May 2010. The judgment on the application for leave to appeal to this Court in the *Skurweplaas* case is being handed down concurrently with this judgment.

and comes close to criminalising the occupiers. This form of citation should not be resorted to. A more neutral appellation like "occupiers" might well be more appropriate.

*In the High Court*

[5] The relevant sections of the PIE Act are set out before looking at the High Court's reasoning:

> "4. Eviction of unlawful occupiers
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> (6) If an unlawful occupier has occupied the land in question for less than six months at the time when the proceedings are initiated, a court may grant an order for eviction if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances, including the rights and needs of the elderly, children, disabled persons and households headed by women.
>
> (7) If an unlawful occupier has occupied the land in question for more than six months at the time when the proceedings are initiated, a court may grant an order for eviction if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances, including, except where the land is sold in a sale of execution pursuant to a mortgage, whether land has been made available or can reasonably be made available by a municipality or other organ of state or another land owner for the relocation of the unlawful occupier, and including the rights and needs of the elderly, children, disabled persons and households headed by women.
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> (8) If the court is satisfied that all the requirements of this section have been complied with and that no valid defence has been raised by the unlawful occupier, it must grant an order for the eviction of the unlawful occupier, and determine—
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> (a) a just and equitable date on which the unlawful occupier must vacate the land under the circumstances; and

> (b) the date on which an eviction order may be carried out if the unlawful occupier has not vacated the land on the date contemplated in paragraph (a)."

[6] It must be pointed out now that the High Court rightly expressed misgivings about the conduct of the City during the proceedings:

> "I have already noted during the hearing that the [City] is conspicuous in its absence. It is a very sad state of affairs, especially as the [City] is the one body which is constitutionally bound to address the problem which exists. They have not only failed dismally in that respect and have done so for many years, but they have not even attended this hearing to assist the court to come to a decision. The [City] merely briefed counsel on a watching brief."[7]

[7] The High Court appreciated that the pertinent enquiry was whether the eviction was just and equitable and if so, it will have to concern itself with determining a just and equitable date of eviction. The High Court sketched certain surrounding circumstances before proceeding with the justice and equity enquiry:

a. The Itireleng informal settlement was established in 2004.
b. When Itireleng became overcrowded, certain of those occupiers (and probably other occupiers who had come from elsewhere) started to move onto property adjacent to Itireleng.[8]
c. The occupiers were evicted from that property during 2009.

[7] Above n 3 at 5.

[8] Described in that judgment as Portion R15.

d. The applicant families moved onto the land which they presently occupy during December 2009 and, after the homes they had constructed there were demolished, began rebuilding their homes on 15 January 2010.
e. The proceedings before the High Court were initiated by Golden Thread on 21 January 2010.

[8] The High Court conducted the justice and equity enquiry on the bases that the right of access to adequate housing is not enforceable at common law or in terms of the Constitution against any individual landowner and that the unlawfulness of the occupation by the applicants was common cause. The High Court took into account a number of factors in coming to the conclusion that the eviction of the applicants was just and equitable. The Court first emphasised that "there does not appear to be any elderly persons, children, disabled persons or households headed by women" on the land. The Court considered that the applicants would have been motivated by the fact that living on vacant land would be better than being in over-populated Itireleng and that the conditions in Itireleng had to be taken into account. It remarked, correctly in my view, that it was unfortunate that the people who came from elsewhere had not said anything about the conditions that existed whence they came.

[9] On the other side of the coin, the Court accorded some weight to the fact that most of the applicants occupied the land "in contempt of a court order". The High Court considered it significant that Golden Thread had instituted proceedings quite quickly and remarked that, if Golden Thread allowed the occupation to continue, the

occupiers "might start to establish rights which would make it very difficult and even impossible to protect its property." The judge also took into account that the applicants had been on the land for a short time, that there is no infrastructure or basic services on the land, and that Golden Thread had no obligation to "carry the burden to supply the present and any would-be land invaders with accommodation." Finally, the High Court considered it significant that there was vacant property adjacent to Itireleng belonging to the City which could accommodate the occupiers.

[10] The order of eviction was accordingly granted:

> "2. The persons in occupation of Portion R25 of the Farm Mooiplaats, JR/355, Tshwane Gauteng (Portion R25) are hereby evicted from Portion R25 and shall vacate Portion R25 by not later than 29 March 2010.
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> 3. The persons in occupation of Portion R25 are hereby ordered to demolish and remove their structures and/or shacks from Portion R25 by not later than 29 March 2010.
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> 4. In the event of any persons in occupation of Portion R25 failing to comply with the order in paragraphs 2 and 3 above, the sheriff of this court is hereby authorised and ordered to evict any and all occupiers on Portion R25 from Portion R25, from 1 April 2010.
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> 5. The sheriff of this court is hereby authorised and ordered to demolish and remove any and all structures and/or shacks mentioned in paragraph 3 above from Portion R25 from 1 April 2010.
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> 6. The sheriff of this court is hereby authorised and ordered to request any person including members of the Tshwane Metro Police and members of the South African Police Services to assist him in the eviction, demolition or removal of the occupiers of Portion R25 and/or their structures and/or their shacks from Portion R25.
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> 7. The first and second respondents are ordered jointly and severally to pay the applicant's costs of suit."

*In this Court*

[11] It is as well to get a dispute between the City and the MEC out of the way before investigating the correctness of the High Court order. The MEC disputed the contention of the City that Chapter 12 of the National Housing Code and the relevant legislative framework conferred neither the obligation nor any power on it to expend its own resources in the provision of emergency housing. The City contended that the province of Gauteng, not the City itself, was obliged to finance all emergency housing provision. This proposition was roundly rejected by this Court in *Blue Moonlight*:[9]

> "Besides its entitlement to approach the province for assistance, the City has both the power and the duty to finance its own emergency housing scheme. Local government must first consider whether it is able to address an emergency housing situation out of its own means. The right to apply to the province for funds does not preclude this. The City has a duty to plan and budget proactively for situations like that of the Occupiers. This brings the issue of available resources to the fore."

This judgment must therefore proceed on the basis that the City does indeed have the power and the obligation to make reasonable provision for emergency housing from its resources.

[12] The applicants made various interesting submissions and criticised the judgment of the High Court on different bases. It is however necessary to investigate only one of the applicants' submissions. That concerns the role of the City in the proceedings before the High Court. The first leg of this submission was that, bearing

[9] *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another (Lawyers for Human Rights as Amicus Curiae)* [2011] ZACC 33, 1 December 2011, as yet unreported, at para 67.

in mind that a large number of families would probably become homeless, it was obligatory on the High Court to require the City to provide particulars of the applicants' housing situation and whether the City could provide emergency housing. Secondly, the applicants say that the Court should also have investigated the possibility of mediation to be facilitated by the City between Golden Thread and the applicants.[10]

[13] This submission is sound. Although the High Court bemoaned the conduct of the City and was critical of that conduct, it did not oblige the City either to investigate the matter or to furnish information about its ability to help with emergency housing in the circumstances. Nor was the mediation aspect explored.

[10] In terms of section 7 of the PIE Act which provides:

> "Mediation
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> (1) If the municipality in whose area of jurisdiction the land in question is situated is not the owner of the land the municipality may, on the conditions that it may determine, appoint one or more persons with expertise in dispute resolution to facilitate meetings of interested parties and to attempt to mediate and settle any dispute in terms of this Act: Provided that the parties may at any time, by agreement, appoint another person to facilitate meetings or mediate a dispute, on the conditions that the municipality may determine.
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> (2) If the municipality in whose area of jurisdiction the land in question is situated is the owner of the land in question, the member of the Executive Council designated by the Premier of the province concerned, or his or her nominee, may, on the conditions that he or she may determine, appoint one or more persons with expertise in dispute resolution to facilitate meetings of interested parties and to attempt to mediate and settle any dispute in terms of this Act: Provided that the parties may at any time, by agreement, appoint another person to facilitate meetings or mediate a dispute, on the conditions that the said member of the Executive Council may determine.
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> (3) Any party may request the municipality to appoint one or more persons in terms of subsections (1) and (2), for the purposes of those subsections.
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> (4) A person appointed in terms of subsection (1) or (2) who is not in the full-time service of the State may be paid the remuneration and allowances that may be determined by the body or official who appointed that person for services performed by him or her.
>
> (5) All discussions, disclosures and submissions which take place or are made during the mediation process shall be privileged, unless the parties agree to the contrary."

[14] In *Shorts Retreat*[11] the Supreme Court of Appeal had occasion to consider an appeal against the order of a High Court evicting a group of people, the majority of whom were "unemployed, poor and homeless" and who had been in unlawful occupation for more than six months. The municipality had not been joined in those proceedings. The Supreme Court of Appeal unanimously emphasised that the municipality should have been joined, focusing on the fact that because the appellants had been in occupation for more than six months section 4(7) of the PIE Act obliged the High Court to investigate whether land could reasonably be made available by the municipality or an organ of state for the relocation of the occupiers. The High Court should also have had before it, the Supreme Court of Appeal said, information relating to the needs of the elderly, children, persons with disability, and households headed by women.[12] The Supreme Court of Appeal also emphasised the importance of mediation and the role of the municipality in this process.[13]

[15] Now this case is distinguishable from *Shorts Retreat*. The applicants in that case had been in unlawful occupation for years. When the High Court considered the case before us the applicants had been in occupation for several months. The difference between the cases lies in the circumstance that, where residents have been in occupation of land for less than six months, a court is not expressly obliged to investigate whether a municipality can reasonably make land available for people who

[11] *Occupiers of Erf 101, 102, 104 and 112 Shorts Retreat, Pietermaritzburg v Daisy Dear Investments (Pty) Ltd and Others* 2010 (4) BCLR 354 (SCA).

[12] Id at para 6.

[13] Id at para 9.

might be evicted.[14] On the other hand a court is enjoined to make the alternative land investigation if the occupation exceeds six months.

[16] While this distinction is important, I do not think it is decisive to the justice and equity enquiry. This is because, if a court has before it a case in which the land occupation falls short of six months, it is obliged to consider all the relevant circumstances. In an enquiry of this kind, a court should determine what the relevant circumstances are. Close to 200 families would have been evicted and in all probability rendered homeless consequent upon the order of the High Court. In the face of this consequence the question whether the City was reasonably capable of providing alternative land or housing was of crucial importance. And what is more, the High Court was alive to the fact that the City did indeed own land which was vacant and which might be made available for that purpose. It was impossible for the High Court to conclude that the eviction was just and equitable without investigating this aspect.

[17] It is possible that the High Court was motivated to some extent by its view that Golden Thread had no obligation towards the applicants; that it had sought an eviction order early; and that the applicants may have acquired greater rights had Golden Thread not acted quickly. This smacks of the thesis that an owner's right to land is virtually unlimited. This Court in *Blue Moonlight* held that ownership in South Africa is not as unrestricted:

[14] Section 4(6) of the PIE Act.

> "Of course a property owner cannot be expected to provide free housing for the homeless on its property for an indefinite period. But in certain circumstances an owner may have to be somewhat patient, and accept that the right to occupation may be temporarily restricted . . . . An owner's right to use and enjoy property at common law can be limited in the process of the justice and equity enquiry mandated by PIE."[15]

[18] It is of some significance in this context that Golden Thread has not put the land to any use, nor is there any evidence that it intends to subject the land to use in the foreseeable future. If this is true, there would be little prejudice to Golden Thread if the applicants remain in occupation for some months longer until alternative land becomes available.

[19] The appeal must succeed. It is appropriate like in *Shorts Retreat*, for the High Court to be given the chance to consider the matter afresh after the City has furnished the relevant information and the applicants and Golden Thread have been given the opportunity to respond.

*Costs*

[20] There is no reason why costs should not follow the result.

*Order*

[21] The following order is made:

1. Leave to appeal is granted and the appeal is upheld with costs, including the costs of two counsel.

[15] Above n 9 at para 40.

2. The order of the North Gauteng High Court, Pretoria in case number 3492/2010 is set aside.

3. The matter is remitted to the High Court for consideration after paragraphs 4 and 5 of this order have been complied with.

4. The City of Tshwane Metropolitan Municipality is ordered to file in the High Court a report, confirmed on affidavit, by 28 February 2012 on—

   (a) the particulars of the housing situation of the applicants, including details as to the number of families that will be rendered homeless if the eviction order were to be carried out;

   (b) the steps it has taken, is able to take, and intends to take to provide alternative land or housing as emergency accommodation for the applicants if they are evicted;

   (c) when alternative land or accommodation can be provided;

   (d) the effects of an eviction on the applicants and the surrounding residents, if the eviction order is executed without alternative land or emergency accommodation being made available; and

   (e) the steps that can be taken to alleviate the effects of the occupation of the land in question on the landowner if the occupiers were physically evicted only after the municipality has made alternative land or accommodation available to those applicants who will be rendered homeless by their eviction.

5. The applicants and the first respondent may, within 15 days of the delivery of the report by the municipality, file affidavits in the High Court in response to the report.

Mogoeng CJ, Moseneke DCJ, Froneman J, Jafta J, Khampepe J, Nkabinde J, Skweyiya J and Van der Westhuizen J concur in the judgment of Yacoob J.

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| For the Applicants: | Advocate R Jansen and Advocate H Barnes instructed by Lawyers for Human Rights. |
| For the Second Respondent: | Advocate JJ Botha instructed by Mphahlele Attorneys. |
| For the Third Respondent: | Advocate N Cassim SC and Advocate J Kanyane instructed by the State Attorney. |
| For the Fourth Respondent: | Advocate T Motau SC and Advocate K Pillay instructed by Mdhluli, Pearce and Mdzikwa Incorporated. |