THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case No: 280/2008

EKURHULENI METROPOLITAN MUNICIPALITY **Appellant**

and

EBRAHIM DADA N.O. **First Respondent**

YUSAF EBRAHIM OSMAN N.O. **Second Respondent**

ESSOP SHAIK N.O. **Third Respondent**

SHAUKAT THOKAN N.O. **Fourth Respondent**

ABDUL' MAJEED DAWOOD N.O. **Fifth Respondent**

ISMAEL ESSA PATEL N.O. **Sixth Respondent**

THE UNLAWFUL OCCUPIERS OF PORTION 41 **Seventh Respondent**

Neutral citation: *Ekurhuleni Municipality v Dada N.O.* (280/2008)[2009] ZASCA 21 (27 March 2009)

Coram: Harms DP, Brand, Mhlantla JJA, Hurt and Bosielo AJJA

Heard: 5 March 2009
Delivered: 27 March 2009

Summary: **Review by court of conduct of municipality – Judge making order that municipality should purchase property on which informal settlement established – Such order not sought by parties, but clearly the result of a preconceived solution arrived at by the judge – Such a prohibited usurpation by judge of the functions and duties of the municipality – Lack of 'judicial deference' displayed by judge in considering the municipality's working procedures, conduct and decisions – Order to purchase property set aside.**

ORDER

On appeal from: Johannesburg High Court (Cassim AJ sitting as court of first instance)

1 The appeal succeeds to the extent that paragraph 1 of the order of the high court is set aside. There will be no order as to costs.

JUDGMENT

HURT AJA (HARMS DP, BRAND, MHLANTLA JJA and BOSIELO AJA concurring):

[1] 'In exercising the judicial function, judges are themselves constrained by the law.' This *dictum* from the recent decision of this court in *National Director of Public Prosecutions v Zuma*[1] restates a time-honoured rule and is probably a sanguine reminder to a judiciary which might often, in its efforts to achieve the objects of the Bill of Rights in the Constitution, be tempted to chafe against the concept of 'progressive' as opposed to 'immediate' realisation of constitutional objectives, especially at the governmental and municipal levels. This is a case in point. It is an appeal against an order granted by Cassim AJ in the Johannesburg High Court, in which, *inter alia*, he ordered the appellant, a municipality, to purchase a property on which an informal settlement had been established, in an application in which the eviction of the occupants of the property had been sought. The appeal is brought with leave granted by Cassim AJ.

[2] The first six respondents are the trustees of the Islamic Dawah Movement Trust, the owner of a property described as 'Portion 41 of the Farm Rooikop 140' (and referred to in this judgment as 'the property') situated in the area of jurisdiction of the Ekurhuleni Municipality. In November and December 2004 approximately 76 families moved onto the property from an informal

[1] 2009 (2) SA 277 (SCA) para 15.

settlement on a neighbouring piece of land which had become uninhabitable because of flooding and marshy conditions generated by the summer rains.

[3] In July, 2006, the Trust brought an application in the Witwatersrand Local Division of the High Court for the eviction of these families, collectively cited in this appeal as the seventh respondent, to whom I shall refer as 'the occupiers'. The application was governed by the procedure prescribed in the Prevention of Illegal Eviction From and Unlawful Occupation of Land Act, 19 of 1998, and the municipality was joined as the second respondent (the occupiers being jointly cited as the first).

[4] The occupiers opposed the application. They did not deny that their occupation of the property was unlawful, but alleged that they had taken occupation under a *bona fide* belief that they had authority from an official of the municipality to do so. In a counter application in which the municipality was cited as the respondent in reconvention, they contended that the municipality was duty-bound in terms of s 26(2) of the Constitution to 'devise and implement within its available resources a comprehensive and co-ordinated programme progressively to realise (the occupiers) right of access to adequate housing'. It was submitted, in this regard, that the municipality was obliged to 'include reasonable measures to provide relief for (the occupiers) who, upon eviction from (the property) will have no roof over their heads and will have to live in intolerable conditions and in a situation of crisis'.[2] The broad contention in this regard was that the plight in which the occupiers found themselves was due to the municipality having failed to comply with its constitutional duties. In a Notice of Counter Application, annexed to the answering affidavit in the main application, they sought elaborately-framed relief in the form of a declarator concerning the municipality's constitutional obligations; an interim interdict against their eviction by the Trust; an order that the municipality comply with its constitutional obligations and report to the court as to its compliance within a period of three months; and provisions to regulate any debate before the court arising from the contents of such report.

[2] The quotation is from the affidavit supporting the counter application.

[5] The municipality, in its riposte to the contentions founding the counter application, took certain procedural objections which, though they were certainly not without substance, need not be dealt with in this judgment. As to the contentions by the occupiers that the municipality had done nothing to afford them access to housing for the four-year period from 2002 to 2006, and appeared to have no plan to render their living conditions more acceptable, the deponent for the municipality dealt in detail with the statutory framework in place for this aspect of the municipality's administrative duties and annexed to his affidavit voluminous documents setting out what are described as 'Strategic Frameworks' and 'Integrated Development Plans'. These reflect the municipality's planning to achieve the objects of s 26(2) of the Constitution through implementation of the provisions of, *inter alia*, the Housing Act 107 of 1997, the National Housing Programme, the Development Facilitation Act, 67 of 1995, the National Environmental Management Act, 107 of 1998 and the Regulations promulgated under ss 24 and 24D of that Act. The contention was that these statutes, regulations, policies and plans represented an ordered, properly prioritised, progressive policy to achieve the objects of the Constitution.

[6] In reply to the municipality's answering affidavit, the deponent for the occupiers pinpointed the provisions concerning 'emergency housing' in chapters 12 and 13 of the Housing Code. There had been no reference in the founding affidavit in the counter application to these provisions. The municipality delivered an application to strike out the passages in the replying affidavit, referring in particular to the Housing Act and the Housing Code, on the basis that they constituted 'new matter'.

[7] In this state, the matter came before Cassim AJ in the court *a quo.* As to what transpired on the first day of the hearing, the record is silent. But one gleans from what was said at the commencement of proceedings on the second day, that the Judge had informed counsel that there should be evidence from representatives of the municipality about what had been done by that body to alleviate the plight of the occupiers during the twenty months

which had, by the date of the hearing, elapsed since the application had been lodged in July, 2006. Whether the learned Judge took the view that there were disputes of fact on the papers which required oral evidence for their resolution, or whether he considered that he should conduct a personal investigation by questioning the employees of the municipality for the purpose of exercising the discretion to evict in terms of s 4(7)[3] of PIE, is not clear. At the commencement of the proceedings on the second day, he was told that the parties had agreed to ask him to separate the issues and to rule first on the counter application.

[8] It is apparent from the tenor of the questions put by him to the two municipal employees, that the Judge had, before hearing their evidence, resolved to order the municipality to buy the property for a price of R250 000. I say this because, having asked the first witness what the municipality was doing to provide homes for poor people, and having been told that there was a plan in place aimed at eradicating all informal settlements by the year 2014, the record of his further questioning runs thus :

'Now if I were to make an order that (the municipality has) to buy the property, will Gauteng then make the moneys available? . . . Ja, well we can apply for the, to make money available.

But look, if you said there is an order of the judge of the high court, we need R250 000.00 they must make the money available? . . . . They must make the money available ja.'

[9] The answer to the second question above was clearly a hypothetical one, because, for the rest of his sojourn in the witness box, this witness endeavoured to explain the prescribed procedure which the municipality was obliged to follow before it could properly resolve to buy immovable property. The second witness called on behalf of the municipality fared similarly. She tried in vain to point out to the judge that before the municipality could acquire the property for development, certain statutory procedures had to be followed,

[3] It emerges from para 9 of his judgment that he called for the oral evidence 'in the exercise of (his) discretion', for the purpose of 'considering the counter-application in motion proceedings' although he appears to have made no attempt to define the issues of fact which he intended to resolve by way of the oral evidence.

such as an environmental impact assessment, a geotechnical assessment,[4] the acquisition of the requisite additional funds from the Provincial Housing Department, formal municipal procedures such as obtaining an empowering resolution from the Council, the provision of essential services to the property, etc. All of these the judge simply shrugged off as unnecessary beaurocracy, reiterating to the witness his suggestion that if an order was made by a high court judge directing the municipality to buy the property, that order would have to be complied with without the delays occasioned by the prescribed procedures. I should mention that in the course of this evidence, reference was made of a proposal to lease the property for a year at a rental of R1800 per month, but this information, too, was received with discernible apathy by the Judge.

[10] In his judgment the Judge expressed his disapproval of the level of inactivity, with regard to the circumstances of the occupiers, shown by the municipality particularly over the period between the lodging of the eviction application and the date of the hearing. He found that this constituted a failure by the municipality to comply with its constitutional duties. In the course of reviewing the law concerning the court's role in the enforcement of fundamental rights, such as the right of access to housing, he referred to the well-known decisions in *Government of the RSA and Others v Grootboom* 2001 (1) SA 46 (CC) and *President of RSA v Modderklip Boerdery (Pty) Ltd* 2005 (5) SA 3 (CC), but expressed the view that the courts had not gone far enough towards enforcing the rights in s 26 of the Constitution in these cases.[5] On this basis, it seems, he apparently decided that the courts should be galvanized into taking a 'robust approach' to the implementation of the provisions of the Constitution. This type of approach is probably the very antithesis of the approach which this court and the Constitutional Court have endorsed in a number of recent decisions. In *Logbro Properties CC v*

[4] To ensure that the land was not rendered unfit for housing by subterranean dolomite deposits which occur regularly in that area.

[5] In para 37 of the judgment he said 'I appreciate and understand that the approach I adopt in this matter may well be viewed not only as ordering the State to fulfil its obligations, but also telling it how to do so and that this would be a breach of the rule on separation of powers (see for instance : *President of the RSA v Modderklip Boerdery (Pty) Ltd* 2005 (5) SA 3 (CC) at 27B)'.

Bedderson NO and Others 2003 (2) SA 460 (SCA), para 21, Cameron JA referred, in the context of a necessity for 'judicial deference', with approval to the following passage from an article by Cora Hoexter entitled 'The Future of Judicial Review in South African Administrative Law' (2000) 117 *SALJ* 484, at 501 to 502, which is to the following effect:

'. . . the sort of deference we should be aspiring to consists of a judicial willingness to appreciate the legitimate and constitutionally-ordained province of administrative agencies; to admit the expertise of these agencies in policy-laden or polycentric issues; to accord their interpretation of fact and law due respect; and to be sensitive in general to the interests legitimately pursued by administrative bodies and the practical and financial constraints under which they operate. This type of deference is perfectly consistent with a concern for individual rights and a refusal to tolerate maladministration.'

This passage was also referred to with approval and the theme taken up by Schutz JA in *Minister of Environmental Affairs v Phambili Fisheries (Pty) Ltd* 2003 (6) SA 407 (SCA), paras 52 and 53, where, after quoting the passage set out above, the learned judge said:

'I agree with what is said by *Hoexter* (*op cit* at 185):

> "The important thing is that Judges should not use the opportunity of scrutiny to prefer their own views as to the correctness of the decision, and thus obliterate the distinction between review and appeal."

[53] Judicial deference is particularly appropriate where the subject matter of an administrative action is very technical or of a kind in which a Court has no particular proficiency. We cannot even pretend to have the skills and access to knowledge that is available to the Chief Director. It is not our task to better his allocations, unless we conclude that his decision cannot be sustained on rational grounds.'[6]

[11] The learned Judge failed to have regard to these precepts and, in the result, he made an order in the following terms:

'(1) The Second Respondent is directed to purchase the property from the Applicants at a purchase consideration of R250 000.00 within 30 (thirty) days from the date of this order.

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[6] Paras 52 and 53. This *dictum* was expressly approved in the subsequent appeal to the Constitutional Court *sub nom Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004 (4) SA 490 (CC).

(2) The Second Respondent is required to forthwith make provision of essential services to the occupiers of the property.
(3) There will be no order as to costs.'

[12] On appeal before us the municipality sought only to set aside paragraph (1) of this order, the services referred to in paragraph (2) having apparently been supplied (or being in the process of being supplied) already.

[13] There can be no doubt that the order that the municipality should purchase the property stemmed from a pre-conceived notion on the part of the Judge that it was time 'to get things moving' as it were. He was not asked, in the papers or in the course of evidence, to make such an order and it was not rationally related to the evidence which was adduced concerning the municipality's policies and plans and the extent of its immediate obligations to alleviate the plight of these particular occupiers. He had plainly persuaded himself that it was time to cut across the principles of 'progressive realisation' of housing access emphasized in the decisions of the Constitutional Court to which he had referred. In this he fell foul of another fundamental rule emphasized in *Bato Star* and the other cases dealt with in para 10, and also in *Zuma*, *supra*, at para 16, viz:

'Judges as members of civil society are entitled to hold views about issues of the day and they may express their views provided they do not compromise their judicial office. But they are not entitled to inject their personal views into judgments . . . '

[14] Counsel for the occupiers was asked, in argument, to refer this court to any decided case, in the Republic or elsewhere, where an equivalent order had been made and she was (not surprisingly) unable to do so. The only basis upon which she attempted to defend the order was that the court had taken an appropriately 'robust' approach to the solution of the occupiers' problems, but such a submission does not warrant serious consideration in the circumstances of this case. The Judge was perhaps right in coming to the conclusion that the municipality had not dealt with the problems of the informal settlement on the property with the measure of alacrity which could reasonably be expected of them. But that did not justify his adopting a solution

which was well outside the limits of his powers. Even if he considered that the occupiers were entitled to by-pass the statutory provisions expressly enacted by Parliament for the purpose of implementing the rights entrenched in chapter 2 of the Constitution,[7] he was nevertheless bound to consider the occupiers' case under the provisions of s 38 of the Constitution, in which event he was empowered to grant 'appropriate relief'. The order that the municipality should purchase the property was plainly not 'appropriate relief'. It follows that the appeal should succeed to the extent that that part of the order must be set aside. The order for the provision of services to the property by the municipality, being accepted by that body, will stand. The issue in the main application relating to the eviction of the occupiers has yet to be set down for hearing and dealt with by the court of first instance. Neither party contended that it was entitled to an order for costs of the appeal.

[15] The appeal succeeds to the extent that paragraph 1 of the order of the court a quo is set aside. There will be no order as to costs.

NV HURT
ACTING JUDGE OF APPEAL

Appearances:

For Appellant: GI Hulley

Instructed by:

[7] See, e.g. *MEC for Education, KwaZulu-Natal, and Others v Pillay* 2008 (1) SA 474 (CC) at para 40.

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For Respondent: URD Mansingh (Ms)

Instructed by:
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Fullard Mayer Morrison Inc Sandton

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