

Jabulani Zulu and 389 Others v eThekweni Municipality and Others

CCT 108/13

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Introduction

On 6 June 2014, the Constitutional Court handed down judgment in the case of *Jabulani Zulu and 389 Others v eThekweni Municipality and Others*.

Fact and procedural history

Jabulani Zulu and 389 other people (Madlala Village residents) lived in informal homes on a property commonly known as Madlala Village in Lamontville Township, Durban. In September 2012, the eThekweni municipality land invasion control unit came to the property and evicted the residents and demolished their homes. The Madlala Village residents rebuild their homes soon after the control unit had left. The eThekweni municipality (the Municipality) carried out the evictions and demolitions without any court order. Subsequent to the demolitions in September 2012, the control unit regularly patrolled the Lamontville property and demolished the Madlala Village residents' shacks and homes, which the residents rebuilt on 24 occasions after each demolition.

The Municipality accused the Madlala Village residents of invading the Lamontville property in order to jump the queue of those waiting to be allocated houses, and pointed out that the Lamontville property had been earmarked for low-cost housing for a group of people who had already been identified (para 8).

The High Court

In March 2013, the Member of the Executive Council for Human Settlements and Public Works, KwaZulu-Natal (the MEC) sought and obtained an interim order from the KwaZulu-Natal High Court (Koen J) (case no. 3329/2013) restraining any persons from invading or occupying various properties that had been allegedly been earmarked for low-cost housing or were being developed (namely, 37 provincial housing department properties, presumably across 1,568 properties in total (para 58)), including the Lamontville property (para 10). In April 2013, the MEC and the Municipality approached the High Court to confirm the interim order.

The Madlala Village residents applied to be joined in the High Court proceedings as interested parties since they were subject to the interim order. They argued that the interim order sought by the MEC affected their property and therefore they had a direct and substantive interest in the proceedings. Further, they argued that the interim order authorised their eviction without compliance with the Prevention of Illegal Eviction from and Unlawful Oc-

cupation of Land Act (19 of 1998) (PIE). The MEC opposed their application and claimed they were not 'genuinely homeless' and were not affected by the court order.

The Madlala Village residents' application to the High Court for leave to intervene was dismissed. No reasons were given by the Court. They then petitioned the Supreme Court of Appeal for the leave to appeal the High Court decision, but their petition was dismissed.

The Madlala Village residents then approached the Constitutional Court to determine whether the High Court erred in refusing them leave to intervene in the proceedings.

On 13 January 2014, the Constitutional Court admitted Abahlali baseMjondolo as an *amicus curiae* in the appeal.

The Constitutional Court decision

The main judgment was written by Zondo J, with whom Moseneke ACJ, Skweyiya ADCJ, Cameron J, Dambuza AJ, Jafta J, Khampepe J, Madlanga J, and Majiedt AJ concurred. The Constitutional Court found that the interim order authorised the Municipality and the Minister of Police, acting through South Africa Police Services (SAPS), to 'take all reasonable steps to prevent any persons from occupying, the Lamontville property'. This would amount to an eviction order (para 24–25).

The Municipality argued that the interim order did not apply to people who were already in occupation of the Lamontville property before the order was granted. However, it was later established that the Municipality relied on the interim order for its authority to carry out demolitions on 13 February 2014, the day after the High Court hearing, on no less than 272 structures, 93 of which were half built and the rest fully built. As such the interim order was effectively an eviction order.

The Constitutional Court found that the Madlala Village residents had a direct and substantial interest in the interim order proceedings in the High Court (case no. 3329/2013) (para 29) as the interim order affected their interests adversely. It found that the High Court therefore erred in dismissing their application for leave to intervene.

The general principle of law

As far as evictions are concerned, Section 25(1) of the Constitution states that no-one may be deprived of property, except in terms of a law of general application, and that no law may permit arbitrary deprivation. Section 26(3) further guarantees that, unless and until a court has issued an order after considering all the relevant circumstances, no

one may be evicted from their home or have their home demolished, and that no legislation may permit arbitrary evictions. PIE governs evictions to ensure the most vulnerable are protected. Section 4 of PIE prescribes some circumstances that have to be taken into account when an eviction of unlawful occupiers is carried out. Sections 4(6) and 4(7) specifically provide that a court hearing an eviction application '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 most vulnerable, such as the elderly, children, disabled persons and households headed by women.

Minority judgment

A separate judgment by Van Der Westhuizen J, with which Froneman J concurs, agrees with the main judgment that Koen J's order is an eviction order that contravenes the protections in PIE, but goes further to find that it is unlawful and unconstitutional. Van der Westhuizen focused on the constitutionality of the interim order. He contextualised the matter squarely: in the 'country's history of colonialism and apartheid, dispossession of land and gross discrimination, as well as prevailing poverty and inequality, issues around housing are central to our constitutional democracy' (para 43). Further it was noted that the Madlala Village residents 'live in abject poverty [and] the interim order strips them of protection for the very little they have' (para 58).

He noted that the interim order was issued without due consideration of the impact it would have on the Madlala Village residents, who had nowhere else to live, which was in contravention with the provisions of PIE, and the underlying constitutional rights. The interim order was therefore unlawful and unconstitutional because it negated their rights under PIE and section 26(3) of the Constitution. PIE particularly offers protective measures that are intended to ensure due process and sufficient consideration of housing needs prior to an eviction order being issued.

Van Der Westhuizen further pointed out that since this was not an isolated incident, it was necessary for the Constitutional Court to 'establish legal certainty on orders like the interim order' (para 50). This is based on the legal principle that 'even where an issue does not have immediate impact on the parties' positions, a court may deal with an issue if its immediate resolution will be in the public interest' (para 51). An example of immediate resolution that was considered to be in the public interest was in *Ra-*

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dio Pretoria v Chairperson, Independent Communications Authority of South Africa and Another [2004] ZACC 24, at para 22; and *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development and Others* [2009] ZACC 8, at para 40.

The interim order is squarely a constitutional matter dealing with Madlala Village residents' rights not to be arbitrarily evicted from their homes as guaranteed under section 26 of the Constitution. The Court also considered whether irreparable harm would result if leave were not granted (para 56). If irreparable harm cannot be shown, the request to appeal an interim order will generally fail. (See also *Treatment Action Campaign* (2002) para 12.) The Madlala Village residents alleged that each time their shelters were dismantled by the Municipality's control unit, the materials which had built their homes and shacks (informal structures) were either taken away or destroyed, 'stripping them of the very little they had, including their homes'.

Significance of this case

This case is significant because the Constitutional Court established that an interim order had been used as an eviction order. The Court noted that the interim order was crucial to the fate of the Madlala Village residents because it did not require the municipality to follow PIE, which requires that certain steps be taken before people can be evicted. As such the Court unanimously held that interim order issued by the High Court was an eviction order, which was unacceptable. Madlala Village residents were granted leave to intervene in the High Court proceedings.

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References

Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development and Others [2009] ZACC 8; at para 40.

Minister of Health and Others v Treatment Action Campaign and Others (No 1) [2002] ZACC 16; 2002 (5) SA 703 (CC) [2002] ZACC 15; (CC) (Treatment Action Campaign) at para 12.

Radio Pretoria v Chairperson, Independent Communications Authority of South Africa and Another [2004] ZACC 24; at para 22.

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