

The constitutional protection of those facing eviction from “bad buildings”

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The Constitutional Court's judgment in the *Olivia* case, handed down on 19 February 2008, represents a victory for the occupiers of “bad-buildings” in the inner city of Johannesburg as well as other poor people facing eviction for health and safety reasons.

The judgment gives effect to South Africa's constitutional commitment to housing rights. It also affirms the obligation on local authorities, in all evictions, to seek reasonable ways to avoid homelessness by engaging meaningfully with the affected communities.

Central to this case are the provisions of the National Building Regulations and Building Standards Act 103 of 1977 (NBRA), which empower local authority officials to issue a notice to occupiers to vacate premises when they deem it necessary for the safety of any person (section 12(4)(b)). Failure to comply with such a notice constitutes a criminal offence for which the offender can be fined

up to R100 for each day of non-compliance (section 12(6)).

Facts and decisions of lower courts

This case began in the High Court, where the City of Johannesburg (the City), relying upon section 12(4)(b) of the NBRA, sought the eviction of over 300 people from six properties in the inner city on health and safety grounds (*City of Johannesburg v Rand Properties (Pty) Ltd and Others* 2006 (6) BCLR 728 (W)). Section 12(4)(b) is in fact regularly used in Johannesburg to clear residents of what the City regards as residential “sinkholes” or “bad buildings”.

Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg v City of Johannesburg and Others CCT 24/07 (*Olivia* case)

This case has been discussed in previous issues of the *ESR Review*: 7(2), 8(1) and 8(3).

The occupiers opposed the eviction order and brought a counter-application aimed at securing alternative accommodation or housing as a precondition to their eviction. Judge Jajbhay held that the City's housing programme failed to comply with its constitutional and statutory obligations, and ordered the City to produce a programme to cater for those in desperate need. Pending the implementation of the programme or the provision of suitable adequate alternative accommodation, the eviction of the occupiers could not take place.

The City then appealed to the Supreme Court of Appeal (SCA) against the High Court's

judgment (*City of Johannesburg v Rand Properties (Pty) Ltd and Others* 2007 (6) BCLR 643 (SCA)). The SCA authorised the eviction of the occupiers based on the finding that the buildings they occupied were unsafe and unhealthy. It ordered, however, that temporary accommodation be provided to those occupiers who were in desperate need of housing assistance. The temporary accommodation was to consist of a place where they could live without the threat of another eviction in a waterproof structure that was secure against the elements and with access to basic sanitation, water and refuse services. The Court also ordered the City to determine the location of the alternative accommodation after consultation with every respondent that requested it.

Not satisfied with the SCA judgment, more than 400 occupiers of two buildings in the inner city of Johannesburg approached the Constitutional Court for leave to appeal against the decision of the SCA.

Issues raised before the Constitutional Court

In the application for leave to appeal, the occupiers raised the issue of whether the SCA had been right in granting an order for the eviction of all the occupiers. As noted by the Constitutional Court, this broad question encapsulated five contentions:

- Section 12 of the NBRA was inconsistent with the Constitution because it provided for arbitrary evictions without a court order.
- The City's decision to evict was unfair because it was taken

without giving the occupiers a fair hearing.

- The administrative decision to evict was not reasonable in all the circumstances as it did not take into account the fact that the occupiers would be homeless after the eviction.
- Section 26(3) of the Constitution precluded their eviction.
- The standards set by the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE) were applicable to these evictions.

Another issue that was raised was whether the City's housing programme "made reasonable provision for the occupiers or for the many thousands of people living in deplorable conditions within the inner city" (para 8).

The interim order and its implementation

The Constitutional Court deemed it necessary to make an interim order after hearing argument in the case because "it was not appropriate to grant any eviction order against the occupiers, in the circumstances of this case, unless there had at least been some effort at meaningful engagement" (para 22). It was clear from the arguments in the Court that the City had not made any effort at all to engage with the occupiers during the eviction proceedings. The interim order was therefore aimed at ensuring that the City and the occupiers engaged with each other on certain issues. The order directed the parties to engage with each other meaningfully in an effort to:

- resolve the issues raised in the application in the light of the values of the Constitution, the constitutional and statutory duties of the municipality, and the rights and duties of the citizens concerned; and
- alleviate the plight of the applicants who lived in the two buildings concerned by making the buildings as safe and conducive to habitation as was reasonably practicable (interim order dated 30 August 2007).

The parties subsequently reached a settlement which involved interim measures to secure the safety of the building and provide the occupiers with alternative accommodation in the inner City of Johannesburg (agreement signed on 29 October 2007). In fact, the agreement underscores the importance of the provision of suitable alternative accommodation in eviction cases, especially for those who are desperately poor and vulnerable and therefore cannot provide for themselves.

The parties agreed on a range of interim measures to improve the conditions in the two buildings pending relocation to the alternative accommodation. These included the provision, at the City's expense, of toilets, potable water, waste disposal services, fire extinguishers and a once-off operation to clean and sanitise the properties.

As with the order of the SCA, they agreed that the alternative accommodation would consist of, at least, security against eviction, access to sanitation, access to potable water, and access to electricity for heating, lighting and cooking. It was further agreed

that, once relocated, the occupiers would occupy the temporary shelter until suitable permanent housing solutions were developed for them. The nature and location of the permanent housing options would be developed by the City in consultation with the occupiers.

The Constitutional Court endorsed the settlement on 5 November 2007 and indicated that the residual issues arising from the parties' reports would be considered in the Court's judgment. The settlement was endorsed because, as the Constitutional Court stated in its judgment, there was no doubt that it represented a reasonable response to the engagement process. The Court commended the City for its response and for adopting a more humane approach as the case proceeded through the different courts (para 28).

The Court held that it would not always be appropriate for a court to approve all agreements entered into consequent upon engagement (para 30). This case is in fact the first time the Constitutional Court has approved a settlement where the parties required its approval before important aspects of it came into operation.

The judgment

The issues that the Constitutional Court considered in its judgment were determined by certain developments that occurred after the application for leave to appeal was granted: the granting of an interim order and the subsequent settlement agreement and its contents, as discussed above.

As the question of temporary accommodation had already been

addressed in the agreement between the parties (para 32) and the City had shown a willingness to engage with the occupiers (paras 34 and 35), the Court did not find it necessary to consider whether the City had failed to formulate and implement a housing plan for the occupiers and other similarly situated persons, or the question of finding a permanent housing solution for the occupiers.

The Court also did not find it necessary to go into a discussion on the "reach and applicability" of sections 26(1) to (3) of the Constitution. Nor did it consider it necessary to deal with whether PIE applied in the present case, or to expand on the relationship between section 26 and PIE. According to the Court, "The question may never arise if the City engages meaningfully with those who would become homeless if evicted by it" (para 38).

The Court essentially decided to focus on the three main issues, discussed below.

The duty to have meaningful engagement

The first concerned its reasons for making the "engagement order". In explaining its reasons, the Court noted that the City ought to have been aware of the possibility, even the probability, that people would become homeless as a direct result of their eviction at its instance. The Court added that, in these circumstances, those involved in the management of the City ought, at the very least, to have engaged meaningfully with the occupiers both individually and collectively (para 13). The objectives of such engagement,

as stated by the Court, would have been to ascertain:

- what the consequences of the eviction might be;
- whether the City could help in alleviating the situation of those in dire need;
- whether it was possible to render the buildings concerned relatively safe and conducive to health for an interim period;
- whether the City had any obligations to the occupiers in the prevailing circumstances; and
- when and how the City could or would fulfil these obligations (para 14).

The Court stated that engaging with the people who might become homeless because of an eviction was in line with the constitutional obligations of municipalities to provide services to communities in a sustainable manner, promote social and economic development and encourage the involvement of communities and community organisations in matters of local government (section 152(1) of the Constitution); to fulfil the objectives in the Preamble to the Constitution; and to respect, protect, promote and fulfil the rights in the Bill of Rights (section 7(2) of the Constitution). The Court highlighted the special significance in this context of the rights to human dignity and to life (sections 10 and 11 of the Constitution).

The Court also located this duty in section 26(2) of the Constitution, which requires the state to take reasonable legislative and other measures to realise the right of access to adequate housing. In this regard, it noted that reasonable conduct of a municipality pursuant to section 26(2) included the reasonableness

of every step taken in the provision of adequate housing as well as its response to potentially homeless people with whom it engaged (paras 17 and 18).

Therefore it held that it was unconstitutional for a municipality to evict people from their homes without first meaningfully engaging with them (para 16).

It is clear from the Court's judgment that meaningful engagement has to be tailored to the particular circumstances of each situation: "the larger the number of people potentially to be affected by eviction, the greater the need for structured, consistent and careful engagement". The Court added that, in the circumstances prevalent in the City, ad hoc (unplanned or informal) engagement was entirely inappropriate (para 19).

In addition, the engagement process should not be shrouded in secrecy. According to the Court:

the provision of a complete and accurate account of the process of engagement including at least the reasonable efforts of the municipality within the process would ordinarily be essential (para 21).

Relevant circumstances

The second major issue dealt with by the Court was whether the City was obliged to take into account the availability of suitable alternative accommodation or land for the occupiers prior to issuing the notices to vacate in terms of section 12(4)(b) of the NBRA.

The Court observed that though the SCA had concluded that the right of local authorities to act under section 12(4)(b) did not necessarily depend on the right of access to adequate housing, that did not mean that it was

"neither appropriate nor necessary for a decision-maker to consider at all the availability of suitable alternative accommodation or land when making a section 12(4)(b) decision" (para 43). According to the Court:

Any suggestion that the availability of alternative accommodation need not be considered carries the implication that whether a person or family is rendered homeless after an eviction consequent upon a section 12(4)(b) decision is irrelevant to the decision itself.

This reasoning, the Court added, rested on the false premise that there was no relationship between section 12(4)(b) of the NBRA and section 26(2) of the Constitution (para 43). The Court thus found it regrettable that the City, in making the decision to evict, did not take into account the fact that the people concerned would be rendered homeless (para 44).

The Court observed that the various departments in a municipality could not function separately, "with one department making a decision on whether someone should be evicted and some other department in the bureaucratic maze determining whether housing should be provided" (para 44). The housing provision and the health and safety provision therefore had to be read together. It thus held that the SCA had been incorrect to find no fault with the City's failure to consider the availability of suitable alternative accommodation or land for the occupiers in the process of making

a section 12(4)(b) decision. It was thus incumbent on local authorities to consider the possibility that they would render the affected residents homeless in the process of issuing an eviction notice in terms of section 12(4)(b).

The constitutionality of section 12(6) of the NBRA

Finally, the Court considered whether the automatic criminal sanction attaching to a failure to comply with a section 12(4)(b) notice infringed section 26(3) of the Constitution. This section prohibits the eviction of people from their homes or

the demolition of homes without "an order of court made after considering all the relevant circumstances".

Given this constitutional guarantee, the Court held that:

any provision that compels people to leave their homes on pain of criminal sanc-

tion in the absence of a court order is contrary to the provisions of section 26(3) of the Constitution (para 49).

It therefore found section 12(6) of the NBRA to be inconsistent with the Constitution.

However, the Court did not find it just and equitable to set aside the provisions of section 12(6) of the NBRA because, as it observed, it was appropriate to encourage people to leave unsafe or unhealthy buildings in compliance with a court order for their eviction - an effect that a criminal sanction has. It instead cured the constitutional defect through the mechanism of a reading-in order,

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providing for a criminal sanction only after a court order for eviction has already been made. The Court added that a court would be obliged to take into account all relevant circumstances before making an order for eviction, and would also afford the occupier a reasonable time within which to vacate the property (para 50).

The Court then ordered that section 12(6) of the NBRA be read as if the following proviso had been added at the end of it:

This subsection applies only to people who, after service upon them of an order of court for their eviction, continue to occupy the property concerned (para 54).

An evaluation of the judgment

The Constitutional Court's judgment underscores the interdependence and linkages between housing rights in section 26 of the Constitution and evictions that take place in terms of health and safety legislation. It highlights three important facets of section 26 in this context:

- the importance of “meaningful engagement” prior to eviction decisions being made;
- the obligation to consider all relevant circumstances, including the availability of suitable alternative accommodation or land, in the process of deciding whether to proceed with an eviction; and
- the requirement of judicial oversight over all evictions.

In this respect, the judgment reaffirms and elaborates the basic principles governing evictions laid down by the Court's earlier decision in *Port Elizabeth Municipality v Various Occupiers* 2004 (12) BCLR 1268 (CC) (PE Municipality).

However, the Court did not explain the relationship between the three subsections of section 26 and evictions. It is not clear, for example, why the Court reasoned that the duty to consider all relevant circumstances prior to issuing a section 12(4)(b) eviction notice arose from section 26(2) of the Constitution and not section 26(3). Clarifying the interpretation of section 26 is not merely a theoretical exercise; it would give greater guidance to both public authorities and those facing evictions as to the scope of their rights and duties.

A similar concern can be raised in respect of the Court's unwillingness to consider the applicability of PIE in situations of evictions for alleged health and safety reasons and its avoidance of the administrative justice arguments on procedural fairness guaranteed under section 33 of the Constitution and the Promotion of Administrative Justice Act 3 of 2000. These issues were comprehensively canvassed in the arguments presented by the legal teams of both the occupiers and the *amici curiae* (the Community Law Centre and the Centre on Housing Rights and Evictions). The failure to deal with these questions represents a missed opportunity to establish a clear legal framework which would govern all future evictions on grounds of health and safety concerns.

Furthermore, the Court failed to support its reasoning by referring to the rich body of international law standards and jurisprudence on evictions, in spite of the clear injunction in section 39 of the Constitution

to consider international law in interpreting the Bill of Rights. Considering international and comparative law should not simply be optional window dressing on a judgment. It may, for instance, reveal creative alternative approaches to a particular problem consistent with human rights norms and values.

Lastly, there is an almost complete absence of analysis of the historical, social and economic context of the occupation of buildings in the inner city of Johannesburg. This is in contrast to the rich contextual analysis in the *PE Municipality* case and the Court's own counsel in *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169 (CC) that rights need to be interpreted and understood in their social and historical context (para 25). Again the Court had plenty of evidence on record to enable it to situate its judgment within such a context.

Despite these minor shortcomings, the judgment represents another important affirmation of the significance of the right to housing to those living in precarious conditions on the margins of our society.

Conclusion

This decision reaffirms the Constitution's transformative role. It defines the obligations of local authorities with regard to the occupiers of abandoned or derelict buildings. Local authorities must first give serious consideration to possibilities of restoring the buildings and rendering them safe for occupation before evictions of the people living in them, who may be rendered homeless, can take place. Under these

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circumstances, evictions should be regarded as an exceptional measure to be used as a last resort.

Where an eviction cannot be averted, local authorities are duty-bound to ensure that alternative accommodation is provided to those who are desperately in need of it. Such alternative accommodation should be affordable to the occupiers and its location should be in close

proximity to places where they earn their livelihood.

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The occupiers were represented by the Centre for Applied Legal Studies (University of the Witwatersrand) and Webber Wentzel Bowens. The Community Law Centre and the Centre on Housing Rights and Evictions (COHRE) were joint *amici curiae* in the case (in both the SCA and the Constitution Court) and were represented by the Legal Resources Centre.