

Enforcing housing rights

How far can the courts go?

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Ekurhuleni Municipality v Dada NO and Others Case No 280/2008(SCA) [Ekurhuleni Municipality case]

On 27 March 2009, the Supreme Court of Appeal (SCA) overturned a High Court judgment ordering the Ekurhuleni Metropolitan Municipality (the municipality) to buy land which had been unlawfully occupied by about 76 families (the occupiers). This case illustrates the difficulties that poor people face in accessing housing.

The facts

The matter arose when the respondent, the Islamic Dawah Movement Trust (the Trust), brought an application in the Witwatersrand Local Division of the High Court for the eviction of a group of people who had illegally occupied its property. The illegal occupiers came from an informal settlement on a neighbouring piece of land, which had become uninhabitable because of flooding and marshy

conditions caused by the summer rains (para 2). The application was brought under the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998, and the municipality was joined as the second respondent (para 3).

Issues before the High Court and its decision

In the main application at the High Court, the occupiers opposed the eviction. Although they conceded that their occupation of the land was unlawful, they argued that they had a *bona fide* (genuine) belief that an official of the municipality had authorised the occupation (para 4). They also argued that the municipality had not complied with its constitutional duties, which had contributed to the plight they were in.

In their counter-application, the occupiers argued that the municipality had a duty under section 26(2) of the Constitution of South Africa (the Constitution), to ‘devise and implement within its available resources a comprehensive and coordinated programme progressively to realise (the occupiers) right of access to adequate housing’. They added that the municipality had a duty to adopt reasonable measures to provide relief to them because they would be rendered homeless and were vulnerable to living in intolerable conditions if evicted (para 4).

The occupiers sought detailed relief in the form of a declaratory order defining the municipality’s constitutional obligations; an interim interdict against their eviction by the Trust; a supervisory order to ensure that the municipality complied with its constitutional obligations; and provisions regarding the resolution of any disagreements concerning the implementation of the court orders.

In reply to the argument that the municipality had done nothing to afford the occupiers access to housing and had no plans to improve their living conditions, the municipality presented ‘strategic frameworks’ and ‘integrated development plans’ to demonstrate that it was doing something to fulfil its section 26(2) obligations. It also cited 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 made under it as further evidence of the efforts it had already undertaken to

progressively achieve the objects of the Constitution (para 5).

The High Court was not persuaded by the municipality’s arguments. In particular, it was dismayed by ‘the level of inactivity, with regard to the circumstances of the occupiers, shown by the municipality over the period between the lodging of the eviction application and the date of the hearing’ (para 10). The Court found this to amount to a breach of the municipality’s constitutional duty. It also found that ‘the courts had not gone far enough towards enforcing the rights in s 26 of the Constitution’ (para 10). Section 26 of the Constitution guarantees the right of access to adequate housing and the right not to be evicted arbitrarily. The High Court directed the municipality to buy the land from the Trust at a price of R250 000 within thirty days from the date of the court order, and to provide essential services to the occupiers (para 11).

The decision of the Supreme Court of Appeal

The municipality appealed against the order of the High Court directing it to buy the land. The municipality did not appeal against the order to provide services because these, as noted by the SCA, had already been supplied or the municipality was already in the process of supplying them (para 12).

The SCA observed that the High Court had failed to consider the principles of judicial deference (paras 10–11). Generally, deference implies that courts should respect policy decisions taken by the legislature, the executive or administrative agencies. The SCA was of the view that the order directing the municipality to purchase the land had not specifically been sought by the occupiers, and in making it, the judge had based it on a ‘pre-conceived notion ... that it was time “to get things moving”’. In the words of the SCA (para 13),

[the High Court Judge] 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 plainly persuaded himself that it was time to cut across the principles of ‘progressive realisation’ of housing emphasized in the decisions of the Constitutional Court to which he had referred.

Although it agreed with the High Court’s conclusion that the municipality had not dealt with the problems

of the occupiers with the measure of promptness that could reasonably have been expected of the municipality, the SCA held nevertheless that this could not justify the High Court's order, 'which was well outside the limits of [the Judge's] power' (para 14). The SCA held that the order directing the municipality to buy the land was not 'appropriate relief' and set it aside (para 14). The order directing the municipality to provide services to the occupiers was upheld.

Conclusion

This case shows that there are still questions as to the extent to which courts should show deference to the executive or administrative agencies in the area of socio-economic rights in general and housing rights in particular. While the SCA was arguably correct in holding that the High Court had gone overboard

in directing the municipality to buy the land (this could be seen as problematic from a separation of powers perspective), its judgment did not say what the appropriate relief was in this particular case. An appropriate relief should take into consideration the interests of all those involved in the case, including the interests of the individual occupiers. Moreover, it must be effective in providing relief to the occupiers.

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The full judgment is available at www.saflii.org/za/cases/ZASCA/2009/21.html.