An overview of the Constitutional Court hearing of the inner-city evictions case

***Rand Properties and others v City of Johannesburg and others* (CCT 24/07)**

Christopher Mbazira

On 28 August 2007, the Constitutional Court heard an appeal against the decision of the Supreme Court of Appeal (SCA) in the *Rand Properties* case. This case concerns the eviction of poor people from dilapidated buildings in the inner city of Johannesburg. Acting in terms of section 12 of the National Building Regulations and Building Standards Act of 1977 (NBRA), the City of Johannesburg (the City) had issued eviction notices on the basis that these buildings were hazardous and not suitable for human habitation. It therefore brought an application to the High Court to enforce these notices.

This case has been discussed in two articles in previous issues of *ESR Review*: Stuart (2006) gave a general review of the High Court judgment and Quinot (2007) focused on the administrative perspective of the case. See also Chenwi (2006).

The High Court found that the City's housing programme failed to comply with the Constitution by not attending to the housing needs of those "in a crisis situation or otherwise in desperate need of accommodation". It directed the City "to devise and implement within its available resources a comprehensive ... programme to progressively realise the right to adequate housing to people living in the inner city". The City was thus interdicted from "evicting or seeking to evict the ... respondents" until it complied with its constitutional obligations. The City appealed against the High Court judgment to the SCA.

The Supreme Court of Appeal

The main argument of the City in the SCA was that the High Court had misinterpreted the City's obligation under the NBRA to prevent unsafe conditions in light of the City's constitutional obligation to provide access to adequate housing.

On the other hand, the respondents cross-appealed against the High Court's failure to hold that the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act of 1998 (PIE) was applicable to the evictions in issue and that section 12 of the NBRA was inconsistent with section 26 of the Constitution.

In what appeared to be turning the clock back in socio-economic rights jurisprudence, the SCA criticised the High Court for ordering the adoption and implementation of a housing programme. According to the SCA:

> [T]he High Court had insufficient regard to the division of power. It is for the democratically elected government of the City to determine what its vision of the inner city is. Courts are not equipped or entitled to second-guess this type of policy decision. The Court also failed to have regard to the constitutional limitation on the right of access to adequate housing. In particular it took no account of the uncontradicted evidence of the City that it did not have the means to provide the respondents with inner city accommodation.

According to the SCA, it is not correct to state that persons in desperate situations may not be evicted unless alternative or adequate housing is provided. "The corollary would be that to deny someone poisoned food is to deny that person food" (para 46).

However, the SCA held that an eviction, at the very least, triggers an obligation on the City to provide emergency and basic shelter. Nevertheless, the SCA found that the obligation on the occupiers to comply with the order arising from the NBRA

notice was not dependent upon their being provided with alternative accommodation "even if the effect of complying with the order will be that they are left without access to adequate housing" (para 68).

It rejected the submission that section 12 of the NBRA has to be read subject to PIE, holding that PIE does not apply to evictions arising from a section 12 notice. Once such notice is issued, the SCA reasoned, the continued occupation of the property becomes an offence and a court is not entitled to uphold such unlawful act. In the SCA's opinion, PIE cannot be used to prevent illegal conduct: "PIE must be seen in light of its history and purpose, which is to resolve a clash between proprietary rights and the plight of the poor" (para 58).

The SCA noted that the respondents did not fit the description of "unlawful occupier" in PIE, which is someone who occupies property without the "express or tacit consent of the owner or without any right in law".

According to the SCA, the buildings in issue had been abandoned by their rightful owners. This conduct amounted to tacit consent to anybody to occupy the buildings.

The SCA recognised the potential overlap between PIE and the NBRA, arising from section 6 of PIE, which permits an organ of state to apply for an eviction "where it is in the public interest", which includes health and safety objectives. It noted, however, that section 6 differed from section 4 of PIE to the extent that section 6 did not contain the qualification "notwithstanding anything to the contrary contained in any law or the common law". According to the SCA, "[t]his means that section 6 recognises that PIE is not the exclusive statutory mechanism in terms of which persons may be evicted at the behest of organs of state" (para 60).

The SCA noted, though, that the NBRA was not without constraints: the notice must be based on necessity on the ground of the safety of persons and the decision to issue the notice must be rational. Thus, according to the SCA, if reasonable alternatives are available, they have to be explored and adopted. However, it noted that, in this case, the buildings could not be made safe (para 52).

It also declined to review the section 12 notice on the ground that the respondents had not been heard in accordance with the provisions of the Promotion of Administrative Justice Act of 2000 (PAJA). It held that PAJA was not applicable. (For a fuller discussion on the findings of the SCA decision and their implications for administrative law, see Quinot, 2007)

The SCA also dismissed the request for a structural interdict to ensure that the poor were provided with adequate housing in the inner city.

It held that "the City is not obliged to provide housing for the poor in the inner city specifically". It added that "[w]here housing is to be provided for any particular economic group is a matter that lies within the province of the policy-making functions of the City" (para 75).

The buildings in issue had been abandoned by their rightful owners which amounted to tacit consent to anybody to occupy them.

Notwithstanding this holding, the SCA held that the City had an obligation towards those who might be left without any shelter as a result of the eviction and who had no resources to get any such shelter. Such persons had to be provided, at least, with temporary shelter "to alleviate the desperate plight in which they will find themselves" (para 76).

Consequent to this finding, the SCA upheld the City's appeal. The respondents were interdicted from occupying the property concerned and were given one month to vacate, failing which the sheriff was authorised to remove them from the property. Conversely, the City was ordered to relocate those respondents who were to be evicted and rendered desperately in need of housing assistance to a temporary settlement area in accordance with the National Housing Code.

In addition, the City was ordered to open, within seven days, a register of persons who qualified for such relocation and to file, within four months, a compliance affidavit, which had to be served on the respondents' attorneys and *amici* (ie the Centre on Housing Rights and Evictions and the Community Law Centre at the University of the Western Cape) as well.

The Constitutional Court

The occupiers (applicants) appealed against the decision of the SCA to the Constitutional Court. I will deal with the grounds of appeal and arguments thereof as presented by the applicants collectively with the arguments of the *amici*.

Arguments of the applicants

The applicants' grounds of appeal opposed both factual and legal findings of the SCA. On factual findings, they contended that the SCA had erred in finding that they (the appli-

cants) demanded less than accommodation in the inner city and that the buildings in issue were filled with waste and sewer water, as well as faeces and refuse. They also challenged the finding that the City had given incontrovertible evidence that it did not have the means to provide the respondents with accommodation in the inner city.

On legal findings, the applicants contended that the SCA had erred in finding that the issue of the constitutional duty of organs of state towards those who have been evicted from their homes in desperate conditions was peripheral to the main issue in this case. They argued that, instead, the SCA should have found that to deprive a person of unsafe housing where such person has nowhere safer to go violated such a person's constitutional right of access to adequate housing. Thus, evicting such persons in terms of section 12 of the NBRA violated the constitutional protection against arbitrary eviction and the right to human dignity.

The applicants also argued that the NBRA notice violated section 26(3) of the Constitution since the notice could be issued without a lawful order. According to the applicants, PIE should apply after the notice has been issued and the applicants refuse to vacate the property (in which case they become illegal occupiers). Furthermore, the absence of a criterion guiding the issuance of such notice renders the NBRA arbitrary and in violation of section 26(3) of the Constitution.

It was also argued that the City had the obligation to afford all affected persons a hearing before issuing the notice and to consider the option of making the buildings safer whilst being occupied.

The City argued that the right of access to adequate housing is only realisablle progressively as a collective and not individual right.

Arguments of the City

In response to the arguments of the applicants, the City contended, amongst other things, that it had a duty and the powers to reduce and eradicate known instances of dangerous living conditions. The exercise of these powers, the City opined, was not conditional on the fulfilment of its obligations in section 26 of the Constitution. It also argued that, even if section 26(3) was applicable, the consideration of relevant circumstances contemplated by the section could include whether the buildings from which the people will be evicted were unsafe as demanded by the NBRA.

The City also sought to confirm the findings of the SCA that PIE was not applicable to NBRA-based evictions. It claimed that "[t]he question is whether an owner who abandons his or her property to the world ... should meaningfully be said to give 'tacit consent' to whoever happens to possess such property" (Heads of argument, para 87).

It also maintained that PIE was not applicable to the matter because the eviction at hand was an emergency one intended to avert a health danger to the occupants and the vicinity. It argued: "It simply cannot be the law that the provisions of the health and safety laws apply to those who occupy property lawfully but not to those who are in occupation against the wishes of the owner" (para 102).

While the City conceded that the exercise of the powers under the NBRA constituted administrative action within the meaning of PAJA, the implementation of a programme to realise the right of access to adequate housing was not. According to the City, conduct of this nature "moves more closely on the legislative and executive than the administrative sphere" (para 67).

From a more normative perspective of the right of access to adequate housing, the City argued that this right is only realisable progressively as a collective and not individual right. It cannot be used by an individual to assert immunity against a specific exercise of state power.

Contentions of the *amici*

While canvassing some of the arguments of the applicants, the *amici* stressed the fact that the case concerned a systemic problem. They argued: "The case should be seen in the context of the pervasive problems of poverty and homelessness" (Heads of argument, para 2).

The *amici* recognised the City's duty to ensure that conditions of accommodation did not constitute a threat to safety. However, they contended that the City should carry out those duties in a manner that did not violate the Constitution (para 7). They argued that section 26 of the Constitution obliged the state "both to refrain from taking action which impairs access to housing, and to take positive measures to assist people in securing adequate housing" (para 18).

In the opinion of the *amici*, if the evictions in terms of the NRBA ren-

dered persons homeless, such homelessness was a consequence of the City's failure to carry out its constitutional obligations (para 33). Like the applicants, the *amici* argued that the SCA should have found that this matter was a clear case in which an interdict against eviction and structural relief were appropriate. According to the *amici*, at the very least, the Constitutional Court should require the City to publish in the media its progress in finding solutions to the problem (paras 174–80).

Additional evidence from the City

In a dramatic turn of events, on the eve of the Constitutional Court hearing, the City filed additional evidence describing an ongoing process to adopt an Inner City Regeneration Charter (the Charter). It pleaded that the City, in conjunction with several partners and stakeholders, was developing an inner-city housing plan that would ensure that at least 50 000 (and ideally 75 000) new units were constructed in or near the inner city by 2015. It projected that 20 000 of these units would be affordable to households in lower income bands, such as the evictees in this case.

The additional evidence also averred that the City was committed to developing a housing plan that provided a wide range of options, including shelter for the homeless and other special groups in need; emergency accommodation; transitional accommodation; affordable rental or social housing at various income levels; inclusionary housing done on the basis of creative partnerships between the public and private sector; and continued delivery of both medium- and high-income rental and ownership options.

The City also stated that it would make at least 500 beds and other decent facilities available for emergency accommodation and use in the inner city by 2007. Indeed, at the hearing, the City indicated that this accommodation was already available. It also informed the Court of seven buildings being prepared for emergency accommodation within the inner city.

The additional evidence was also led to demonstrate that funds had been allocated to provide housing. According to the City, 6% of the current year's operating budget was allocated to housing.

The additional evidence marks a dramatic shift by the City from being indifferent towards the applicants and similarly situated people to recognising that there is a housing problem within the City that needs attention. In spite of this shift, the process of adopting a housing plan is only prospective. A lot still has to be done, not only to finalise the adoption of the plan, but also to ensure its effective implementation.

The hearing

At the hearing, both the applicants and *amici* welcomed the new developments and the City's change of attitude. Nevertheless, some concerns were raised regarding the proposed plan as well as the current position of the applicants. The additional evidence did not adequately illustrate the budgetary allocation and its applicability to housing. It was, for instance, pointed out that the additional evidence did not account for approximately R800 million allocated to housing.

The additional evidence did not adequately illustrate the budgetary allocation and its applicability to housing.

During the hearing, the Court also grappled with the issue of whether the applicants were entitled to some form of interim relief pending its decision, given that the City had discontinued such services as water and refuse collection and nothing had been done to make the properties less hazardous and more hygienic.

The interim order

At the end of the hearing, the Court reserved judgment. However, two days after the hearing, the Court issued an interim order in which it directed the parties to consider resolving the matter amicably, in order to alleviate the plight of the applicants by making the buildings as safe and as conducive to health as reasonably practicable.

However, the order was disappointing in that it did not expressly direct the respondents to restore the basic services discontinued by the City and improve the hygiene of the properties.

Conclusion

One can deduce from the interim order that the Court was more comfortable dealing with the wider implications of the case in a way that benefited all persons in the applicants' position. The Court has always been cautious in resolving socio-economic rights claims involving specific individuals. On many occassions, it has avoided granting individual remedies to the litigants before it.

In the *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC), for instance, the case between the parties was settled through

an interlocutory process, and the final judgment of the Court defined the general obligations of the state and not those towards respondents who were living in desperate conditions. It appears, therefore, as if the Court adopted the same approach in the present case.

It is, however, too early to determine whether the settlement proposed by the Court will be concluded to the satisfaction of all the parties.

Christopher Mbazira is a researcher in the Socio-Economic Rights Project.

References

Government of the Republic of South Africa and Others v Grootboom and Others 2001 (1) SA 46 (CC).

City of Johannesburg v Rand Properties (Pty) Ltd 2007 (1) SA 78 (W), 2006 (6) BCLR 728.

City of Johannesburg v Rand Properties & Others 2007 (6) BCLR 643 (SCA).

National Building Regulations and Building Standards Act, Act 103 of 1977.

Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, Act 19 of 1998.

Chenwi, L 2006.Advancing the right to adequate housing of desperately poor people: City of Johannesburg v. Rand Properties. 1 *Human Rights Brief*: 13-16.

Quinot, G 2007. An administrative law perspective on "bad buildings" evictions in the Johannesburg inner city. *ESR Review,* (8)1: 25-8.

Wilson, S 2006. A new dimension to the right to housing. *ESR Review,* (7)2: 9-13.