

# Government's obligation to unlawful occupiers and private landowners

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*Blue Moonlight Properties 39 (Pty) Limited v Occupiers of Saratoga Avenue and Another Case No 2006/11442 (2010) ZAGPJHC 3 [Blue Moonlight case]*

*On 4 February 2010, the South Gauteng High Court ordered the City of Johannesburg (the City) to pay rent to a property owner whose building was occupied by squatters. The Court also found the City's housing policy to be unconstitutional to the extent that it discriminated against people occupying privately owned land. The Court's order will compel the City to reassess its housing programme in accordance with its constitutional obligations.*

## The facts

Blue Moonlight Properties, a private landowner, launched the application in 2006 after the occupiers failed to abide by two notices to vacate the premises so that the landowner could redevelop the property. The applicant relied on its rights as the registered owner of the property and also on a warning notice issued by the City of Johannesburg regarding the dangerous state of the building (para 21). It filed a

motion requesting that the eviction be granted and that the City provide emergency housing to the occupiers or pay an amount equivalent to fair and reasonable monthly rental for the premises (paras 5 and 38).

At the time the application was launched, the occupiers were 62 adults and nine children, most of whom had lived at the property for over two years (para 13). Some had an average household income of R790 per month while others had no income at all (para 13). The occupiers argued that they were entitled to protection under the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 and that the City was thus under an obligation to provide them with alternative temporary accommodation from the date of their eviction until it was able to provide them with adequate and more permanent housing (paras 1 and 22–23).

The occupiers also relied on their constitutional rights to housing, dignity, equality and security of the person, and the rights of children to basic shelter and protection against degradation, as well as the Housing Act 107 of 1997 and Chapter 12 of the National Housing Code, the Emergency Housing Programme (EHP) (para 24). They further sought an order requiring the City to report on its ability to provide temporary adequate shelter to them, and also, progressively, to adequate housing (para 23). They also argued that the City's policy of not providing alternative

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accommodation to poor people who faced eviction from privately owned land was arbitrary and unfairly discriminatory (paras 3, 4 and 36).

The City was joined in the application in 2007 (paras 23 and 25). It argued that the occupiers were obliged to join the provincial government because, among other reasons, it was responsible for emergency housing under the EHP (paras 37 and 51). The City alleged that the provincial government had refused to allocate funds to the City under the EHP. It could therefore not be asked to provide emergency housing to the unlawful occupiers.

### The issues

The key questions raised in the case were

- whether private landowners have the obligation to provide housing to unlawful occupiers indefinitely (para 6); and
- whether local government can join any other sphere of government when faced with the prospect of an order to provide accommodation or pay constitutional damages (para 8).

Other legal issues considered included the obligations of the City to unlawful occupiers of privately owned land and to landowners whose property had been occupied illegally (para 91). The Court was also asked to consider whether the City was obliged to provide at the very least emergency housing and possibly temporary housing (para 92).

### The decision

#### The rights of private landowners

In line with the Constitutional Court's jurisprudence in *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd and Others* 2005 (8) BCLR 786 (CC) [Modderklip], the High Court emphasised the importance of the right to property and the right not to be deprived of property enshrined in section 25 of the Constitution (paras 93–94). It observed that section 26 of the Constitution, which protects the right of access to adequate housing, did not impose an obligation on the private sector to give up its property for the purpose of ensuring that everyone enjoyed this right. It also did not permit the state to relinquish its duty to provide access to adequate housing and leave it to the private sector (para 97). The obligation of the private sector, the Court added, was to provide the necessary revenues through taxation or other means in order to enable the government to meet its obligations under section 26 (para 96). Private landowners could not be compelled

to provide housing without compensation (para 97).

The Court also noted that the government's obligation under section 26(2) to adopt reasonable measures did not envisage laws that would indefinitely require the private sector to be deprived of its rights to use and occupy its own land (para 98). Section 26(3), on the other hand, allowed for the eviction of people who were not entitled to occupy private land but were doing so (para 99). Indefinite deprivation of the rights of the landowner, the Court held, constituted a contravention of section 25 of the Constitution (para 194). Blue Moonlight Properties was thus entitled to an eviction order (para 191).

In granting the eviction order, the Court considered a number of factors, including the inability of the occupiers to afford rented accommodation or any basic accommodation without subsidisation, the degree of movement of the occupier, the purpose for which Blue Moonlight Properties had acquired the property (ie development) and the prospect of gaining possession of its property without an eviction (para 190).

#### The right of unlawful occupiers of private land

The Court reiterated the link between the right of the unlawful occupiers to have access to adequate housing and their entitlement to dignity. It held that the right to dignity was severely compromised where people did not have a basic roof over their heads (para 118). In line with the Constitutional Court's decision in *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC), the High Court held that those in desperate situations and faced with eviction, like everyone else, were entitled to have access to adequate housing on a progressive basis, and all spheres of government had to ensure that this happened. This did not imply a 'right to look to private landowners for indefinite continued accommodation at no cost' (para 127).

#### The City's obligation in relation to housing

The Court reminded the City of several Constitutional Court, Supreme Court of Appeal and lower court decisions stating that

local government [is] directly responsible for implementing the constitutional and statutory obligations regarding the provision of adequate housing on a progressive basis and to take active steps to provide accommodation for the most desperate by reference not only to the socio-economic rights identified in the Constitution and in housing legislation, but also by reference to the entrenched rights to dignity under Section 10 of the Constitution (para 58; see also paras 59 and 61–67).

The Court noted that section 152(1)(b) and (d) of the Constitution further required local government to ensure the provision of services to communities in a sustainable manner and to promote safe and healthy conditions. Local government had a primary responsibility to give priority to the basic needs of the community. It also had positive obligations in relation to the right to have access to adequate

housing and under the Housing Act (para 62). The Court therefore disagreed with the City's contention that the provincial government should be joined on the basis that the City had no greater obligation than to seek financial assistance from the province and was confined to the role of a bystander (para 68). This was because local government had the primary responsibility to make provision for housing on a progressive basis having regard to its availability of resources (para 81). The Court did not therefore find it desirable to join the provincial government even if it had an interest in the outcome (para 82).

It is worth emphasising that the Court's finding on the joinder of the provincial government should not, however, be seen by the provincial government as an escape hatch in relation to its duty to ensure that it allocates the necessary resources to local government to enable local government meet its obligations to unlawful occupiers. Local government must in turn ensure that it not only brings to the attention of the province its housing needs, but also follows up to ensure that these are included in the budgeting and planning processes.

### **The City's obligation to unlawful occupiers of private land**

The Court reiterated the general obligation of the City to ensure that desperately poor people were not rendered homeless (para 128). The City was required to take reasonable measures through a coherent housing programme towards the progressive realisation of the right to have access to adequate housing (para 129). This included facilitating access to temporary housing for people living in intolerable conditions with no roof over their heads (para 130).

The City had failed to justify its policy of not providing emergency housing to indigent occupiers of private land who were threatened with eviction (para 140). The Court thus attributed the lack of budgetary allocation for this group to their exclusion, which it found to be unjustifiable (para 141). It also found that the exclusion was in violation of the right of the occupiers to equal protection and benefit of the law under section 9(1) of the Constitution. The exclusion further limited their enjoyment of the right to have access to emergency or temporary housing under section 26 of the Constitution (para 144).

The Court then concluded that this amounted to unfair discrimination, which in turn rendered the City's policy and its implementation constitutionally flawed, irrational and unreasonable (paras 144–145). The City was therefore found to have breached its constitutional and statutory obligations towards the occupiers by precluding them from accessing emergency and temporary housing programmes for a period of at least four years (para 172). The Court stressed that the City was constitutionally obliged to include indigent people occupying private land and facing eviction in its housing programmes and budget (para 177), and should avoid disrupting the lives of the occupiers by relocating them (para 181). The Court then ordered

the City to provide the occupiers with, at least, temporary accommodation in a location as near as possible to their present location (para 196). In its order, the High Court required the City to report back on the steps it had taken and would take in future and the time frames within which the steps would be taken (para 196).

### **The City's obligation to private landowners**

The Court reiterated that it was unreasonable for a private entity to bear the burden that should be borne by the state of providing occupiers with accommodation (para 132). By unfairly discriminating against the unlawful occupiers, the City had also breached the right of Blue Moonlight Properties to be treated equally (paras 151 and 154) and deprived it of its entitlement to use and develop its property (paras 153 and 162). With regard to an appropriate remedy for this breach, the Court observed that it would be inappropriate to order expropriation in this case (para 159). As had been held in the *Modderklip* case, the High Court found that constitutional damages were appropriate in this case. Consequently, it ordered the City to pay Blue Moonlight Properties damages up to the date when the eviction order was effected and the occupants vacated the premises (para 171). The amount was to be determined by agreement between the occupiers and the City. Additionally, the City had to provide the occupiers with at least temporary accommodation or, alternatively, pay each occupier R850 a month for rent (para 196).

### **Conclusion**

The judgment illustrates the relationship between subsections (1), (2) and (3) of section 26 of the Constitution. It further recognises not just the importance of housing rights, but also the importance of a landowner's right to the use of and benefit from its property. It reiterates the importance of taking both these interests into consideration in eviction cases. The decision also provides guidance and clarity on the obligations of organs of state, particularly local government, in private evictions. It emphasises that local government cannot deny its duties towards unlawful occupiers in private eviction applications. In addition, the judgment is part of an emerging trend of courts increasingly issuing supervisory orders requiring the government to report on the implementation of court orders.

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The full judgment is available at <http://www.saflii.org/za/cases/ZAGPJHC/2010/3.pdf>.