



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Reportable

Case Nos 187/03 and 213/03

In the matters between:

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| 1. MODDER EAST SQUATTERS
GREATER BENONI CITY COUNCIL | First Appellant
Second Appellant |
| and
MODDERKLIP BOERDERY (PTY) LTD | Respondent |
| 2. PRESIDENT OF THE REPUBLIC OF
SOUTH AFRICA | First Appellant |
| THE MINISTER OF SAFETY AND
SECURITY | Second Appellant |
| THE MINISTER OF AGRICULTURE AND
LAND AFFAIRS | Third Appellant |
| THE NATIONAL COMMISSIONER OF
POLICE | Fourth Appellant |
| and
MODDERKLIP BOERDERY (PTY) LTD | Respondent |

Coram: HARMS, FARLAM, CAMERON, MTHIYANE JJA and
SOUTHWOOD AJA

Heard: 3 & 4 MAY 2004

Delivered: 27 MAY 2004

Subject: Illegal occupation of land – infringement of constitutional
rights of owner and of occupiers – constitutional damages

J U D G M E N T

HARMS JA/

HARMS JA:

[1] This judgment deals with two related matters: the first is an application for leave to appeal against the judgment of Marais J in *Modderklip Boerdery (Pty) Ltd v Modder East Squatters and another* 2001 (4) SA 385 (W) ('the eviction case'); and the second is an appeal against a judgment of De Villiers J in *Modderklip Boerdery (Edms) Bpk v President van die RSA en andere* 2003 (6) BCLR 638 (T) ('the enforcement case'). Both arise from the pressing – and often charged – current issue of access to land and were heard together because of their close relationship – the enforcement case flowed from the order made in the eviction case.

[2] The applicant (and present respondent) in each instance is Modderklip Boerdery (Pty) Ltd. It is the owner of a portion of the farm Modder East,¹ which adjoins Daveyton Township and which now falls within the jurisdiction of the Ekurhuleni Metropolitan Municipality in a part run by the Greater Benoni City Council. I shall refer to the company as 'Modderklip' and to the local authority as the 'municipality'. During the 1990s, due to overcrowding, residents of Daveyton began settling on a strip of land between Daveyton and the

¹ The remaining extent of the farm Modder East 72, registration division IR, Gauteng, 731,3308 ha, held in terms of deed of transfer T3691/66.

farm. This came to be known as the Chris Hani informal settlement. During the beginning of May 2000 some 400 persons, who had been evicted by the municipality from Chris Hani, moved onto a portion of the farm and erected about 50 shacks. By October 2000 there were about 4 000 residential units inhabited by some 18 000 persons. Modderklip launched on 18 October 2000 an application for the eviction of the occupiers under the Prevention of Illegal Eviction and Unlawful Occupation of Land Act 19 of 1998 (colloquially referred to as 'PIE'). The application, which was opposed, succeeded and Marais J issued an eviction order on 12 April 2001. The occupiers were granted a period of two months to vacate but they failed to comply in spite of service of the order on 10 May 2001. And they did not note an appeal.

[3] In fact, whilst the proceedings were pending and even after the grant of the order their number kept swelling. It was later estimated that there were 40 000 persons of whom a third are illegal immigrants on 50 hectares of the property. The settlement has streets; the erven are mostly fenced and numbered; and there are shops and other commercial facilities. There are no services apart from pit toilets. Water is drawn from, it seems, a solitary tap. The community, which has been referred to and which called itself in the papers the 'Modder East Squatters', is now known as the Gabon informal settlement.

Although the settlement is organised and run by a committee, the committee could not provide proper information about the inhabitants since they 'were reluctant to come forward due to unspecified problems with identity documents'.

[4] A writ of execution was issued and the sheriff requested to execute. The sheriff responded by insisting on a deposit of R1,8m in order to cover the estimated costs of a security firm which she intended to engage to assist her in evicting the occupiers and demolishing their shacks. This amount by far exceeded the value of the part of the property occupied. Modderklip was unwilling and unable to spend this kind of money on executing its judgment.

[5] Already during May 2000, Modderklip laid charges of trespassing against the occupiers. Some were prosecuted, found guilty and were warned and discharged, and they returned to the farm. The head of the local prison soon afterwards requested Modderklip and the SA Police Service ('SAPS') not to proceed with criminal charges because, if sentenced to imprisonment, the prison would not have been able to accommodate the illegal occupiers.

[6] During the middle of 2001, after the eviction order had been granted, the SAPS adopted the attitude that the matter was now a civil one and that it was not prepared to assist in evicting the occupiers

although it was prepared to stand by during the process in order to ensure that there was no breach of peace. The Minister for Safety and Security (the late Mr Tshwete) wrote to Modderklip expressing his sympathy for its plight but stating that the SAPS 'is unable to intervene in what is, after all, a civil matter between an applicant and a number of respondents involved in litigation'. The minister was not properly advised. Civil contempt of court may be criminally prosecuted.² Additionally, the court order did not inhibit prosecutions under the Trespass Act 6 of 1959.

[7] With an eviction order in hand and no practical method of enforcing it, Modderklip began writing letters to the central government invoking its aid. The President referred the matter to the Department of Agriculture and Land Affairs and to the SAPS. The department referred it to the Department of Housing. The answer of the SAPS was by way of Mr Tshwete's letter. The Department of Housing did not respond. And the sheriff kept insisting on payment of a deposit (the amount has since increased to more than R2m). This led to the launch of the enforcement case. In it Modderklip invoked the provisions of the Bill of Rights and sought a declaratory order against the President, the Ministers of Safety and Security, of Agriculture and Land Affairs and of

² *S v Beyers* 1968 (3) SA 70 (A); *Jayiya v MEC for Welfare, Eastern Cape* 2004 (2) SA 611, [2003] 2 All SA 223 (SCA) para 18.

Housing, and the National Commissioner of Police (the appellants, to whom I shall refer jointly as 'the state'). They were required to take all steps, including the provision of assistance to the sheriff, necessary to remove the unlawful occupiers from the land. In addition an order was sought requiring some of the parties named to cause the occupiers to vacate the property or to prosecute them for trespassing or contempt of court.³

[8] In the founding affidavit the deponent on behalf of Modderklip indicated that the basis for the relief sought would become apparent during argument. He nevertheless listed a number of provisions of the Bill of Rights, including s 7 (rights), 9 (equality), 25 (property), and 26 (housing). In addition he relied on other provisions of the Constitution namely s 41(1) (principles of co-operative government and intergovernmental relations), 165(4) (the duty of organs of state to assist and protect courts) and 205 (the duties of the police).

[9] In spite of this shotgun approach, what Modderklip effectively sought was the enforcement by the state of the eviction order. The founding affidavit stated namely that Modderklip was in a checkmate position: it had followed the correct legal procedures; it was in

³ The order sought against the sheriff declaring her request for a deposit to be unconstitutional or *ultra vires* was not pursued and can be ignored.

possession of a court order; and the organs of state were either unwilling or unable to assist in enforcing it.

[10] Initially only the SAPS opposed the enforcement application.⁴ While denying its responsibility to enforce the eviction order, the SAPS nevertheless indicated that, if tasked to perform the work, it would cost at least R18m. Realistically, its deponent (Commissioner van der Westhuizen) posed the question: Where should the occupiers be taken and their goods dumped? To drop them next to the road would solve nothing because they would simply return whence they came or they would occupy other property illegally. And, added the commissioner, the problem is not a police matter: it is a land reform issue involving the orderly resettlement of illegal occupiers.

[11] In any event, said he, it would be futile to prosecute that number of persons and, as past events have shown, criminal convictions provide no solution. Furthermore, he asked: who has to be prosecuted for contempt of court? It is not possible to establish on whom the eviction application was served or on whom the order was served and it is impossible to distinguish between illegal occupiers and transient visitors.

[12] Modderklip later joined the municipality as a further respondent because of the interest the municipality has in the matter but no relief

⁴ As mentioned, the opposition by the sheriff does not concern us.

was sought against it. I shall return to the role of the municipality but it may already be mentioned that it did not take part in the proceedings save for filing an affidavit in support of the state. The ‘Modder East Squatters’ were also joined as respondent and without relief being sought against them. They were represented however at the hearing in the court below until it became clear to them that their immediate eviction was not sought. More importantly, the Minister of Agriculture and Land Affairs belatedly entered the fray on behalf of the state. At the same time Agri SA obtained leave to file evidence and to present argument *as amicus curiae*.⁵

[13] In requesting a postponement in order to file affidavits, the Department of Agriculture and Land Affairs, through its Director General, Mr Mayende, said:

‘The eviction of the group of people involved will obviously impact upon the functions of the relevant public authorities. The people in question will have to resettle elsewhere. This will undoubtedly involve the relevant government departments particularly Land Affairs and Housing. Given the apparently large number of people involved, there is an overwhelming likelihood that any steps to evict them would place a tremendous burden on the already over-stretched infrastructure in the area and would simply shift the problem of unlawful occupation elsewhere in the vicinity. It is also no mean feat to orderly move such a

⁵ Before this court there were further *amici* who presented argument only, namely the Nkuzi Development Association, the Community Law Centre (University of the Western Cape) and the Programme for Land and Agrarian Studies at the same university.

large group of people. The matter is complex and needs proper co-ordination amongst various role-players and government departments.'

'In these circumstances applicant accepts that the Ministry and Department of Land Affairs must endeavour to place as complete a picture as possible before this honourable court concerning the consequences to the government of the relief sought by [Modderklip]. This would clearly be in the interests of justice and of all the interested parties. It is particularly important to ensure that effective remedies are given in the circumstances.'

In this regard the deponent echoed the views of the SAPS, namely that the issue is not simply one relating to enforcement of a court order but that it is intimately connected to the larger legal, social and political issue of access to land.

[14] Agri SA, a voluntary organisation representing commercial farmers, adopted a similar approach. It went to the trouble of obtaining through a court order access to the plans of the municipality in relation to this settlement and obtaining expert advice on resettlement of the community. The conclusion of its expert was that the occupied land is probably unsuitable for formal township development since it may be undermined. Other land has therefore to be found. Adjoining land has been identified. Developing it by providing services and building houses will take time. But that will not necessarily solve the problem because only those who qualify can be relocated. Illegal immigrants do not qualify, nor do those who are not entitled to subsidies. Agri SA,

accordingly, suggested that the occupied land be expropriated and the occupiers remain *in situ* until the problems are solved. Another suggestion it made was that the state should provide a plan setting out how and when the occupiers could be relocated. This could be prioritised in order to accommodate both Modderklip and the occupiers. It may be added that Agri SA tried to solve the matter by engaging the Minister of Agriculture and Land Affairs and also the Gauteng Province, but to no avail.

[15] Mr Mayende, in the state's answering affidavit, responded to Modderklip's founding affidavit and also to the evidence of Agri SA. For my immediate purposes he made three points. The first is that land invasion cannot be tolerated:

'The absolute opposition of Government to land invasions is publicly known. Apart from the fact that it is unlawful, invasions also undermine the entire land reform and housing programmes of Government. It prejudices law abiding citizens who await their turn on the waiting-lists to benefit from these programmes. The Government accordingly unequivocally supports all lawful steps to curb land invasions as well as action taken against unlawful occupiers of land.'

The second point was rather blunt:

'Applicant can vindicate its property through the simple expedient of having the eviction order executed.'

'The issue in this case simply relates to the execution of the eviction order which is a mundane matter regulated by the private law and civil proceedings.'

And the third point was that –

‘issues of alternative accommodation which [Agri SA] attempts to raise do not arise in this matter and fall, in any event, within the ambit of matters constitutionally reserved for the Executive.’

[16] The first point shows some acceptance at a political level of what the Constitutional Court had said in *Grootboom*.⁶

‘The issues here remind us of the intolerable conditions under which many of our people are still living. The respondents are but a fraction of them. It is also a reminder that, unless the plight of these communities is alleviated, people may be tempted to take the law into their own hands in order to escape these conditions. The case brings home the harsh reality that the Constitution's promise of dignity and equality for all remains for many a distant dream. People should not be impelled by intolerable living conditions to resort to land invasions. Self-help of this kind cannot be tolerated, for the unavailability of land suitable for housing development is a key factor in the fight against the country's housing shortage.’

However, the change reflected in the second point if compared to his first affidavit is notable. Exactly two years after the *Grootboom* judgment it does not reflect an adequate appreciation of the wider social and political responsibilities that case identified in respect of persons such as the present occupiers.

[17] The third point, namely, that issues relating to the rights of the Gabon occupiers to land did not arise in the litigation and were matters

⁶ *Government of the Republic of South Africa and others v Grootboom and others* 2001 (1) SA 46 (CC) para 2 per Yacoob J for the court.

for the executive, is plainly wrong. Unless they can be relocated sensibly, as the same deponent earlier said and the SAPS recognised, the 'simple' expedient of executing the court order simply does not exist.⁷

[18] In the light of the foregoing it is not surprising that at the hearing before De Villiers J, Modderklip and Agri SA accepted that the unconditional removal of the occupiers was not a viable option. Instead they proposed an order in two parts: the first was a declaratory order relating to the state's constitutional obligations towards not only Modderklip but also the occupiers, and the second part was a mandamus requiring of the state to submit to court a comprehensive plan to solve the problems of Modderklip and the occupiers.⁸ In the court below the state objected to the new direction, wishing to hold Modderklip to the relief originally sought. This objection was overruled by De Villiers J (at para 52), correctly so. If a constitutional breach is established, this court is (as was the court below) mandated to grant appropriate relief. A claimant in such circumstances should not necessarily be bound to the formulation of the relief originally sought or the manner in which it was presented or argued. That much is

⁷ It should be noted that the state applied, in the court below, for the striking out of much of Agri SA's evidence. This was refused by De Villiers J (at para 31). The issue was not resuscitated on appeal.

⁸ Their intervention on behalf of the occupiers was permissible: s 38 of the Constitution.

apparent from the course the litigation took in *Carmichele*⁹ and *Bannatyne*¹⁰ and why the further *amici*, the Nkuzi Development Association, the Community Law Centre and the Programme for Land and Agrarian Studies (University of the Western Cape), were admitted to the proceedings.

[19] The order that issued was substantially in accordance with the draft submitted. Paragraphs 1 and 2 read as follows:¹¹

‘1. Dit word verklaar dat:

1.1 daar op die applikant se regte soos uiteengesit in artikel 25(1) van die Grondwet inbreuk gemaak word deur die 8ste respondent [the Gabon occupiers] se weiering om die betrokke grond van die applikant te ontruim in terme van die uitsettingsbevel in saak no 23013/2000 in die Witwatersrandse Plaaslike Afdeling van die Hooggeregshof [the eviction case];

1.2 die regering verplig is om in terme van artikel 26(1) en (2) gelees met 25(5) van die Grondwet redelike maatreëls daar te stel binne sy beskikbare middele om die 8ste respondent se reg op toegang tot geskikte behuising en grond te verwesenlik;

1.3 die regering verplig is in terme van artikel 165(4) van die Grondwet om die nodige maatreëls in plek te stel om die hof by te staan en te beskerm ten einde die doeltreffendheid van die hof te verseker ten aansien van die uitvoering van die vermelde uitsettingsbevel;

⁹ *Carmichele v Minister of Safety and Security and another (Centre for Applied Legal Studies intervening)* 2001 (4) SA 938 (CC).

¹⁰ *Bannatyne v Bannatyne (Commission for Gender Equality, as amicus curiae)* 2003 (2) SA 363 (CC).

¹¹ The other parts of the order contained in para 3, 4 and 5 were consequential to para 1 and 2 and need not be quoted.

1.4 die regering nie aan sy verpligtinge uiteengesit in subparagrafe 1.2 en 1.3 hierbo en sy verpligtinge bedoel in artikel 7(2) van die Grondwet ten opsigte van die applikant se regte in terme van artikel 25(1) voldoen het met betrekking tot die besetting deur 8ste respondent van die applikant se grond nie.

1.5 Die 2de [the Minister of Safety and Security] en 5de [the National Commissioner of Police] respondente nie hulle verpligtinge in terme van artikel 205(3) van die Grondwet, gelees met artikel 14 van die Wet op die Suid-Afrikaanse Polisie diens 68 van 1995, nagekom het nie deur hulle versuim om:

1.5.1 klagtes ten opsigte van die 8ste respondent volledig te ondersoek met die oog op strafregtelike vervolging; en

1.5.2 die applikant se eiendom te beskerm en te beveilig.

1.6 Die regering se bestaande beleid, optrede en programme met betrekking tot die voorgaande tekort skiet ten aansien van die grondwetlike verpligtinge hierbo uiteengesit deurdat:

1.6.1 dit nie voorsiening maak vir die prioritering van 'n projek of projekte vir die hervestiging van die lede van die 8ste respondent onder omstandighede waar op die applikant se regte in terme van artikel 25 van die Grondwet inbreuk gemaak word en daar 'n bevel van die hof bestaan vir onmiddellike uitsetting van die 8ste respondent vanaf die applikant se grond nie;

1.6.2 dit nie voorsiening maak vir die uitvoering van die regering se verpligtinge in terme van artikel 165(4) van die Grondwet nie;

1.6.3 dit die *de facto* onteiening van die applikant se grond in die hand werk en gedoog;

1.6.4 dit gevolglik die applikant in stryd met artikel 9 van die Grondwet ongelik behandel deurdat hy as enkeling die las van die besetting deur die 8ste respondent van sy grond ten behoewe van die gemeenskap moet dra.

2. Dat die regering gelas word om voor of op 28 Februarie 2003 'n omvattende plan onder eed af te lewer aan die hof en die partye wat voorsiening maak vir:

2.1 die beëindiging van die inbreukmaking deur die 8ste respondent op die vermelde regte van die applikant binne 'n redelike tydskaal, hetsy by wyse van onteining van die applikant se betrokke grond, hetsy by wyse van ander maatreëls;

2.2 die nakoming van die regering se verpligting in terme van artikel 165(4) van die Grondwet;

2.3 die nakoming van die regering se verpligtings in terme van artikel 25(5) gelees met artikels 26(1) en (2) van die Grondwet;

2.4 die prioritisering van 'n skema of skemas vir die verskaffing van huisvesting, alternatiewelik toegang tot grond vir sodanige van die lede van die 8ste respondent as wat daarvoor kwalifiseer;

2.5 die verwydering, alternatiewelik akkommodasie van sodanige lede van die 8ste respondent as wat nie kwalifiseer soos voormeld nie;

2.6 die monitering van die uitvoering en instandhouding van die voormelde plan.

[20] To decide the issues that have arisen it is necessary to consider the different fundamental rights involved, determine whether they were breached and then to judge whether and what appropriate relief should

be granted. In doing this I shall discuss the matter with reference to the terms of the order rather than to the judgment because it tends, from time to time, to overstate matters and be inappropriately critical of state organs. Much of counsel's complaint was directed not at what the judge said but to how he said it.

[21] Basic to this case is Modderklip's right to its property entrenched by s 25(1) of the Bill of Rights, which provides that 'no one may be deprived of property except in terms of law of general application'. De Villiers J found that the refusal of the occupiers to obey the eviction order amounted to a breach of this right. That finding is reflected in para 1.1 of the order. Counsel for the state accepted that the finding was justified. Counsel also accepted that the unlawful occupation of Modderklip's land *per se*, even had an eviction order not been granted, amounted to a breach of the s 25(1) right. I agree.

[22] The occupiers have a right of access to housing under s 26(1). That it exists is not in issue. Nor is the extent of the right at stake in this case – it is limited to the most basic, a small plot on which to erect a shack or the provision of an interim transit camp. The people of Gabon have never asked for more, at least as far as we know. And the state does not have any real objection to para 1.2 of the order, which provides for the recognition of that right. But the real issue is not the

existence of the right; it is whether the state has taken any steps in relation to those who, on all accounts, fall in the category of those in 'desperate need'.¹³ The answer appears to be fairly obvious; it did not. Does the state have any plan for the 'immediate amelioration of the circumstances of those in crisis'?¹⁴ The state, at all three levels, central, provincial and local, gave the answer and it is also no. The medium and long-term plans at present also provide no apparent solution.

[23] As predicated by the first point of Mr Mayende, the state justifies its refusal to make current provision for the Gabon residents now located on the land with what I shall call the 'queue-jumping' exception. *Grootboom* explained:¹⁵

'This judgment must not be understood as approving any practice of land invasion for the purpose of coercing a State structure into providing housing on a preferential basis to those who participate in any exercise of this kind. Land invasion is inimical to the systematic provision of adequate housing on a planned basis. It may well be that the decision of a State structure, faced with the difficulty of repeated land invasions, not to provide housing in response to those invasions, would be reasonable. Reasonableness must be determined on the facts of each case.'

¹³ *Grootboom* para 63.

¹⁴ *Grootboom* para 64.

¹⁵ *Grootboom* para 92.

[24] The point was developed in general terms by the executive director of housing of the municipality, Mr Chainee. Unlawful occupation of land, he said, cannot be allowed to undermine plans and programmes for orderly settlement, and in particular to prejudice law abiding citizens who patiently await their turn to benefit from housing and law reform programmes. To prioritise the Gabon project at the expense of older projects would be a disaster. He concluded:

‘Should the view be spawned that unlawful occupations are compensated with the expedited allocation of land and housing, the entire programme of land reform and housing would collapse.’

Mr Odendaal, the chief director of housing of the province, added to this. The plan presented by Agri SA, he said,

‘does not take into account the existing priorities and obligation to accommodate people according to their ranking on the waiting list. The kind of “queue-jumping” which the deponent advocates would be disastrous for the existing programs. Once it becomes apparent that the acquisition of housing can be expedited through invasion of land, the system will collapse. There would then be no motivation or reason for abiding by the rules, leaving the land reform and housing programs in chaos.’

[25] There is no doubt merit in the concern expressed but whether the concern is justified on the facts of this case is open to doubt.¹⁶

There is no evidence that the occupation took place with the intent to

¹⁶ Cf *City of Cape Town v Unlawful Occupiers, Erf 1800, Capricorn (Vrygrond Development) and others* 2003 (6) SA 140 (C).

obtain precedence over any other person. It took place, and this appears from the eviction case, because the people had nowhere else to go and because they believed that the land, which to them did not appear to have been cultivated, belonged to the municipality. After the eviction application they were brought under the impression that the municipality was negotiating to purchase the land and, they say, for that reason they remained on the land.

[26] There is another angle. To the extent that we are concerned with the execution of the court order, *Grootboom* made it clear that the government has an obligation to ensure, at the very least, that evictions are executed humanely.¹⁷ As must be abundantly clear by now, the order cannot be executed – humanely or otherwise – unless the state provides some land. This factor must be taken into account without granting the Gabon residents priority.

[27] Section 7(2) of the Bill of Rights commands the state to ‘respect, protect, promote and fulfil the rights’ in the Bill of Rights. With reference to judgments of diverse international tribunals,¹⁸ De Villiers J held (para 44) that this duty exists also if the damaging act is caused by third parties. These judgments are all to the effect that –

¹⁷ *Grootboom* para 88.

¹⁸ *X & Y v The Netherlands* [1986] 8 EHRR 235; two judgments of the Africa Commission: *Union des Jeunes Avocats v Chad* 9th Annual Activity Report 72 and *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria* 15th Annual Activity Report 30; *Velásquez Rodríguez v Honduras*, 28 ILM 291 (1989) part XI, the Inter-American Court of Human Rights.

'Governments have a duty to protect their citizens, not only through appropriate legislation and effective enforcement but also by protecting them from damaging acts that may be perpetrated by private parties.'¹⁹

The state did not argue that this conclusion was incorrect and since the CC judgment in *Carmichele*²⁰ and the subsequent judgments of this court in *Van Duivenboden*,²¹ *Van Eeden*,²² *Hamilton*²³ and *Carmichele*²⁴ the contrary is not open for argument.²⁵

[28] De Villiers J found that the state had failed to protect Modderklip's rights entrenched in s 25(1). Para 1.4 of the order is premised on this finding. There are two legs to this part of the order. First, there is the cross-reference to s 26(1) and (2), namely the breach of the duty to provide the Gabon residents with land, a matter I have already dealt with. The finding in that regard, namely that the state was in breach of its obligation to the residents, leads ineluctably to the conclusion that the state simultaneously breached its s 25(1) obligations towards Modderklip.

¹⁹ *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria* at para 57.

²⁰ *Carmichele v Minister of Safety and Security and another (Centre for Applied Legal Studies intervening)* 2001 (4) SA 938 (CC).

²¹ *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA).

²² *Van Eeden v Minister of Safety and Security (Women's Legal Centre Trust as amicus curiae)* 2003 (1) SA 389 (SCA) para 13-14.

²³ *Minister of Safety and Security v Hamilton* [2003] 4 All SA 117 (SCA)

²⁴ *Minister of Safety and Security and another v Carmichele* 2004 (3) SA 305, [2003] 4 All SA 565 (SCA).

²⁵ See also Cheadle et al *South African Constitutional Law: The Bill of Rights* p 16-18; *City of Cape Town v Rudolph and others* 2003 (11) BCLR 1236 (C) 1266-1267; *Jaftha v Schoeman and others, Van Rooyen v Stoltz and others* 2003 (10) BCLR 1149 (C) para 31 and 39.

[29] The other cross-reference in the order was to s 165(4) of the Constitution, which requires of organs of state, through legislative and other measures, *inter alia*, to assist the courts to ensure their effectiveness. As far as this is concerned, De Villiers J found that the SAPS had failed in its duty to investigate the complaints laid and to protect the property of Modderklip. That finding is reflected in para 1.5 of the order. The eviction order authorised the sheriff to request members of the SAPS to assist her in evicting – something envisaged by s 4(11) of PIE.²⁶ Modderklip apparently thought that this placed a duty on the SAPS to effect the eviction. This appears from the formulation of the notice of motion. But Modderklip erred. The order did not and could not require the SAPS to execute it. Concerning the failure to investigate and prosecute, it is true that the SAPS did neither but that does not mean that it failed in its constitutional duties. In the circumstances sketched earlier, its failure is both understandable and reasonable. Consequential to para 1.5, para 2.2 of the order required of the state to present a plan setting out how it intended to comply with its s 165(4) obligations. Counsel for Modderklip was asked what the order envisaged. He did not know. Neither do I, nor can I fathom how the state should know.

²⁶ It reads: ‘A court may, at the request of the sheriff, authorise any person to assist the sheriff to carry out an order for eviction, demolition or removal subject to conditions determined by the court: Provided that the sheriff must at all times be present during such eviction, demolition or removal.’

[30] To an extent the state did comply with its s 165(4) duties. There are the provisions of PIE which create a mechanism, although sometimes burdensome, to evict unlawful occupiers. There is a sheriff who has to execute court orders. The SAPS, to prevent lawlessness, is prepared to police the execution of the eviction order. But the state does not serve as insurer of litigants and if an order is unenforceable because of practical considerations the loss is usually that of the litigant. However, in a material respect the state failed in its constitutional duty to protect the rights of Modderklip: it did not provide the occupiers with land which would have enabled Modderklip (had it been able) to enforce the eviction order. Instead, it allowed the burden of the occupiers' need for land to fall on an individual,²⁷ which leads to the next point, namely s 9 of the Bill of Rights.

[31] Section 9(1) provides that everyone is equal before the law and has the right to equal protection and benefit of the law while s 9(2) states that equality includes the full and equal enjoyment of all rights and freedoms. As appears from para 1.6.4 of the order, De Villiers J found that Modderklip was not treated equally because as an

²⁷ Cf *East London Western Districts Farmers' Association and others v Minister of Education and Development Aid and others* 1989 (2) SA 63 (A) 75I-76B: 'In our system of law, however, the bureaucratic solution of problems, however intractable, must be achieved with due regard to the legitimate property rights of ordinary citizens. The situation no doubt called for prompt action by the respondents. Such action, however, required not merely the alleviation of the lot of the refugees but simultaneously therewith the protection of the farming community into whose midst so many distressed persons were being precipitately introduced. The respondents failed to secure the latter.' (Per Hoexter JA.)

individual it has to bear the heavy burden, which rests on the state, to provide land to some 40 000 people. That this finding is correct cannot be doubted. Marais J, in the eviction case, said that the 'right' of access to adequate housing is not one enforceable at common law or in terms of the Constitution against an individual land owner and in no legislation has the state transferred this obligation to such owner.²⁸ As to the second point he is no doubt correct but I would qualify the first. Circumstances can indeed be envisaged where the right would be enforceable horizontally but the present is not such a case.

[32] The state impliedly accepted the correctness of the foregoing but attempted to justify its breach by submitting that Modderklip was to blame for its own predicament. It accepted, however, that Modderklip could be denied relief only if it were established that there was culpable and unreasonable delay in seeking to assert its rights. Both in evidence and argument, somewhat mischievously, reference was made to the phenomenon of 'shack farming'²⁹ as if Modderklip may have been guilty of this social evil. The evidence is clear: Modderklip did not engage in shack farming.

²⁸ At 395A-B and referred to with approval in *Theewaterskloof Holdings (Pty) Ltd, Glaser Afdeling v Jacobs en andere* 2002 (3) SA 401 (LCC) para 18: 'Wat die posisie met betrekking tot alternatiewe akkomodasie ookal mag wees, dit kan nie van die applikant verwag word om die respondente onbepaald op sy plaas te huisves nie. Die reg op behuising vervat in art 26 van die Konstitusie is nie gemeenregtelik of ingevolge die Konstitusie teen individuele grondeienaars afdwingbaar nie.'

²⁹ 'Shack farming' refers to the case of a landowner permitting persons to erects shacks on its land, which is not zoned as a township and which does not have basic facilities, against payment of compensation – usually exorbitant.

[33] The state submitted that Modderklip should have applied for an urgent eviction, availing itself of s 5 of PIE, which reads:

‘(1) Notwithstanding the provisions of section 4, the owner or person in charge of land may institute urgent proceedings for the eviction of an unlawful occupier of that land pending the outcome of proceedings for a final order, and the court may grant such an order if it is satisfied that-

(a) there is a real and imminent danger of substantial injury or damage to any person or property if the unlawful occupier is not forthwith evicted from the land;

(b) the likely hardship to the owner or any other affected person if an order for eviction is not granted, exceeds the likely hardship to the unlawful occupier against whom the order is sought, if an order for eviction is granted; and

(c) there is no other effective remedy available.’

It is conceivable that Modderklip would have been able to discharge the onus in (a) and (b),³⁰ although it is somewhat doubtful, but that does not mean that not engaging in urgent proceedings was at the time unreasonable. Modderklip realised right from the beginning that more than a simple eviction was involved, and it engaged the municipality immediately properly and prudently.

[34] To assess Modderklip’s culpability (if any) it is useful to have regard to the role played by the municipality. That the municipality had

³⁰ Cf *Groengras Eiendomme (Pty) Ltd and others v Elandsfontein Unlawful Occupants and others* 2002 (1) SA 125 (T).

a duty to act is clear from *Grootboom*. Dealing with the facts of the case, Yacoob J said (at para 87):

‘The respondents began to move onto the New Rust land during September 1998 and the number of people on this land continued to grow relentlessly. I would have expected officials of the municipality responsible for housing to engage with these people as soon as they became aware of the occupation. I would also have thought that some effort would have been made by the municipality to resolve the difficulty on a case-by-case basis after an investigation of their circumstances before the matter got out of hand. The municipality did nothing and the settlement grew by leaps and bounds.’

[35] In this case the municipality became aware of the invasion during May 2000 and instead of engaging with the occupiers – it will be recalled that the original occupation was the result of an eviction effected by the municipality – it gave notice to Modderklip by letter dated 19 May to institute proceedings to evict them under PIE. Modderklip responded the next day by pointing out that the situation had arisen from a spill-over from overcrowding at Daveyton and Chris Hani and that eviction should therefore be the responsibility of the municipality. Modderklip nevertheless offered to join in any action which the municipality deemed advisable.

[36] The municipality did not respond to this offer and took no steps to evict the occupiers. Its reluctance or failure to take steps flowed from the provisions of PIE. Section 6, which permits an organ of state

to apply for the eviction of illegal occupiers (and the court may order the owner to foot the bill), requires of the court to have regard to the question whether there is available to the occupiers suitable alternative accommodation or land (s 6(3)(c)).³¹ If, on the other hand, the owner is the applicant and applies within six months of the settlement (s 4(6))³² the requirement of the availability of alternative accommodation does not apply but it does if the owner applies thereafter (s 4(7)).³³ The municipality could or would not provide alternative accommodation or land.

[37] The attorneys of Modderklip and of the municipality soon entered into negotiations in terms of which Modderklip was to sell two portions of land to the municipality. Modderklip in consequence of the negotiations, by letter of 12 June, made an offer to sell the occupied land at R10 000 per hectare. After having repeatedly requested an answer, the municipality eventually responded on 22 August,

³¹ 'In deciding whether it is just and equitable to grant an order for eviction, the court must have regard to-

(a) the circumstances under which the unlawful occupier occupied the land and erected the building or structure;

(b) the period the unlawful occupier and his or her family have resided on the land in question; and

(c) the availability to the unlawful occupier of suitable alternative accommodation or land.'

³² 'If an unlawful occupier has occupied the land in question for less than six months at the time when the proceedings are initiated, a court 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 elderly, children, disabled persons and households headed by women.'

³³ 'If an unlawful occupier has occupied the land in question for more than six months at the time when the proceedings are initiated, a court 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, except where the land is sold in a sale of execution pursuant to a mortgage, whether land has been made available or can reasonably be made available by a municipality or other organ of state or another land owner for the relocation of the unlawful occupier, and including the rights and needs of the elderly, children, disabled persons and households headed by women.'

indicating that it would be prepared to purchase the Gabon land at the proposed price during the next financial year subject to certain conditions. It stated that unless its offer was acceptable, Modderklip should immediately evict the occupiers. On 1 September Modderklip indicated its agreement. It mentioned that the actual size of the land occupied had to be determined because Modderklip doubted whether the municipality's estimate was correct. On 8 September, however, the municipality stated firmly that it was not interested in purchasing the Gabon land and instructed Modderklip to apply for eviction.³⁴

[38] After some further correspondence and the obtaining of expert evidence concerning the health hazards in informal settlements, Modderklip launched the eviction application on 18 October 2000. It was within the six-month period envisaged by s 4(6) of PIE. PIE orders are not given for the asking. A lengthy procedure has to be followed. In the event the case was heard six months later and judgment was given on 12 April 2001. It follows that Modderklip was vigilant and that its delay was not culpable or unreasonable and that the state's argument in this regard has to be rejected.³⁵

[39] As mentioned, the court below granted, in terms of s 38 and 172(1), a declaratory order and a mandamus in the form of a

³⁴ The municipality's assertion that it did not negotiate in respect of the land in issue is refuted by the correspondence.

³⁵ See further the enforcement case para 33.

‘structural interdict’ (ie an order where the court exercises some form of supervisory jurisdiction over the relevant organ of state).³⁶ The declaratory order was too broadly formulated. Simply to declare what the Constitution states serves no purpose.³⁷ Declaring that a breach of a constitutional duty occurred is however on another level.³⁸ Structural interdicts, on the other hand, have a tendency to blur the distinction between the executive and the judiciary and impact on the separation of powers. They tend to deal with policy matters and not with the enforcement of particular rights. Another aspect to take into account is the comity between the different arms of the state.³⁹ Then there is the problem of sensible enforcement: the state must be able to comply with the order within the limits of its capabilities, financial or otherwise.⁴⁰ Policies also change, as do requirements, and all this impacts on enforcement.

[40] The structural interdict contained in para 2 of the order suffers from some of these defects. In addition, the time limit appears to be

³⁶ *Minister of Health and others v Treatment Action Campaign and others (No 2)* 2002 (5) SA 721 (CC) para 107.

³⁷ Cf *Ex parte Noriskin* 1962 (1) SA 856 (D).

³⁸ S 172(1)(f) of the Constitution.

³⁹ *President of the Republic of South Africa and others v South African Rugby Football Union and others* 2000 (1) SA 1 (CC) para 234. Compare the judgment of the Supreme Court of Ireland in *D. (T.) v. Minister for Education* [2001] 4 IR 259, [2001] IESC 86 where Hardiman J said at para 362: ‘Accordingly, the fundamental requirement for constitutional harmony and modulation imperatively requires that the courts, as well as the other branches of government, recognise and observe the boundaries between them.’

⁴⁰ *Minister of Health and others v Treatment Action Campaign (No 2) and others* 2002 (5) SA 721 (CC) para 37-38.

unrealistic and there is no indication of what is expected of the state apart from the generalised obligation to comply with constitutional duties in some unspecified way. It also encroached on policy matters by requiring a prioritisation of the Gabon resettlement while there is no evidence that these people are entitled to it. The order justifies, it seems, queue-jumping, which is inappropriate. Then there is the fact that much of what is required may fall within the field of either the province or the municipality while the former was not cited and the latter, though cited, was informed that no relief was being sought against it.

[41] But merely criticising structural interdicts provides no solution to the problem. The problem, as must by now be apparent, lies on two fronts. On the one hand there is the infringement of the rights of Modderklip. On the other there is the fact that enforcement of its rights will impinge on the rights of the occupiers. Moving or removing them is no answer and they will have to stay where they are until other measures can be devised. Requiring of Modderklip to bear the constitutional duty of the state with no recompense to provide land for some 40 000 people is also not acceptable. Although in an ideal world the state would have expropriated the land and have taken over its

burden, which now rests on Modderklip, it is questionable whether a court may order an organ of state to expropriate property.

[42] Courts should not be overawed by practical problems. They should 'attempt to synchronise the real world with the ideal construct of a constitutional world'⁴¹ and they have a duty to mould an order that will provide effective relief to those affected by a constitutional breach.⁴² *Fose v Minister of Safety and Security*⁴⁴ held that –

'(a)ppropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case the relief may be a declaration of rights, an interdict, a *mandamus* or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the courts may even have to fashion new remedies to secure the protection and enforcement of these all-important rights.'

[Para 19.]

'I have no doubt that this Court has a particular duty to ensure that, within the bounds of the Constitution, effective relief be granted for the infringement of any of the rights entrenched in it. In our context an appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the right entrenched in the Constitution cannot properly be upheld or enhanced. Particularly in a country where so few have the means to enforce

⁴¹ *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) para 94 per Kriegler J.

⁴² *Minister of Health and others v Treatment Action Campaign and others (No 2)* 2002 (5) SA 721 (CC) para 102.

⁴⁴ 1997 (3) SA 786 (CC) per Ackermann J.

their rights through the courts, it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated. The courts have a particular responsibility in this regard and are obliged to "forge new tools" and shape innovative remedies, if needs be, to achieve this goal.'

[Para 69.]

[43] What 'effective relief' entails will obviously differ from case to case. Where a trespasser invades an owner-occupied household, more immediate intervention will be required from the state than in the case of unoccupied or unutilised land. This is not to deny the fact of the breach of rights in the latter case. It is merely to assert that constitutional remedies will differ by circumstance. The only appropriate relief that, in the particular circumstances of the case, would appear to be justified is that of 'constitutional' damages, ie, damages due to the breach of a constitutionally entrenched right. No other remedy is apparent.⁴⁵ Return of the land is not feasible. There is in any event no indication that the land, which was being used for cultivating hay, was otherwise occupied by the lessees or inhabited by anyone else. Ordering the state to pay damages to Modderklip has the advantage that the Gabon occupiers can remain where they are while Modderklip will be recompensed for that which it has lost and the state

⁴⁵ Cf *Olitzki Property Holdings v State Tender Board and another* 2001 (3) SA 1247 (SCA) esp para 42.

has gained by not having to provide alternative land. The state may, obviously, expropriate the land in which event Modderklip will no longer suffer any loss and compensation will not be payable (except for the past use of the land). A declaratory order to this effect ought to do justice to the case. Modderklip will not receive more than what it has lost, the state has already received value for what it has to pay and the immediate social problem is solved while the medium and long term problems can be solved as and when the state can afford it.

[44] This option was put to counsel for the state during his opening argument. Counsel did not resist and did not submit that such an order would be incompetent or unfair. It does, however, raise a number of issues. The first is the appropriate measure of damages. Two spring to mind immediately: should it be the market value of the land or the value of the right of occupation (as long as it lasts), calculated according to the principles applicable to expropriation? This could depend on the probable length of the occupation which, prima facie, appears to be indefinite since informal settlements tend to become permanent. On the other hand, the value of the land may have to be discounted taking into account the possibility of the reversion of the occupation. Another issue is the date on which the loss should be calculated considering that this is probably a case of a continuing

wrong in which case the loss may have to be calculated on present-day values. Then there is the question of whether the value of the land should be calculated as vacant land or as land occupied by illegal occupiers who are difficult to evict. The answer may be that since a party (in this case the state) may not derive any benefit from its own default it has to be determined ignoring the presence of the illegal occupiers. However, since these issues were not canvassed it would be inappropriate to come to a definite finding in relation to them. As far as procedure is concerned, it seems to be appropriate to order an inquiry into damages.⁴⁶ Although this may appear to be extraordinary, it will serve the interests of justice not to require Modderklip to institute new proceedings.

ANCILLARY MATTERS

[45] Two of the points *in limine* raised by the state in the court below were again argued before us. They are dealt with at this stage of the judgment because they were nothing but a diversion without merit. The first was that the Transvaal Provincial Division had no jurisdiction to hear the enforcement case because the eviction case was brought in the Witwatersrand Local Division. However, s 19(1)(a) of the Supreme Court Act 59 of 1959 invested the Transvaal Provincial Division with jurisdiction because all the respondents 'reside' within the area of

⁴⁶ *Harvey Tiling Co (Pty) Ltd v Rodomac (Pty) Ltd and another* 1977 (1) SA 316 (T) 330A-B.

jurisdiction. The enforcement application was not merely an application concerned with execution of the eviction application or ancillary thereto. It was a self-contained substantive application.

[46] The second was based on uniform rule 49(11), which provides that where an appeal has been noted or an application for leave to appeal made, the operation and execution of the order is suspended. In this case, as will appear soon in more detail, the 'Modder East Squatters' lodged their application for leave to appeal together with an application for condonation some 18 months after the order had issued. The right to apply for leave to appeal by then had lapsed. Rule 49(11) presupposes a valid application for leave to appeal to effect the suspension of an order.⁴⁷ In this case there was none.

[47] To revert to the application for leave to appeal in the eviction case, I have mentioned already that the application for leave to appeal was filed 18 months after the order while it should have been lodged within 15 days. The 'Modder East Squatters' had, at the time of the order, legal representation and there can be little doubt that they knew their rights and elected not to appeal. Their election was based on a belief that the municipality would purchase the land but when after a few months it became obvious that it would not, they still did nothing. Under somewhat unusual circumstances their present attorney

⁴⁷ Cf *Schmidt v Theron and another* 1991 (3) SA 126 (C).

became involved, probably as a rearguard action to ward off the enforcement application – whence the second point *in limine*.

[48] The nature of the delay was such that on that ground alone relief could have been refused. As counsel submitted, the delay induced a reasonable belief in the mind of Modderklip that the order had become unassailable in consequence of which the enforcement application was lodged at great expense. Marais J nevertheless carefully considered the grounds of appeal and came to the conclusion that they were without merit. With his reasons and conclusion I agree and it is unnecessary to spend much time in repeating the same matter. In summary, the one argument was that the applicant had failed to prove ownership, something not raised in the papers or before Marais J in the first instance, in spite of the fact that the applicant repeatedly referred to the property as the ‘applicant’s farm’. Then it was submitted that the occupiers may have been on the property with Modderklip’s consent, something controverted by the facts and not raised by them in opposition. The next submission was that the court had failed to consider all the relevant circumstances, which is incorrect as the reported judgment shows. Marais J, it was further argued, should have called for oral evidence despite the fact that the then respondents, who were represented, did not suggest that there was a factual dispute

which required oral evidence. It was also argued that the order for substituted service was irregular because it did not name the occupiers by name, even though it accorded with s 4(4) of PIE.⁴⁸ Last, the learned judge was taken to task for not varying his order *mero motu*, the point being that it allegedly covered all the occupants, whether they occupied at the time of service of the application or later. As Marais J said, the order accorded with his intention and did not allow for a variation. In any event, the fact that the order may be difficult to enforce because of the lack of specificity concerning the parties to it does not *per se* raise an arguable issue.

[49] It follows that the application for leave to appeal in the eviction case has to be dismissed with costs. Modderklip, however, asked for a costs order *de bonis propriis* against the attorney. There can be little doubt that the attorney's intervention was a cause of much aggravation and irrecoverable costs by his pursuit of a matter obviously lacking merit. Misguided and over-zealous he may have been but there is no reason to doubt his bona fides and a special order consequently cannot be justified.

⁴⁸ It reads: 'Subject to the provisions of subsection (2), if a court is satisfied that service cannot conveniently or expeditiously be effected in the manner provided in the rules of the court, service must be effected in the manner directed by the court: Provided that the court must consider the rights of the unlawful occupier to receive adequate notice and to defend the case.'

[50] In the enforcement case *Modderklip* was successful in the court below and although on appeal much of the order of De Villiers J will be replaced, the state did not have substantial success and must pay the costs of the appeal.⁴⁹ De Villiers J made the following order in relation to costs, which remain unaffected:

'6. Die 1ste, 2de, 3de en 5de respondente word gelas om gesamentlik en afsonderlik die applikant se koste te betaal met betrekking tot die aansoek om deurahaling sowel as die hoofaansoek, insluitende die koste van twee advokate in albei gevalle. . . .

7. Die 1ste, 2de, 3de en 5de respondente word gelas om gesamentlik en afsonderlik die amicus curiae se koste te betaal met betrekking tot die aansoek om deurahaling, insluitend die koste van twee advokate.'

ORDERS

[51] In *Modder East Squatters v Modderklip Boerdery (Edms) Bpk* (the eviction case 187/2003):

The application for leave to appeal is dismissed with costs.

[52] In *President van die Republiek van Suid-Afrika en andere v Modderklip Boerdery (Edms) Bpk* (the enforcement case 213/03):

- (a) The appeal is upheld in part.
- (b) Para 1 to 5 of the order of the court below is set aside and replaced with an order –

⁴⁹ Cf the costs order on appeal in *Minister of Health v Treatment Action Campaign (No 2)* 2002 (5) SA 721 (CC) para 135.

- (i) Declaring that the state, by failing to provide land for occupation by the residents of the Gabon Informal Settlement, infringed the rights of Modderklip Boerdery (Pty) Ltd which are entrenched in s 7(2), 9(1) and (2), and 25(1) and also the rights of the residents which are entrenched in s 26(1) of the Constitution.
- (ii) Declaring that the applicant is entitled to payment of damages by the Department of Agriculture and Land Affairs in respect of the land occupied by the Gabon Informal Settlement.
- (iii) Declaring that the residents are entitled to occupy the land until alternative land has been made available to them by the state or the provincial or local authority.
- (iv) The damages are to be calculated in terms of s 12(1) of the Expropriation Act 63 of 1975.
- (v) If, in relation to the investigation and determination of the damages suffered, the parties are unable to reach agreement regarding the pleadings to be filed, and discovery, inspection, and other matters of procedure relating thereto, leave is granted to any of the parties to make application to the court in terms of Rule 33(5) for directions.

- (c) The third appellant is to pay the costs of appeal of the respondent.

L T C HARMS
JUDGE OF APPEAL

Agree:

FARLAM JA
CAMERON JA
MTHIYANE JA
SOUTHWOOD AJA