THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

Case no: 102 / 09
Case no: 499 / 09

THE OCCUPIERS, SHULANA COURT, 11 HENDON ROAD, YEOVILLE, JOHANNESBURG **Appellants**

and

MARK LEWIS STEELE **Respondent**

Neutral citation: **The Occupiers, Shulana Court, 11 Hendon Road, Yeoville, Johannesburg v Steele (102/09 and 499/09) [2010] ZASCA 28 (25 March 2010)**

BENCH: **MPATI P, VAN HEERDEN, MHLANTLA, SHONGWE JJA and THERON AJA**

HEARD: **18 February 2010**

DELIVERED: **25 March 2010**

SUMMARY: Rescission of Judgment – good cause shown – bona fide defence based on non-compliance with s 4(6) and (7) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 and s 26(1) and (3) of the Constitution.

ORDER

On appeal from: South Gauteng High Court (Johannesburg) (Satchwell J and Tsoka J, respectively, sitting as courts of first instance).

1 The rescission appeal (case no 499/09) is upheld with costs including the costs of two counsel.

2 The order of the high court is replaced with the following:

'(a) The default judgment granted against the applicants on 18 June 2008 is rescinded and the applicants are granted leave to oppose the application for their eviction.

(b) The applicants are directed to file their opposing affidavits within the time period prescribed by the Uniform Rules of this Court and the *dies* in this respect will be calculated as from the date of this order.

(c) The costs of this application are reserved for the trial court.'

3 No order as to costs is made in the appeal against the order of eviction (case no 102/09).

JUDGMENT

THERON AJA (MPATI P, VAN HEERDEN, MHLANTLA and SHONGWE JJA concurring)

[1] The appellants are a group of people who occupy property situated at 11 Hendon Road, Yeoville in central Johannesburg (the property). A curious feature

of this matter is that there are two appeals before this court. One is directed against an order of eviction that was granted by default against the appellants and the other relates to the dismissal of an application for rescission of the order of eviction. Both Satchwell J (who granted the eviction order) and Tsoka J (who refused the rescission application) granted the appellants leave to appeal to this court. The parties were agreed that if the rescission appeal was successful it would be determinative of the entire matter.

[2] The respondent, Mr Mark Steele, became the owner of the property on 9 February 1993. The property consists of four large flats and three separate rooms, which were originally staff quarters. These flats and rooms have been divided into multiple units with each unit being occupied by several people. According to the respondent, the appellants have occupied the property in terms of oral agreements of lease. In terms of the agreements, their tenancy was on a periodic monthly basis and the monthly rental was R1 239 per flat and R266 per room. It was alleged by the respondent that the property had become run down, dilapidated and overcrowded. He consequently decided to renovate it and terminated all the leases.

[3] On 30 October 2007, the respondent gave the appellants notice of termination of their respective leases and they were given three months, until 31

January 2008, to vacate the property. None of the appellants vacated the property by the due date. During April 2008, the respondent instituted eviction proceedings against the appellants in the South Gauteng High Court (Johannesburg). The appellants failed to oppose those proceedings and on 18 June 2008, the high court granted the eviction order in terms of which the appellants were directed to vacate the property. The appellants subsequently applied for rescission of the eviction order, which application was dismissed by Tsoka J.

[4] Before us, as in the court below, the appellants relied on the common law, as well as Uniform rule 42(1) for their claim for rescission. It is trite that in terms of the common law, an applicant, in order to be successful in an application for rescission, is required to show good cause. Generally, an applicant will establish good cause by giving a reasonable explanation for his or her default and by showing that he or she has a bona fide defence to the plaintiff's claim which prima facie has some prospect of success.[1]

[5] Mr Muzikayifani Ngcobo, one of the occupiers of the property, deposed to an affidavit in support of the rescission application, in which he set out his and the remaining appellants' personal circumstances and explained why they had failed to

[1] *Chetty v Law Society, Transvaal* 1985 (2) SA 756 (A) at 765B-C; *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA) para 11.

appear in court on 18 June 2008. Ngcobo, his two wives and their children have been residing in a single room on the property since 1992. According to Ngcobo, approximately 70 people reside on the property, including children and disabled persons and women who are household heads, most of whom have been living on the property for a considerable number of years. Ngcobo described the occupiers as poor, the majority of whom earn a living as hawkers selling goods such as sweets and cigarettes from informal stalls set up in the inner city area. According to Ngcobo, he and some of the appellants have - he does not specify when - searched for alternate accommodation in the inner city but could not find anything that they could afford. Ngcobo gave a plaintive description of his previous homelessness, which was a result of being evicted.

[6] In respect of their failure to appear in court, Ngcobo states that after the eviction papers were served on him and the remaining appellants, he, on behalf of the appellants, sought assistance from the Inner City Resources Centre (the ICRC), a non-governmental organization which provides assistance to people threatened with eviction. Ms Shereza Sibanda, from the ICRC, unsuccessfully attempted to secure legal representation for the appellants. According to Ngcobo, the appellants had assumed that the ICRC would take all the necessary steps to oppose the eviction application. On 13 June 2008, the Centre for Applied Legal Studies

(CALS), which had been contacted by Sibanda, advised Ngcobo that it would not be able to assist the appellants. Ngcobo again contacted the ICRC, and discovered that Sibanda was in Kenya. According to Ngcobo, he and the remaining appellants had believed that the ICRC would appear in court on their behalf on 17 June 2008, the date on which the eviction application was to be heard. Early in the morning of 17 June 2008, he again contacted the ICRC. He was advised that Sibanda was not yet in the office. Later that morning, he went to the ICRC offices. It was only then that Sibanda, who had just returned from Kenya, became aware of the fact that CALS had declined to assist the appellants. Sibanda indicated that it was 'too late to attend court, because an order [of eviction] had most likely already been granted'.

[7] It is apparent from the facts that the appellants failed to appear in court because they genuinely believed that they were being assisted by the ICRC. The appellants assumed that the ICRC would take all the necessary steps to oppose the eviction application. Ngcobo explained that he and the remaining appellants had not understood that the ICRC could not itself provide them with legal representation and appear in court on their behalf.

[8] The appellants did take steps to secure legal assistance in opposing the eviction application. It had clearly always been their intention to oppose the matter. They failed to appear in court because they bona fide, but mistakenly believed that they would be represented. That he had contacted the ICRC on the morning of the hearing and later personally called at their offices, is confirmation of this fact. The explanation for their non-appearance is reasonable and I am satisfied that they were not in wilful default.

[9] The appellants relied on two grounds in support of their assertion that they have a bona fide defence. First, they contended that in terms of s 4(6) and 4(7) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE), a court can only grant an eviction order once it is satisfied that it is just and equitable to do so. It was further contended that although the eviction application was not opposed in the high court, there was sufficient evidence before the court to have alerted it to the fact that the occupiers of the property were poor and faced the very real prospect of homelessness if evicted. Thus, so it was submitted, they were entitled to protection in terms of s 26(1) and (3) of the Constitution. Second, it was argued that where the grant of an order of eviction may result in the occupiers of the property being homeless, the municipality was a

necessary party to the proceedings and the failure to join the municipality rendered the grant of the eviction order premature.

[10] Section 26 of the Constitution, which entrenches the right to housing, provides that:

'(1) Everyone has the right to have access to adequate housing.

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.

(3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.'

Section 26(1) imposes a negative duty on the state not to interfere with or deprive a person of existing access to adequate housing.[2] Section 26(2) creates a positive obligation on the state to devise and implement a reasonable housing programme. In *Government of the Republic of South Africa & others v Grootboom & others*,[3] the Constitutional Court held that a housing programme could only be reasonable if it provided emergency shelter to people in desperate need who, for whatever reason, faced the prospect of homelessness. The right to be protected from arbitrary eviction, as contained in s 26(3) of the Constitution, is given effect to through various provisions of PIE. One of the primary objectives of PIE is to

[2] *Jaftha v Schoeman & others*; *Van Rooyen v Stoltz & others* 2005 (2) SA 140 (CC) paras 32-34.
[3] 2001 (1) SA 46 (CC) paras 52, 63 and 69.

ensure that evictions take place in a manner consistent with the values of the Constitution.[4] PIE prescribes the requirements which must be satisfied before a court may grant an order of eviction. Of relevance to this application are ss 4(6) and 4(7) which provide that a court may only grant an eviction order if it is just and equitable to do so, after considering all the relevant circumstances. These sections read:

'4(6) 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.

(7) 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.'

In terms of s 4(6) and 4(7), a court is obliged to consider the rights and needs of the elderly, children, disabled persons and households headed by women. These are

[4] *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 11.

specifically listed as relevant factors to which a court must have regard. In terms of s 4(7), the court is also obliged to consider the availability of alternative land for the relocation of an occupier. Where information relating to these matters is not placed before the court, the court will not be in a position to consider these circumstances in determining whether the eviction was just and equitable.[5]

[11] Our courts have recognised that there is a duty on them, in eviction matters, to consider all relevant circumstances and that they are not in a position to discharge this duty where information relating to, inter alia, the rights and needs of the elderly, children, disabled persons and households headed by women, has not been placed before them.[6] This constitutional approach was explained by Sachs J in *Port Elizabeth Municipality v Various Occupiers*:[7]

'The obligation on the court is to "have regard to" the circumstances, that is, to give them due weight in making its judgment as to what is just and equitable. The court cannot fulfil its responsibilities in this respect if it does not have the requisite information at its disposal. It needs to be fully apprised of the circumstances before it can have regard to them. It follows that, although it is incumbent on the interested parties to make all relevant information available, technical questions relating to *onus* of proof should not play an unduly significant role in its

[5] *Occupiers of Erf 101, 102, 104 and 112 Shorts Retreat, Pietermaritzburg v Daisy Dear Investments (Pty) Ltd & others* [2009] 4 All SA 410 (SCA); [2009] ZASCA 80 paras 5-6.
[6] *Transnet t/a Spoornet v Informal Settlers of Good Hope & others* [2001] 4 All SA 516 (W); *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC); *Ritama Investments v Unlawful Occupiers of Erf 62 Wynberg* [2007] JOL 18960 (T); *Cashbuild (South Africa) (Pty) Ltd v Scott & others* 2007 (1) SA 332 (T); *Occupiers of Erf 101, 102, 104 and 112 Shorts Retreat, Pietermaritzburg v Daisy Dear Investments (Pty) Ltd.*
[7] 2005 (1) SA 217 (CC).

enquiry . . . *Both the language of the section and the purpose of the statute require the court to ensure that it is fully informed before undertaking the onerous and delicate task entrusted to it.* In securing the necessary information, the court would therefore be entitled to go beyond the facts established in the papers before it. *Indeed, when the evidence submitted by the parties leaves important questions of fact obscure, contested or uncertain, the court might be obliged to procure ways of establishing the true state of affairs, so as to enable it properly to "have regard" to relevant circumstances.*'[8] (Emphasis added and footnotes omitted.)

[12] PIE imposed a new role on the courts in that they are required to hold the balance between illegal eviction and unlawful occupation and ensure that justice and equity prevail in relation to all concerned.[9] Sachs J, in *Port Elizabeth Municipality*, described this new role of the court as 'complex, and constitutionally ordained'[10] and one which required a court 'to go beyond its normal functions, and to engage in active judicial management'.[11] A number of courts, including this court, have, in relation to the provisions of s 4 of PIE, recognised the duty of the court to act proactively, as well as its powers to investigate, call for further evidence or make special protective orders.[12] In *Shorts Retreat*,[13] Jafta JA stated that s 4 obliges courts to be 'innovative' and in some instances, 'to depart from the conventional approach'.

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[8] Para 32.
[9] *Port Elizabeth Municipality v Various Occupiers* para 13.
[10] *Ibid.*
[11] Para 36.
[12] See the authorities listed in n 6 above.
[13] Para 14.

[13] In terms of s 4(7) a court is obliged, in addition to the circumstances listed in s 4(6), namely, the rights and needs of the elderly, children, disabled persons and households headed by women, to give due weight to the availability of alternative land. There is nothing to suggest that in an enquiry in terms of s 4(6), a court is restricted to the circumstances listed in that section. The court must have regard to *all* relevant circumstances. The circumstances identified are peremptory but not exhaustive.[14] The court may, in appropriate cases, have regard to the availability of alternative land. However, where the availability of alternative land is relevant, then it is obligatory for the court to have regard to it.

[14] I turn now to consider whether the high court had, in granting the eviction order, properly discharged its statutory obligations. In his founding affidavit, the respondent had alleged that the property was extremely old, dilapidated and overcrowded, with the flats and rooms having been informally subdivided into multiple living quarters. It was also apparent from the evidence that the appellants had paid relatively low rentals. Information relating to the needs of the elderly, children, disabled persons and households headed by women was not placed before the court. In my view, the court was not in a position to have regard to all relevant

[14] *Port Elizabeth Municipality v Various Occupiers* above n 7 para 30. Although the court referred specifically to s 6, there is no reason why this reasoning should not apply to s 4 as well.

circumstances as the necessary information was not placed before it. It did not have the views of the municipality which was best placed to inform the court of the availability of land within its jurisdiction and measures that the court could put in place, temporarily or permanently, to accommodate the appellants. As was mentioned by Jafta JA in *Shorts Retreat*,[15] a municipality has constitutional obligations which it must discharge in favour of people facing eviction. These safeguards are designed to ensure that an occupier's constitutional rights are protected and, as previously mentioned, that evictions take place in a humane manner consistent with the values of the Constitution.[16] Based on the information which had been placed before the high court, it cannot be said that the court was sufficiently informed of all relevant circumstances before granting an order which had the effect of depriving people of their homes. The high court failed to comply with the mandatory provisions of s 4 of PIE.

[15] Although the information which had been placed before the high court was insufficient to enable it to discharge its statutory obligations, the scant information which had been made available should have alerted the court to the fact that the occupiers of the property were poor and that the prospect of homelessness, if they were to be evicted, was very real. The high court ought to have been proactive and

[15] *Occupiers of Erf 101, 102, 104 and 112 Shorts Retreat, Pietermaritzburg v Daisy Dear Investments (Pty) Ltd* above n 5 para 14.
[16] Para 10 above.

should have taken steps to ensure that it was appraised of all relevant information in order to enable it to make a just and equitable decision. The court has, in these circumstances, also failed to comply with its constitutional obligations.

[16] It will, generally, not be just and equitable for a court to grant an eviction order where the effect of such an order would be to render the occupiers of the property homeless.[17] In *Port Elizabeth Municipality*,[18] the Constitutional Court cautioned that 'a court should be reluctant to grant an eviction against relatively settled occupiers unless it is satisfied that a reasonable alternative is available'. I am of the view, having regard to the personal circumstances of the occupiers, and in particular the real prospect that their eviction could lead to homelessness, that they have established a bona fide defence that carries some prospect of success.

[17] In the result the appellants have shown good cause for a rescission order under the common law. It is consequently unnecessary to consider whether the appellants would be entitled to claim rescission in terms of Uniform rule 42(1) and whether the failure to join the municipality as a party to the proceedings in the high court was fatal.

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[17] *Government of the Repuplic of South Africa v Grootboom* above n 3; *Modderfontein Squatters, Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, Amici Curiae); President of the Republic of South Africa & others v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, Amici Curiae)* 2004 (6) SA 40 (SCA).
[18] 2005 (1) SA 217 (CC) para 28.

[18] The following order issues:

1 The rescission appeal (case no 499/09) is upheld with costs including the costs of two counsel.

2 The order of the high court is replaced with the following:

‘(a) The default judgment granted against the applicants on 18 June 2008 is rescinded and the applicants are granted leave to oppose the application for their eviction.

(b) The applicants are directed to file their opposing affidavits within the time period prescribed by the Uniform Rules of this Court and the *dies* in this respect will be calculated as from the date of this order.

(d) The costs of this application are reserved for the trial court.’

3 No order as to costs is made in the appeal against the order of eviction (case no 102/09).

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L V THERON
ACTING JUDGE OF APPEAL

APPEARANCES:

For Appellants:	P Kennedy SC I Goodman Instructed by: Routledge Modise (in association with Eversheds) Sandton McIntyre & Van Der Post Bloemfontein
For Respondent:	J Both SC A W Pullinger Instructed by: Kern and Partners Johannesburg Naudes Attorneys Bloemfontein