REPUBLIC OF SOUTH AFRICA

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

REPORTABLE
Case number: 464/2002

In the matter between:

CECIL BAARTMAN	**1st Appellant**
JAFTA JACOBS	**2nd Appellant**
ISACK LEVACK	**3rd Appellant**
GLADMAN SAM	**4th Appellant**
ISAK LEVACK	**5th Appellant**
VUYANI NDOTSHAYISA	**6th Appellant**
JAN LEVACK	**7th Appellant**
CHARMAIN RICHTENBURG	**8th Appellant**
JACOB DAVIDS	**9th Appellant**
ANITA VAN RENSBURG	**10th Appellant**
WILLEM AFRIKA	**11th Appellant**
ISAK UITHALER	**12th Appellant**

and

PORT ELIZABETH MUNICIPALITY Respondent

CORAM: MPATI DP, STREICHER, BRAND, LEWIS JJA and MOTATA AJA
HEARD: 15 AUGUST 2003
DELIVERED: 26 SEPTEMBER 2003

Summary: Land – Land reform – eviction by organ of state – application of s 6(3) of the Prevention of Illegal Eviction and Unlawful Occupation of Land Act 19 of 1998.

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JUDGMENT

MPATI DP:

[1] This appeal concerns the application of s 6(1) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (the Act). The section provides:

'An organ of state may institute proceedings for the eviction of an unlawful occupier from land which falls within its area of jurisdiction, except where the occupier is a mortgagor and the land in question is sold in a sale of execution pursuant to a mortgage, and the court may grant such an order if it is just and equitable to do so, after considering all the relevant circumstances and if –

(a) the consent of that organ of state is required for the erection of a building or structure on that land or for the occupation of the land, and the unlawful occupier is occupying a building or structure on that land without such consent having been obtained; or

(b) it is in the public interest to grant such an order.'

[2] The Port Elizabeth Municipality (respondent) applied in the South Eastern Cape Local Division of the High Court for an order for the eviction of the appellants (respondents *a quo*) from privately owned land, erven 113 to 128 inclusive, Lorraine, Port Elizabeth. These erven form part of an undeveloped piece of land within a proclaimed township and fall within the area of jurisdiction of the respondent. They are zoned for residential purposes and dwellings erected thereon for residential purposes must be in accordance with plans approved by the Building Control Officer in terms of s 4 of the National Building Regulations and Building Standards Act 103 of 1977, as amended. I shall refer to the erven collectively as 'the property'.

[3] The appellants occupy a number of shacks which they have erected on the property without first having obtained respondent's consent, which they required. In the founding affidavit respondent alleges that it had approached the various owners of the property and established that none of the appellants occupy the property with the

express or tacit permission of the owners and that the appellants have failed to vacate the property notwithstanding their having been requested by the owners to do so. The appellants opposed the proceedings, but the court *a quo* (Jennett J) granted the order sought and directed, *inter alia*, that the appellants vacate the property within a period of eight weeks after the date of his order. Their subsequent application for leave to appeal was refused by the court *a quo* and the appellants are before us with leave of this Court.

[4] The appellants deny that they occupy the property unlawfully and allege that permission to occupy was obtained from an old woman who they assume to be one of the owners. They also deny that they have been requested by any owner to vacate the property.

[5] Although in its founding affidavit respondent states that the owners of the property did not want to depose to affidavits for security reasons, respondent annexed to its replying affidavit no less than seventeen affidavits deposed to by the registered owners, each denying having granted any of the appellants permission to occupy the property and withdrawing any consent which might have been given by a previous owner or owners. The court *a quo* found that the appellants occupy the property unlawfully. This finding has not been challenged on appeal and I shall accordingly proceed from the premise that the appellants' occupation of the property is indeed unlawful.

[6] When seeking an eviction order in terms of s 6 of the Act an organ of state is required by subsec 6 to follow the procedures set out in s 4, with the necessary changes. In this regard Jennett J said:

'The present application was launched in June 2000 and since then in *Cape Killarney Property Investment (Pty) Ltd v Mahamba* (2001) 4 All SA 479 (SCA) the Supreme Court of Appeal has confirmed the peremptory nature of the provisions of section 4 of the Act. To the extent, however,

that the provisions of section 4(2) of the Act have not been followed in the present case, all parties to the present application accepted that to have postponed the application further to enable the provisions of section 4(2) of the Act to be complied with, would serve no purpose whatsoever. The respondents have had ample opportunity to deal with the merits of the case and they have in fact placed their versions fully before the Court.'

Again no argument to the contrary was advanced before us and nothing further need be said in this regard.

[7] Section 6(3) of the Act reads:

'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.'

Mr Scott, who, together with Mr Jurgens, appeared for the appellants, submitted that a distinction should be drawn between ss 4 and 6 of the Act. Whilst subsecs 6 and 7 of s 4 provide that 'a court may grant an order of eviction if it is of the opinion that it is just and equitable to do so after considering all relevant circumstances', including the rights and needs of the elderly, children, disabled persons and households headed by woman, the factors mentioned in s 6(3) are a *numerus clausus*. A Court, when dealing with eviction proceedings in terms of s 6(1) of the Act, is precluded from considering any relevant circumstance other than those enumerated in s 6(3), so it was argued.

[8] I do not agree. A court is indeed enjoined to have regard to the factors mentioned in s 6(3) of the Act when considering whether it is just and equitable to grant an eviction order. But the section does not state that those are the only factors to be considered. I can find nothing wrong in a court, for example, taking into account the very factors mentioned in section 4(6) and (7) in deciding whether it would be just

and equitable to grant an order of eviction in proceedings instituted in terms of s 6(1) of the Act. In my view, a court would be entitled to have regard to all relevant circumstances.

[9] Although subsecs 1(a) and (b) of s 6 of the Act are separated by the disjunctive 'or', which might arguably indicate that a court may grant an eviction order without having regard to the public interest when the person sought to be evicted occupies a building or structure which had been erected without the consent of the organ of state concerned, it is, in my view, imperative in this case, as will probably be the position in the majority of cases of eviction, that the question whether it is in the public interest to grant such an order also be considered. The interests of the public inevitably impact upon the justness and equitability of the order.

[10] In its founding affidavit respondent alleges that the occupation of the property by the appellants has drawn complaints from various residents of Lorraine, that the appellants have no free access to water and that they have no toilet facilities with the result that they use the surrounding area of bush as a toilet, which in turn is a health risk. The residents of Lorraine have expressed their displeasure at the fact that respondent 'is allegedly allowing people to occupy shacks in a residential area'. Consequently respondent dispatched an official to inspect the property and he requested the appellants to vacate it.

[11] It is common cause that the appellants are willing to vacate the property if they are provided with alternative land. In this regard respondent says in its founding affidavit:

'The [appellants] indicated that they have no objection to relocate to the area which is known as Walmer Township. As Walmer Township has grown steadily on an informal basis the [appellants] could move to Walmer Township and erect their structures there.'

The allegation that the appellants have no objection to relocate to Walmer Township is

denied by them. They strongly object to the suggested move to Walmer Township because, so they allege, it is overcrowded and the crime rate is high. Whilst they are prepared to vacate the property they require respondent to designate alternative land 'to which we can move to ensure that we do not have to face the prospect of being evicted again due to the fact that we illegally occupy land without the [respondent's] consent'.

[12] In response to this demand for alternative land respondent alleges that it is aware of its obligation in regard to housing and has for that reason embarked on a comprehensive housing development programme which it refers to as a 4 peg policy programme. It is not necessary to explain this programme here. Suffice it to say that it involves the development of 3000 erven per financial year. It is a programme for which respondent is to be commended.

[13] However, the programme does not provide any form of interim relief to those in desperate need of access to housing. I say this because respondent, whilst conceding that it has vast tracts of undeveloped land, alleges that such land will be developed 'on a systematic basis in the future as funds become available'. The implication, therefore, is that respondent is unable to allocate land to the appellants even on an interim basis. Its attitude is that what the appellants have sought to do is to unilaterally occupy private land and when requested to vacate, to allege that they have nowhere else to go 'and [respondent] must solve their problem by providing alternative land'.

[14] This indeed highlights the dilemma with which local authorities such as respondent have to contend. Whilst they may have devised comprehensive housing programmes such as that of respondent, they are often faced with people who are in desperate need of access to housing or land and whom they are unable to assist immediately. In the instant case, and at the rate of 3000 erven being developed in a

year, it will take a considerable time before the appellants can be assisted under respondent's housing development programme. Respondent contends that the appellants, by occupying private land and, when asked to vacate it, demanding that they be provided with alternative land, will disrupt the housing programme. If they are successful this will result in other people forcing it (respondent) to grant them preferential treatment. This, respondent says, will in turn result in 'queue jumping'. However, the appellants are not asking for preferential treatment in the sense that they are asking that housing be made available to them in preference to people in the housing queue. They are merely asking that land be identified where they can put up their shacks and where they will have some measure of security of tenure.

[15] There was a suggestion in the founding affidavit that the appellants could also move to Greenbushes, an area that falls within the jurisdiction of the Western Region District Council. It is not clear from the papers what the relationship is between respondent and the Western Region District Council but the suggestion was that the appellants were at liberty to approach the latter. In the replying affidavit, however, it is alleged that Greenbushes now falls within respondent's jurisdiction, but that the land has been earmarked for other people who are already part of respondent's housing programme and thus not available to the appellants. It is then suggested that the appellants 'should act in the same manner that other newcomers to the city do by renting accommodation in recognised residential areas, of which there are many in Port Elizabeth'.

[16] Of the thirteen appellants nine are heads of households whilst the rest are single persons. Three, of whom two are heads of households, are disabled. As at the time the application was launched the children in the various households were 23 in total. The appellants allege that they previously resided at an informal settlement in Glenroy, Port Elizabeth, from where they were removed approximately eight years

ago – the appellants' answering and supporting affidavits were deposed to on 8 August 2000. But one of them, the 13th appellant, presumably with his family, is said to have resided on the property 'for the past ten years', while three are said to have lived there for four years, one for two years and the rest for eight years. Only the second appellant appears to be in full-time employment. He is employed as a shoemaker. The fourth appellant is unemployed; the seventh and twelfth appellants receive disability grants, while the tenth appellant is awaiting the approval of a disability grant. The rest hold temporary employment. One can hardly think that under these circumstances the appellants would be able to rent accommodation as suggested by respondent.

[17] As to the basis of the appellants' objection to moving to Walmer Township the court *a quo* considered that whether Walmer Township is 'suitable' alternative land (s 6(3)(c)) is not an issue dependent on the subjective views of the person sought to be evicted but rather upon whether the alternative land is objectively suitable for occupation. Jennett J consequently held that it can hardly be gainsaid that Walmer Township is alternative land to which the appellants can move. The learned judge considered the fact that respondent seeks to evict the appellants from privately owned land, and not from municipal land, as important in deciding whether it is just and equitable that an eviction order be granted. The appellants occupy the property unlawfully and the issue, according to the learned judge, was not so much whether an eviction order should issue, but rather when should the eviction order be carried out in the event of the appellants' failure to vacate the land by the date fixed.

[18] In my view, although it is not a precondition for the granting of an eviction order but rather one of the factors to be considered by a court, as was said in *P E Municipality v Peoples Dialogue on Land and Shelter* (2001) All SA 381 (E) at 387, the availability of suitable alternative land becomes *the* important factor in the instant

case. This is because of the length of time the appellants have resided on the property and, perhaps more importantly, because the eviction order is not sought by the owners of the property but by an organ of state. The State is obliged, in terms of s 26 of the Constitution, to take legislative and other measures, within its available resources, to achieve the progressive realisation of the right which everyone has, namely to have access to adequate housing.

[19] The appellants do not object to being moved from the property but merely wish to settle where they will be assured of security of tenure, something to which the respondent seems reluctant to commit itself although it has vast tracks of vacant land available. The court *a quo* found that Walmer Township is alternative land to which the appellants can move. But it is certainly not in the public interest, in my view, to evict the appellants from the property only for them to be evicted again from Walmer Township on grounds of being unlawful occupants. On the papers it is not clear whether Walmer Township is on land owned by the respondent or whether it is privately owned land. If it were owned by respondent, something we cannot ascertain from the papers, the appellants' objection to it as being overcrowded, with a high crime rate, would probably not have been sufficient to move a court to refuse an order of eviction on that basis alone. But in the absence of an assurance that the appellants will have some measure of security of tenure at Walmer Township I consider that the court *a quo* should not have granted the order sought.

[20] Mr Beyleveld, who, together with Mr Laher, appeared for respondent, urged us to infer from respondent's allegation in the papers that Walmer Township is available for appellants to move to, that respondent has control of or owns the land in Walmer Township. In my view, such an inference is not supported by any fact that is readily ascertainable on the papers.

[21] In the result I make the following order:

(a) The appeal is upheld with costs, such costs to include those consequent upon the employment of two counsel.

(b) The order of the court *a quo* is set aside. For it is substituted the following order:

'The application is dismissed with costs.'

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L MPATI DP

CONCUR:

STREICHER JA

BRAND JA

LEWIS JA

MOTATA AJA