CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 17/16

In the matter between:

BONGANE NGOMANE	First Applicant
SAMSON NKABINDE	Second Applicant
NOMAWETHU CAWE	Third Applicant
OCCUPIERS OF EXTENSIONS 9, 21, 25 KINROSS AND THE FARM ZONDAGSKRAAL 125 IS, DISTRICT KINROSS	Fourth and further Applicants

and

GOVAN MBEKI MUNICIPALITY	Respondent

Neutral citation: *Ngomane and Others v Govan Mbeki Municipality* [2016] ZACC 31

Coram: Mogoeng CJ, Bosielo AJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mhlantla J, Nkabinde J and Zondo J

Judgments: The Court (unanimous)

Decided on: 08 September 2016

Summary: Eviction — Municipality obligations for meaningful engagement — Section 26 — Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 — Illegal occupants — Interdict application altered — R*es judicata*

ORDER

On appeal from the High Court of South Africa, Gauteng Division, the following order is made:

1. Leave to appeal is granted.
2. The appeal succeeds with costs.
3. The order of the High Court is set aside and replaced with the following:
   (a) The Govan Mbeki Municipality and the applicants are required to engage with each other meaningfully to come up with a reasonable solution that accords with the applicants' rights and the Municipality's obligations under section 26 of the Constitution.
   (b) To facilitate such engagement, the Municipality must proactively seek the participation of the applicants, including those amongst the fourth and further applicants. The Municipality may choose measures that facilitate engagement, but those measures must reasonably enable the applicants to participate meaningfully in the processes of engagement. Adopting and modifying the order of the High Court to ensure adequate notice under section 4(2) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998, such measures may include:
      i) assigning an identification feature on existing complete and incomplete structures in Extensions 21 and 25 Kinross and on the farm Zondagskraal 125 IS, Kinross;

ii) affixing notice to such structures that informs occupiers of engagement forums, invites their participation, and provides enough time between the date of the notice and the date of the event so that the occupiers have a reasonable opportunity to participate;

iii) erecting five notice boards in common areas in Extensions 21 and 25 Kinross and the farm Zondagskraal 125 IS, Kinross respectively and affixing notice described in 3(b)(ii) to the notice boards; and

iv) distributing pamphlets containing notice described in 3(b)(ii) in English and in two other languages spoken by persons occupying Extensions 21 and 25 Kinross and the farm Zondagskraal 125 IS, Kinross.

(c) Meaningful engagement must occur as soon as possible.

(d) Should a resolution not be reached, and should the Municipality again seek to evict the applicants, compliance with this order will be relevant to whether the Municipality fulfilled its obligations under the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998.

(e) The applicant is ordered to pay the respondents' costs.

JUDGMENT

THE COURT (Mogoeng CJ, Bosielo AJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mhlantla J, Nkabinde J and Zondo J):

[1] The applicants apply for leave to appeal against a judgment and order of the High Court of South Africa, Gauteng Division, Pretoria (High Court). The High Court set aside a rule nisi granted against the applicants for the removal of some 200 families from a tract of municipal land, but proceeded to order ordinary eviction proceedings in terms of section 4 of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act.[1] The applicants seek to appeal that decision. The respondent does not oppose the application in this Court.

Background

[2] The respondent, Govan Mbeki Municipality (the Municipality), sought two separate eviction orders in a period of a year. It seeks to have the applicants and other occupiers (the occupiers) evicted from properties that it owns and which are zoned as agricultural land. The occupiers have erected structures which they use as residential dwellings on the properties without the consent of the Municipality. The Municipality first brought an application on 3 September 2013, after which an order interdicting Mr Dlamini, Ms Nkambule and others, cited as "illegal occupants", from occupying vacant stands at Extension 21 Kinross, was successfully obtained. The occupiers were evicted from the said property and the Municipality was authorised to demolish the "illegal shacks". The order was executed in October 2013.

[3] The occupiers who were evicted in October 2013 proceeded to take refuge in the community hall in Kinross. They were evicted from the hall within two weeks. Thereafter, they stayed at the local primary school. They made several attempts to meet the officials of the Municipality in order to find an amicable solution. The majority of the occupiers have been on the Municipality's housing waiting list since 2002 but have not yet received any housing. Prior to taking occupation of Extension 21 Kinross, they were renting dwellings in the backyards of permanent residents where they were allegedly charged unreasonably high rental fees and were often evicted arbitrarily.

[1] 19 of 1998 (PIE Act).

Some of the residents are dependents of the occupiers and have now become adults that require their own accommodation.

[4] In response to the occupiers' plight, the Municipality's officials stated that the occupiers should return to where they came from. The occupiers alleged that, in light of the intolerable conditions that they were exposed to as backyard tenants and the fact that some of them were evicted by their landlords, it was not a viable option for them to return.

[5] In May 2014 the occupiers took occupation of Extensions 21 and 25 Kinross and the farm Zondagskraal 125 IS, District Kinross, Mpumalanga (properties). The occupation of the properties took place in February when a piece of land was vacated and intended to be used for a pre-primary school facility by the Municipality. These events prompted the Municipality to bring an urgent application to the High Court for the eviction of the occupiers from the properties. The application was also aimed at obtaining an order for the demolition of the illegal shacks on the properties and an interdict prohibiting the community from erecting shacks on the properties in future.

Litigation History

[6] On 16 May 2014 Hlapi J granted a rule nisi calling on the community to show cause why the order should not be made final. The application was opposed by some of the occupiers. The matter was heard on 30 July 2014 by Modiba AJ in the High Court. The representatives of the community raised several points *in limine* (preliminary points), among others, that the Municipality did not rely on section 5 of the PIE Act in its founding papers and only referred to it in its replying affidavit. The applicants alleged that this was an admission of the intention to evict and not to make out a proper cause in the founding affidavit to support an urgent eviction. All four points *in limine* were upheld by the High Court. The rule nisi was set aside.

[7] Stating that an outright dismissal of the application would render it *res judicata*, the Court proceeded to make an order demanding that the necessary procedural steps be

taken – detailing the measures that the Municipality needed to employ in order to ensure compliance with an ordinary eviction process in terms of section 4(2) of the PIE Act. The High Court also included additional duties that the Municipality had to comply with to give effect to substantive fairness. This included requiring them to identify the respondents on the housing list and submitting a report to the court containing a housing policy (for provision of emergency housing to people on the housing list). The High Court held that as a general rule our courts do not make cost orders in cases involving constitutional rights. The judgment was handed down on 26 September 2014.

[8] The occupiers' application to the High Court for leave to appeal to the Supreme Court of Appeal was dismissed on 20 March 2015. An application to the Supreme Court of Appeal for leave to appeal was dismissed on 7 December 2015– on the grounds that there were no reasonable prospects of success and that there was no other compelling reason why an appeal should be heard. No costs order was made.

In this Court

Jurisdiction

[9] The applicants contend that this matter gives rise to constitutional issues. The Municipality has attempted to circumvent the PIE Act, which in turn undermines the rights in section 26(3) of the Constitution. It is in the interests of justice for this appeal to be heard. Despite the order not being final, they allege the Municipality has made a habit of evicting occupiers in this manner which, they argue, is an abuse of process. In support, they attach orders that were granted in applications of a similar nature. They view the Municipality's actions as attempts to circumvent the PIE Act.

[10] The applicants also contend that their application for leave to appeal presents arguable points of law of general public importance. Firstly, because proper compliance with the PIE Act in eviction applications is required in order to ensure that the rights in section 26 of the Constitution are protected. Secondly, because it is essential for legal certainty that this Court provides direction to the application and ambit of rule 6(6) of

the Uniform Rules of Court – to establish whether a court may *mero moto* (of its own accord) alter an interdict application into an eviction in terms of the PIE Act.

Merits

[11] The applicants seek leave to appeal against the whole of the judgment of Modiba AJ, handed down in September 2014. They request that the order of the High Court be set aside and substituted with an order providing for the discharge of the rule nisi and that the application be dismissed with costs.

[12] The applicants submit that the High Court erred in the following respects:

(a) That the points *in limine* raised only procedural defects that are not fatal to the application. It is argued that the points *in limine* are substantively defective, as compliance with the High Court's directives does not cure the application – the requirement of meaningful engagement before instituting eviction proceedings is negated;

(b) That the Court had a discretionary power in terms of rule 6 of the Uniform Rules of Court to issue directives in order to transform the interdict application into an eviction application. It is argued that rule 6(6) is intended to allow a party to remedy a procedural defect. In this case the court a quo went beyond the ambit of the rule by allowing the Municipality to amend its entire application and granting relief in terms of section 4(2) of the PIE Act – without such relief being sought; and

(c) To dismiss the application would render the issue of the lawfulness of the occupation of the properties *res judicata.* It is contended that the Municipality would be free to institute eviction proceedings at any future date if meaningful engagement failed to reach a settlement – it would not be a claim for the same relief.

Leave to appeal

[13] This matter raises important constitutional issues relating to the right to access to housing and the eviction of people from their homes under section 26 of the Constitution, and the PIE Act. There are prospects of success. Leave should be granted.

The appeal

[14] The High Court made a practical order that sought to accelerate the process of reaching a just and fair solution to the problem. That is commendable, but it overlooked two aspects that prejudiced the applicants. The applicants were essentially successful in their opposition to the application and had the High Court not out of its own accord made the order it did, they would have been entitled to a costs order if the application was dismissed. That should be rectified. The second advantage the applicants were deprived of was an opportunity of meaningful engagement with the Municipality in accordance with *Olivia Road,*[2] before further proceedings for their eviction could proceed.

[15] Accordingly the appeal must succeed to the extent that these defects must be remedied.

Order

[16] The following order is made:

1. Leave to appeal is granted.
2. The appeal succeeds with costs.
3. The order of the High Court is set aside and replaced with the following:
   (a) The Municipality and the applicants are required to engage with each other meaningfully to come up with a reasonable solution that accords with the applicants' rights and the Municipality's obligations under section 26 of the Constitution.

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[2] *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg and Others* [2008] ZACC 1; 2008 (3) SA 208 (CC); 2008 (5) BCLR 475 (CC) (*Olivia Road*) at para 15.

(b) To facilitate such engagement, the Municipality must proactively seek the participation of the applicants, including those amongst the fourth and further applicants. The Municipality may choose measures that facilitate engagement, but those measures must reasonably enable the applicants to participate meaningfully in the processes of engagement. Adopting and modifying the order of the High Court to ensure adequate notice under section 4(2) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998, such measures may include:

i) assigning an identification feature to all complete and incomplete structures on existing complete and incomplete structures in Extensions 21 and 25 Kinross and on the farm Zondagskraal 125 IS, Kinross;

ii) affixing notice to such structures that informs occupiers of engagement forums, invites their participation, and provides enough time between the date of the notice and the date of the event so that the occupiers have a reasonable opportunity to participate;

iii) erecting five notice boards in common areas in Extensions 21 and 25 Kinross and the farm Zondagskraal 125 IS, Kinross respectively and affixing notice described in 3(b)(ii) to the notice boards; and

iv) distributing pamphlets containing notice described in 3(b)(ii) in English and in two vernacular languages spoken by persons occupying Extensions 21 and 25 Kinross and the farm Zondagskraal 125 IS, Kinross.

(c) Meaningful engagement must occur as soon as possible.

THE COURT

(d) Should a resolution not be reached, and should the Municipality again seek to evict the applicants, compliance with this order will be relevant to whether the Municipality fulfilled its obligations under the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998.

(e) The applicant is ordered to pay the respondents' costs.

For the Applicants:	Lawyers for Human Rights
For the Respondent:	Dikotope Attorneys