CONSTITUTIONAL COURT OF SOUTH AFRICA

Bongane Ngomane and Others v Govan Mbeki Municipality

CCT 17/16
Date of judgment: 8 September 2016

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

Today, the Constitutional Court handed down judgment in an application 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 and Unlawful Occupation Act (PIE).

The respondent, Govan Mbeki Municipality (Municipality), sought two separate eviction orders in a period of a year. It seeks to have the applicants and other occupiers (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.

In May 2014, the occupiers took occupation of Extension 21, Extension 25 and Farm Zondagskraal 125 IS 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. 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 from the properties and an interdict prohibiting the community from erecting shacks on the properties in future.

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 matter was heard on the return day by Modiba AJ in the High Court on 30 July 2014. The representatives of the community raised several points *in limine*, among others, that the Municipality did not rely on section 5 of PIE 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 of the points *in limine* were upheld by the High Court. The rule nisi was set aside.

Stating that 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 PIE. 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 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 PIE. There are prospects of success and thus leave to appeal is granted.

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 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 this Court's decision in *Occupiers of 51 Olivia Road.*

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