THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

REPORTABLE

Case No: 937/13

In the matter between:

RUSTENBURG LOCAL MUNICIPALITY **Appellant**

and

VINCENT MDANGO AND OTHERS **1-20th Respondents**

MEMBER OF THE EXECUTIVE COUNCIL FOR

HUMAN SETTLEMENT, PUBLIC SAFETY

AND LIASON, NORTH WEST PROVINCE **21st Respondent**

THE MINISTER OF RURAL
DEVELOPMENT AND LAND REFORM **22nd Respondent**

Neutral citation: *Rustenburg Local Municipality* v *Vincent Mdango* (937/13) ZASCA 83 [30 May 2014]

Coram: Mhlantla, Bosielo, Theron and Willis JJA and Swain AJA

Heard: 09 May 2014

Delivered: 30 May 2014

Summary: Eviction in terms of Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 – section 6 – eviction of unlawful occupiers – power of court to make an order that is just and equitable.

ORDER

On appeal from: North West High Court, (Mafikeng), Gura J sitting as court of first instance:

1 The appeal and cross-appeal are upheld to the extent set out below.

2 The order of the high court is set aside.

3 The matter is remitted to the high court for reconsideration.

4 Prior to the hearing of the matter in the high court:

(i) The 21st and 22nd respondents are ordered, within 30 days of the grant of this order, to file affidavits in which they set out the following details:

(a) The steps taken to ascertain the availability of suitable alternative accommodation for the 1st to 20th respondents; and

(b) What alternative land and/or alternative accommodation is now or in the near future likely to become available for the 1st to 20th respondents.

(ii) The 1st to 20th respondents are ordered to file affidavits setting out their personal circumstances including, but not limited to, the rights and needs of the elderly, children, disabled persons and households headed by women, and any such additional information that is relevant to a just determination of this matter. These affidavits must be filed on or before 6 August 2014.

(iii) The appellant may, within 15 days after the filing of the 1st to 20th respondents' affidavits, file such affidavits as it deems necessary.

5 Pending the finalisation of this matter in the high court, the appellant is interdicted from evicting the 1st to 20th respondents from the properties they are currently occupying.

6 The high court is directed to afford the parties preference in respect of the reconsideration of the matter.

7 The costs of the proceedings in the high court and in this court shall be costs in the cause.

8 The appellant is directed to immediately serve a copy of this order on the 21st and 22nd respondents.

JUDGMENT

Mhlantla JA (Bosielo, Theron and Willis JJA and Swain AJA concurring):

[1] On 9 May 2014, this court ordered a remittal of this matter to the high court for reconsideration in terms of the orders set out above. We indicated that the reasons for the order would follow. These are the reasons.

[2] This appeal and the cross-appeal are against the decision of the North West High Court, Mafikeng (Gura J), in terms of which he granted an eviction order against the respondents but suspended the order pending the availability of suitable accommodation or land for the settlement of the respondents. The appeal and cross-appeal are before this court with the leave of the high court.

[3] The appellant is the Rustenburg Local Municipality (the municipality), a local municipality as defined in the Local Government: Municipal Structures Act 117 of 1998. The first to twentieth respondents (the respondents) are various occupiers of the Reconstruction and Development Program (RDP)

houses at Seraleng Township, Rustenburg. The Member of the Executive Council for Human Settlement, Public Safety and Liason, North West (the MEC) and the Minister of Rural Development and Land Reform (the Minister) are cited as twenty first and twenty second respondents respectively.

Background

[4] The litigation leading to this appeal arose as a result of the respondents' conduct. During November 2007 the respondents invaded a number of RDP houses owned by the municipality. These houses were due to be allocated to applicants who had been approved by the municipality. In September 2011, the municipality launched an application in the North West High Court, Mafikeng and sought an order for the eviction of the respondents from these houses in terms of the provisions of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE). No order was sought against the MEC and the Minister.

[5] In the founding affidavit to which the acting municipal manager deposed, he said that the respondents had illegally occupied the houses and that the Housing Programme of the municipality was as a result hampered. He said that the municipality had been informed that no land could be made available for purposes of housing. In this regard, he declared that it would be advisable that the MEC and the Minister participate actively in this matter with a view to overcoming the impasse.

[6] The municipality's wish did not materialise as neither the MEC nor the Minister participated in the litigation. Initially, the MEC filed a notice of opposition but withdrew this a day later, electing to abide the decision of the

court. The court was therefore left in the dark with regard to the availability of suitable alternative accommodation or land as well as steps taken to ascertain the availability of suitable alternative accommodation and various other factors relevant thereto.

[7] The respondents in their answering affidavit, revealed a sad state of affairs regarding the issue of housing in this country. They provided a detailed account of the history and circumstances that led them to occupy the houses. In this regard, they stated that in 1996 they were inhabitants of an informal settlement called Sondela. They later moved to an area known as Etipini when Sondela became full. In 2002 they were uprooted officials of the municipality with a promise that their area was earmarked for a development of RDP houses. They were advised to submit their names to the relevant officials who would compile a list for their allocation to the houses to be built in Etipini. Thereafter, they were moved to an area called Egcibhala whilst the building construction of the RDP houses at Etipini was conducted. They stayed in shacks and remained at Egcibhala until 2005.

[8] In 2005, the construction of RDP houses at Etipini was completed. The respondents expected the municipality to allocate the houses to them in terms of the agreement but were shocked to discover that most of the houses had already been allocated to persons unknown to them. They enquired from the officials about the situation and the municipality's failure to honour the agreement. They did not receive a positive response. Instead, the municipality demolished their shacks at Egcibhala. As a result, the respondents found themselves homeless.

[9] The respondents found some vacant land at Etipini. They again engaged the municipality and sought damages for the demolition of their properties. They also requested that they be considered for allocation of RDP houses that were being constructed at Egcibhala. Discussions were held with ward councillors. The respondents further alleged that in 2006, they discovered that the municipality had allocated these houses to other people. Owing to their experience and, in despair, they decided to occupy the houses as it became clear to them that the municipality had no intention of honouring the agreement. At that stage their shacks had already been demolished.

[10] The application in the high court came before Gura J. That court correctly found that since the municipality had not allocated the RDP houses to the respondents, they were in unlawful occupation thereof. Regarding the question whether it would be just and equitable to evict the respondents, the judge lamented the paucity of information. The court was concerned about the attitude of the municipality and its failure to suggest any plan regarding the resettlement of the occupiers as well as its failure to provide steps taken to consider the issue of alternative accommodation or land. Notwithstanding the concerns raised, the court granted an order for the eviction of the respondents, but suspended it pending the availability of suitable accommodation or land for the settlement of the respondents.

[11] Both parties were not satisfied with the outcome. The high court granted them leave to appeal and cross-appeal to this court.

[12] In this court, the issues were twofold. First, whether it was just and equitable to evict the respondents. Second, whether the court below erred in suspending the eviction order.

Legal Framework

[13] Sections 26 and 28 of the Constitution are the key constitutional provisions at issue in this case. Section 26 provides:

'**Housing –**

(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.'

[14] Section 28 reads:

'**Children**-

(1) Every child has the right -
(a) . . .
(b) . . .
(c) to basic nutrition, shelter, basic health care services and social services;
(d) . . .

[15] The current state of our law in regard to evictions and giving effect to section 26 of the Constitution is found in PIE. Section 6 of PIE governs the eviction proceedings by an organ of state and reads:

'**Eviction at instance of organ of state-**

(1) 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 unlawful occupier is a mortgagor and the land in question is sold in a sale in 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) For the purposes of this section, "public interest" includes the interest of the health and safety of those occupying the land and the public in general.

(3) 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.'

[16] At the commencement of the appeal, we raised our concerns with counsel for both parties about the paucity of information and in particular the fact that the MEC had elected to abide the decision of the court instead of providing information relating to alternative suitable accommodation, and the fact that the municipality had failed to submit a report about any steps taken by it to provide alternative suitable accommodation to the respondents. We were also concerned about the respondents' failure to bring their personal circumstances to the attention of the court below.

[17] It is imperative that a court seized with an application in terms of section 4 or 6 of PIE must take all relevant factors into consideration before granting an eviction order. We referred counsel for the parties to the decision of this court in *Ekurhuleni Metropolitan Municipality & another* v *Various Occupiers, Eden Park Extension 5,*[1] where Ponnan JA said:

'[T]he enquiry to be undertaken is therefore whether, given all the relevant factual, legal and socio-economic circumstances, it is just and equitable to order the eviction of the unlawful occupier:

"This requires a court to make a value judgment, but it must not do so in a vacuum."

There are various considerations relevant to this determination, as outlined both in the Act and through the case law, with each factor taking on either an increased or lesser importance depending on the prevailing factual matrix of each matter. According to Chenwi the following are potentially relevant to the enquiry:

"(i) [T]he manner in which the occupation was effected; (ii) the duration of the occupation; (iii) the availability of suitable alternative accommodation or land; (iv) reasonableness of offers made in connection with suitable alternative accommodation or land; (v) the timescales proposed relative to the degree of disruption involved; (vi) the willingness of the occupiers to respond to reasonable alternatives put before them; (vii) the extent to which serious negotiations have taken place with equality of voice for all concerned; and (viii) the gender, age, occupation or lack thereof and state of health of those affected. . . [and] the manner of execution of the eviction order, that is, whether it was executed humanely… Furthermore, the interests of surrounding communities as well as the negative impact of "land gaps" on investor-confidence in the country, and the right of landowners (discussed subsequently), have been regarded by the courts as relevant factors."'

[18] In coming to its decision in *Ekurhuleni*, this court was influenced by the Constitutional Court decisions in *Government of the Republic of South Africa &*

[1] *Ekurhuleni Metropolitan Municipality & another* v *Various Occupiers, Eden Park Extension 5* [2014] 1 All SA 386 (SCA) para 19.

others v *Grootboom & others, Joe Slovo Community, Western Cape* v *Thubelisha Homes & others (Centre on Housing Rights and Eviction & another, Amici Curriae)* as well as *Port Elizabeth Municipality* v *Various Occupiers*.[2] The decision of *Ekurhuleni* is instructive. It is undesirable for the courts to make orders of eviction where the information or factors referred to in *Ekurhuleni* are lacking or insufficient. In the present case, it is common cause that the respondents have been in occupation since 2007. Their personal circumstances including the rights and needs of the elderly, children, disabled persons and households headed by women must be placed before the court. Similarly, the MEC's involvement and input is crucial to the determination of whether it will be just and equitable to evict the respondents.

[19] In the result, counsel for both parties conceded that insufficient information was presented in the high court. They agreed that the matter should be remitted to the high court and that both parties including the MEC be allowed to provide the relevant information to enable the court to make a proper determination of the issues.

[20] It is for these reasons that the order to which reference was made in the first paragraph above was made.

NZ MHLANTLA
JUDGE OF APPEAL

[2] *Government of the Republic of South Africa & others* v *Grootboom & others* 2001 (1) SA 46 (CC) paras 82 and 83; *Joe Slovo Community, Western Cape* v *Thubelisha Homes & others (Centre on Housing Rights and Eviction & another, Amici Curriae)* 2010 (3) SA 454 (CC) para 148; *Port Elizabeth Municipality* v *Various Occupiers* 2003 (2) SA 363 (CC), (2003 (2) BCLR 111) paras 35 and 36.

APPEARANCES:

For Appellants:	H Lever SC (with him O.K Chwaro) Instructed by: Kgomo Mohetle & Tlou Attorneys c/o Bezuidenhouts Inc, Bloemfontein
For Respondents:	P Shapiro Instructed by: S Shapiro Attorneys Johannesburg