THE DUTY TO HAVE ‘Meaningful engagement’ BEFORE AN EVICTION

From the COURTS

Occupiers of 51 Olivia Road and Others v City of Johannesburg and Others, Case CCT 24/07 [2008]

On 19 February 2008 the Constitutional Court (CC) considered an appeal by more than 400 occupiers of two buildings in the inner city of Johannesburg (the occupiers) against a decision of the Supreme Court of Appeal (SCA).

The High Court

The City sought the eviction of the occupiers, relying on section 12(4)(b) of the National Building Regulations and Standards Act (NBRA) (Act 103 of 1977), which gives it the power to order occupiers to vacate any buildings it considers unsafe and unhealthy. The occupiers submitted a counter-application aimed at securing alternative accommodation or housing as a precondition to their eviction. The High Court (HC) held that the City had a constitutional duty to provide the applicants with alternative accommodation before it could evict them. The HC was silent on the issue of a structural interdict sought by the occupiers.

The Supreme Court of Appeal

The City appealed to the SCA against the HC’s judgment. The SCA disagreed with the finding of the HC that the City could only evict people from unsafe buildings if such people were provided with alternative accommodation. The SCA authorised their eviction and ordered the City to provide alternative (temporary) accommodation to the occupiers who were “desperately in need of housing assistance”.

The Constitutional Court

Issues before the CC

The main arguments discussed in the judgment were these:

- Section 12 of the NBRA was inconsistent with the Constitution because it provided for arbitrary evictions without a court order.

key points

- If eviction will result in homelessness, municipalities must engage seriously and in good faith with those affected.
- If a municipality evicts, it must provide a record of the process of engagement with the affected community, showing at least a reasonable effort on the part of the municipality.
- What is ‘reasonable engagement’ depends on the particular circumstances of each case.
- The absence of engagement, or an unreasonable response from the municipality, could result in a court refusing to grant the eviction order.
- Municipalities must consider the availability of suitable alternative accommodation or land in deciding whether to proceed with an eviction.

Run-down inner city flats in Hillbrown, Johannesburg

- The decision by the City to evict the occupiers was unfair as it was taken without giving them a hearing, and therefore unconstitutional.
- The administrative decision to evict the occupiers was not reasonable in all the circumstances because it did not take into account that they would be homeless after the eviction.
- Section 26(3) of the Constitution precluded their eviction.

The engagement order

The judgment of the CC was delivered against the backdrop of an earlier 'engagement order' that the Court had issued on 30 August 2007 after hearing the case. When it issued the 'engagement order', the CC essentially asked the two parties to engage with each other – that is, have face-to-face interaction – in order to seek a mutually acceptable agreement.

On 5 November 2007 the occupiers and the City approached the CC to approve the following agreement:

1. An interim measure: It was agreed that the City would improve the two buildings and make them "safer and more habitable". This would include the installation of chemical toilets, the cleaning and sanitation of the buildings, the delivery of refuse bags, the closing of a certain lift shaft and the installation of fire extinguishers. The City also agreed to provide the occupiers with alternative accommodation to avoid homelessness upon eviction.
2. A permanent housing plan: The agreement stated that the occupiers would move into alternative accommodation pending the provision of permanent housing solutions that would be developed in consultation with them.

As stated in the CC's judgment, the parties were required to continue with the engagement process and could approach the courts if it became necessary.

The judgment

The CC held that the City had an obligation to fulfil the objectives mentioned in the preamble to the Constitution, among them to "improve the quality of life of all citizens and free the potential of each person". Most importantly, it held that the City must respect, protect, promote and fulfil the rights in the Bill of Rights (section 7(2)).

According to the CC, in the present case, the most important of these rights were the right to human dignity (section 10) and the right to life (section 11). A municipality that ejected people from their homes without first meaningfully engaging with them was acting in a manner that was at odds with the spirit and purpose of these rights.

The CC held further that the duty of the City to engage with people who might be rendered homeless after eviction was also grounded in section 26(2) of the Constitution, and that this provision required the City to act in a reasonable manner. Reasonable conduct of a municipality pursuant to section 26(2) includes the reasonableness of every step taken in the provision of adequate housing. The CC held that every homeless person was in need of housing, and this meant that every step taken in relation to a potentially homeless person also had to be reasonable if it was to comply with section 26(2). It also held that section 26(2) required the response of the municipality to the engagement process to be reasonable, acting within its available resources.

The CC also held that in any eviction proceedings at the instance of a municipality, the provision of a complete and

accurate account of the process of engagement, including at least the reasonable efforts of the municipality within that process, would ordinarily be essential. The absence of any engagement or an unreasonable response by a municipality in the engagement process would ordinarily be a weighty consideration against the grant of an eviction order, the CC added. The CC found that it was common cause that there had been no meaningful engagement between the occupiers and the City. For this reason, the CC held that the SCA should not have granted the eviction order.

In the end, the CC was satisfied that the engagement agreement, which it approved on 5 November 2007, showed that there had been meaningful engagement between the occupiers and the City, and the measures agreed upon showed that the City's response to the engagement process was reasonable.

The CC did, however, find it necessary to decide on the constitutional validity of section 12 of the NBRA. The Court observed that the right to act under section 12(4)(b) and the right to have access to adequate housing were not reciprocal and that the former was neither dependant nor conditional on the latter. However, according to the CC, this could not mean that it was neither appropriate nor necessary for a decision-maker to consider the availability of suitable accommodation or land when making a section 12(4)(b) decision. Any suggestion that the availability of alternative accommodation need not be considered implied that whether a person or family was rendered homeless after an eviction consequent upon a section 12(4)(b) decision was irrelevant to the decision itself. The CC held that this reasoning denoted a false premise that there was no relationship between section 12(4)(b) of the NBRA and section 26(2) of the Constitution even if the person was rendered homeless by the decision.

Accordingly, the CC found that the SCA was incorrect in its conclusion that the failure of the City to consider the availability of suitable accommodation or land for the occupiers in the process of making a section 12(4)(b) decision was not objectionable. The CC found that the relationship between the eviction of people by the City pursuant to section 12(4)(b) and the possibility of their being rendered homeless upon eviction could not be overlooked. It therefore held that the City had to take into account the possibility of the homelessness of any resident that resulted from a section 12(4)(b) eviction in the process of making the decision as to whether or not to proceed with the eviction.

Regarding section 12(6) of the NBRA, which imposes a criminal sanction for failure to act after a section 12 notice has been issued, the CC found the section to be at odds with section 26(3) of the Constitution. Section 26(3) authorises any person to remain in their homes in the absence of a court order. If allowed to stand, the CC held, section 12(4)(b) would render section 26(3) weak, offering little protection if people could be compelled to leave their homes by the exertion of the pressure of the criminal sanction without a court order.

The CC held, however, that it would not be just and equitable to strike down section 12(6), as it was appropriate to encourage people to leave unsafe and unhealthy buildings in compliance with a court order for their eviction. According to the CC, a reading-in order, providing for the criminal sanction only after a court order for eviction had already been made, would be appropriate. The CC then set aside both the HC and SCA orders.

Comment

This judgment confirms once again that state action pursuant to any legislation should be guided by and is subject to the values enshrined in the Constitution. The CC confirmed the interdependence and interrelatedness of the rights in the Constitution. This was evidenced by the CC's finding that the order by the SCA authorising the City to evict the occupiers notwithstanding the potential homelessness resulting from such an order threatened not only the right of access to adequate housing but also the right to human dignity and the right to life.

In line with the right to be heard in terms of the provisions of the Promotion of the Administrative Justice Act (Act 3 of 2000), this judgment makes it obligatory for municipalities to engage meaningfully with unlawful occupiers, especially if the decision to evict them has the potential to render them homeless.

Most importantly, the judgment subjects the engagement process to the standard of reasonableness and the principle of openness, both enshrined in the Constitution.

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Who can appoint commissions of enquiry?

CONDUCTING A 'SECTION 106 INVESTIGATION'

Minister of Local Government, Housing and Traditional Affairs (KwaZulu-Natal) v Umlambo Trading 29 CC, [2007] SCA 130 (RSA)

If the member of a province's executive council (MEC) responsible for local government suspects maladministration, fraud, corruption or any other serious malpractice in a municipality, that MEC must designate a person or persons to investigate the matter. This judgment of the Supreme Court of Appeal deals with the rules that must be followed by the MEC in ordering such an investigation.

Law

The Municipal Systems Act provides that the applicable provincial law on commissions of enquiry determines how a 'section 106 investigation' must be conducted and what the powers of the investigators are. If there is no provincial legislation, the national Commissions Act (Act 8 of 1947) is applicable.

In this case, there was applicable provincial legislation. The KwaZulu-Natal Commissions Act (Act 3 of 1999) provides that the Premier may by proclamation in the *Provincial Gazette* appoint a commission. The Premier may define its terms of reference and make rules on how it goes about its work. The Premier may also appoint a secretary and designate a chairperson of the commission. The Act provides that a commission of enquiry has the power to subpoena persons to attend hearings or produce documents.

Facts

The MEC for local government in KwaZulu-Natal appointed Manase & Associates (Manase), a local law firm, to investigate tender irregularities by sending a letter to Manase. A subpoena that claimed to be in terms of section 106(2) of the Systems Act and the KwaZulu-Natal Commissions Act was served by Manase on the company, requesting financial and banking information.

Arguments and judgment

The company applied to the Court to have the investigation halted and the MEC's decision to appoint Manase set aside. It relied on the MEC's failure to adhere to the KwaZulu-Natal Commissions Act in launching and conducting the investigation.

The Court agreed with the company. The KwaZulu-Natal Commissions Act vests the power to appoint commissions of enquiry in the Premier. The Court held that, in terms of the KwaZulu-Natal Commissions Act, the MEC had no power of his own to appoint a commission of enquiry. Furthermore, it held that there had been no publication of the 'investigation' or 'commission' in the *Provincial Gazette* as required by the KwaZulu-Natal Commissions Act. Neither the topic of the investigation nor the terms of reference had been defined. No regulations had been issued by the Premier and no secretary or chairperson had been appointed, let alone published in the *Provincial Gazette*. The MEC himself did not have the power to issue subpoenas.

The subpoenas that Manase had issued and served on Umlambo were thus unlawful and set aside by the Court.

Comment

A section 106 investigation is an important instrument in the hands of the provincial government to get to the bottom of alleged irregularities in a municipality. It is the most intrusive form of 'monitoring' permitted by law because persons can be subpoenaed to appear before the commission or produce documents. The Court made it clear that the exercise of any public power is only legitimate when it is lawful.

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