'Suitable alternative land' before evictions

Section 6(3)(c) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE) provides that when a court decides whether an eviction order is just and equitable, it needed to consider the availability of "suitable alternative land". The main question is what is meant by this term.

Facts

The appellants in *Baartman v Port Elizabeth Municipality* (Supreme Court of Appeal: SCA 464/2002) appealed against a High Court eviction order to vacate the property, which they allegedly occupied without the owners' consent. The property was privately owned and formed part of an undeveloped piece of land within a proclaimed township and fell within the area of jurisdiction of the municipality.

Issue

The issue before the Court was whether they could be evicted, the Court having considered the availability of suitable alternative land? What was meant by 'suitable alternative land'?

In terms of Section 6(3)(c) of PIE, a court must take the following into account when it decided whether an eviction is just and equitable:

- the circumstances under which the unlawful occupier occupied the land and erected the building or structure;
- the period the unlawful occupier and his or her family have resided on the land in question; and
- the availability to the unlawful occupier of suitable alternative accommodation or land.

The arguments

Alternative land was available in Walmer Township. However, the appellants strongly objected to moving there as they alleged it is overcrowded and has a high crime rate. They required that the municipality designate alternative land to which they could move without fear of being evicted again due to illegal occupation. Though the municipality embarked on a comprehensive housing programme, it did not provide for any form of interim relief to those in desperate need of access to housing. It was therefore unable to allocate land to the appellants, even on an interim basis. It argued that the appellants had unilaterally occupied private land; when requested to vacate this land, the appellants alleged that they had nowhere else to go and required the municipality to solve their problem by providing alternative land. This, in turn, led to queue jumping, which should be avoided.

The judgment

The Court held that the availability of suitable alternative land was the important factor in this case. This was because of the length of time the appellants had resided on the property and, perhaps more importantly, because the eviction order was not sought by the owners of the property but by an organ of state. It was held that the state is obliged, in terms of section 26 of the Constitution, to take legislative and other measures, within its available resources, to achieve the progressive realisation of the right to access to adequate housing.

The appellants did not object to being moved from the property but merely wished to be settled somewhere where they would be assured of security of tenure. The municipality seemed reluctant to commit itself to this despite having vast tracks of vacant land available. The Court held that it was certainly not in the public interest to evict the appellants from the property only for them to be evicted again from a new area on grounds of being unlawful occupants.

If land was owned by the municipality, the appellants' objection that it was overcrowded,

key points

- Suitable alternative accommodation must ensure some tenure security.
- Relocation to alternative land must not lead to re-eviction due to illegal occupation.

with a high crime rate, would probably not have been sufficient on its own to move a Court to refuse an order or eviction.

The Court found in favour of the appellants.

It is important to note that there was no evidence before the Court that the alternative land was municipal property. Nor was there an assurance that the appellants would never be evicted from the land. When a municipality applies for an eviction order and makes alternative accommodation available, it needs to ensure that those moved will have some security of tenure.

Comments

The lessons learnt from this case are that PIE is not addressing the housing and land issues adequately. There seems to be no synergy between the Act and the land reforms or housing strategy of the government. Amendments to the Act are proposed to bridge this gap and to properly address the issues of housing and land.

The unlawful occupation of land and increased land invasions are a cause for grave concern. PIE did not contribute towards finding a solution to this pressing problem. It seems that it was enacted to address the old, constitutionally challenged Squatters Act but without taking cognisance of new, pressing problems.

Like the *Grootboom* judgment, this judgment should not be understood as approving any practice of land invasion for the purpose of coercing the state. In *Grootboom* the Court held that land invasion is inimical to the systematic provision of adequate housing on a planned basis.

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Property owners not responsible for outstanding municipal debts on transfer

According to the Systems Act, a property transfer cannot be registered by a registrar of deeds until a municipality has issued a certificate confirming that all charges due in connection with the property during the previous two years have been paid (s 118).

Two previous constitutional challenges to this provision, brought on different grounds, were unsuccessful (the *Summer Symphony Properties* case and the *Geyser* case; see *LGB* 5(2): 8 and 13). However, in the present case, a High Court ruled that the provision was unconstitutional.

Facts

In *Mkontwana v Nelson Mandela Metropolitan Municipality and Others* and *Bisset and Others v. Buffalo City Municipality and Others*, High Court (South Eastern Cape Local Division), the applicants were property owners who were refused the certificates required for transfer of their properties by their respective municipalities, on the basis that charges were outstanding.

The charges had been incurred by previous

occupiers and not by those now seeking to transfer the property.

Issues and ruling

All parties accepted that the "municipal services" referred to in s 118 included the supply of water and electricity by a municipality.

However, the applicants argued that a distinction could be made between services supplied *at the property*, arising from a contract between a consumer and a supplier (including water and electricity), and services supplied *in connection with the property* (including removal of refuse and sewage from the property).

While charges of the second type would fall within the wording of s 118, charges of the first would not.

The court rejected this argument. It found that the purpose of s 118 was to protect municipalities and to promote the collection of certain arrear debts. This purpose was not so unjust, unreasonable or burdensome that the provision should be applied as suggested by the applicants.

Fees arising out of a contractual arrangement, even with a person other than the owner of the property, were included in the expression, "all amounts that became due in connection with that property", in the Act.

The applicants were also unsuccessful in arguing that the charges in question did not include amounts incurred while they were not the owners of the property. The court found that the wording of the section clearly encompassed such amounts.

However, the Court found that s 118(1) constituted a deprivation of property, in violation of s 25(1) of the Constitution. It also found that the deprivation was arbitrary.

In the *Geyser* case, the Court concluded that this deprivation of property was reasonable. The Court in the present case disagreed. Although it was important for municipalities to recover their debts, it was also important not to "sacrifice the constitutional rights of landowners on the altar of expediency".

There was no rational connection between the payment of fees incurred in respect of electricity consumed by another person and the achievement of the purpose of the provision. The resulting debt was in respect of an expenditure from which the owner derived no benefit and over which he or she exercised no control.

A municipality has an obligation to its ratepayers to collect amounts owed to it with all reasonable diligence. The measures available under Chapter 9 of the Systems Act, which include disconnection of services and the recovery of debts from the debtors' employers, should be sufficient to enable municipalities to recover their debts without resorting to s 118(1).

If an owner were deprived of the right to transfer his or her property due to the non-payment of the charges incurred by another, this could result in considerable hardship to both the present and prospective owner. Further, it is not the responsibility of property owners to act as debt collectors for municipalities. Rather, it is the

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key points

- Section 118 of the Systems Act was held to be unconstitutional.
- A municipality has an obligation to the community to collect arrears with all reasonable diligence; this responsibility should not be passed on to property owners by requiring them to pay debts incurred by other persons.
- The Systems Act (Chapter 9) provides adequate means for the municipality to collect on debts, without resorting to preventing owners from transferring their property where charges incurred by a previous occupant or owner are outstanding.

duty of municipalities themselves to properly control their credit facilities and collect their debts in a timely manner.

The Court then considered whether the statutory provision was reasonable and justifiable under s 36(1) of the Constitution. It found that the deprivation of property resulting from s 118(1) could not be justified where the end was readily attainable through other viable and less damaging means.

The Court granted an order that s 118(1) of the Systems Act was unconstitutional and referred the matter to the Constitutional Court for confirmation.

It also noted that, had the section referred to a narrower category of persons, or prevented transfer of property by an owner where debts incurred by the owner were unpaid, it might not have been found defective.

Local government has a developmental constitutional mandate and to achieve this, it needs to be sustainable.

Comments

This decision of the High Court makes a significant finding regarding the responsibility, or fiduciary duty, owed by municipalities to their ratepayers. The duty requires that debts be collected in a timely manner. While it is important that municipalities are able to collect debts, this should not happen in such a way that individuals are deprived of their property rights in an arbitrary manner.

Chapter 9 of the Systems Act provides ample means for debt collection, without the municipality resorting to forcing property owners to pay arrears incurred by persons other than themselves.

Two previous challenges to this provision were unsuccessful. In reaching its decision in the present case, the High Court did not disagree with the reasoning in *Summer Symphony Properties*, which dealt solely with the issue of whether s 118 had retrospective application.

Importantly, however, it departed from the conclusion of the High Court in *Geyser* that the deprivation of property resulting from s 118 was not arbitrary.

In that case, the Court emphasised the magnitude of outstanding debt for unpaid municipal service fees, and found that, by comparison, the effect of the deprivation of property rights on the individual owner was limited.

Local government has a developmental constitutional mandate and in order to achieve this, it needs to be sustainable. There are limited ways in which municipalities can ensure payment for service delivery, which include disconnections or by implementation of s 118.

However, municipalities also have an obligation to ensure and implement socio-economic rights in their communities and thus, in most cases – such as water – disconnections are not even an option.

In many cases there are limitations to constitutional rights. Although s 118 restricts an individual's property rights, it also provides municipalities with a mechanism to achieve their developmental mandate. In order to ensure the provision of sustainable service delivery they need the protection of s 118.

It is hoped that the Constitutional Court will give some clarity on this issue. If it accepts that s 118 is unconstitutional, this will both sacrifice the limited protection municipalities have available to them and have grave implications for the sustainability of local government.

This will, in turn, hamper the provision of services and amount to throwing out the baby with the bathwater to the benefit of property owners.

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