

REPUBLIC OF SOUTH AFRICA



SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 9509/2011

DATE:30/11/2011

- (1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED.

SIGNATURE

In the matter between:

**MEMBER FOR THE EXECUTIVE COMMITTEE
DEPARTMENT OF LOCAL GOVERNMENT
AND HOUSING GAUTENG PROVINCE**

APPLICANT

and

KOLOMBEA MIRRIAM HLOMPHO

RESPONDENT

LEAVE TO APPEAL JUDGMENT

VICTOR, J:

[1] Although this is an application for leave to appeal the applicant has raised the question of the separation of powers doctrine for the first time when arguing this application for leave to appeal. The issues are substantive and new and therefore require reasons for the order that I intend making. I granted the applicant an eviction order subject to it assisting the respondent to gain vacant occupation of the property it had allocated to her.

[2] At the heart of this matter is the question of housing and whether the effect of my order could result in the domino effect of making the respondent homeless. I am mindful of the principle set out in the case of *President of The Republic of South Africa and another v Modderklip Boerdery (Pty) Ltd (Agri SA and others, Amici Curiae)* 2005 (5) Sa 3 (CC) at para [49].

“The State is under an obligation progressively to ensure access to housing or land for the homeless. I am mindful of the fact that those charged with the provision of housing face immense problems. Confronted by intense competition for scarce resources from people forced to live in the bleakest of circumstances, the situation of local government officials can never be easy. The progressive realisation of access to adequate housing, as promised in the Constitution, requires careful planning and fair procedures made known in advance to those most affected. Orderly and predictable processes are vital. Land invasions should always be discouraged. At the same time, for the requisite measures to operate in a reasonable manner, they must not be unduly hamstrung so as to exclude all possible adaptation to evolving circumstances. If social reality fails to conform to the best-laid plans, reasonable and appropriate responses may be necessary. Such responses should advance the interests at stake and not be unduly disruptive towards other persons. Indeed, any planning which leaves no scope whatsoever for relatively marginal adjustments in the light of evolving reality, may often not be reasonable.”

[3] The applicant had granted one Ms Sedipe rights to erf 1205 Johandeo Township, Sedibeng (1205). The applicant had similarly granted the respondent rights to erf 656 Johandeo Township, Sedibeng (656). The respondent has not received vacant possession of the property.

Unlawful occupiers invaded 656 and are still in occupation. They threaten the respondent with death should she evict them. 1205 is occupied by the respondent who resided there by virtue of the following facts. This right arose when the respondent's husband in 2000 "purchased and paid for a right to build a shack" on 1205. He expended quite a lot of money in improving his section of the property. This lawful occupation came to an end when Mr Sedipe died and Mrs Sedipe wanted to return to 1205. In order to assist Mrs Sedipe the applicant brought an application to evict the respondent from 1205.

- [4] I granted the eviction subject to the applicant ensuring that the respondent was given occupation of 656 and suspended such eviction until the Applicant obtained an eviction order against the unlawful occupiers currently occupying Erf 656.

THE NEED FOR CONGRUENCE BETWEEN SEPARATION OF POWERS DOCTRINE AND THE PROVISIONS OF PREVENTION OF ILLEGAL EVICTION FROM AND UNLAWFUL OCCUPATION OF LAND ACT 19 of 1998 (PIE)

- [5] The effect of the order was to prevent a domino effect of families being evicted in the context set out in the judgment. As stated in Modderklip supra "Orderly and predictable processes are vital." The Applicant seeks leave to the appeal the latter part of the order which is the suspension of the eviction pending it evicting the unlawful occupiers from the respondent's home.

- [6] The Applicant contends that the effect of the judgment is to infringe the separation of powers doctrine presumably because the court would be directing another organ of state to take legal steps to evict the unlawful occupiers of the house which it allocated to the respondent.
- [7] The doctrine of separation of powers is of great importance in our democracy and a legal attack of such a nature requires meaningful presentation of facts and properly considered legal argument. The applicant failed to provide detail as to exactly what aspect the separation of powers had been breached and the argument did not take constitutional application of the doctrine much further.
- [8] The separation of powers doctrine is not something which should be raised and dealt with in passing. The total ambit of this assertion that the separation of powers doctrine has been breached is in one paragraph in the notice of appeal. It is asserted that the:

“Judgment also violates the constitutional principle of separation of powers, in that it improperly interferes with the functioning and powers of the Executive”.

- [9] The above sentence is the extent of the detail of the complaint. No detail is given as to which function of the executive is interfered with or which power. The context of this entire matter is of importance. The eviction order was granted pursuant to functions and powers exercised by the applicant. This court also suspended the order in the context of

the facts presented where the applicant clearly has the powers to instruct the state attorney to institute eviction proceedings. The applicant could very easily have assisted the respondent. Nothing is said in the main application or indeed in the leave to appeal notice why this was not possible. It was the respondent's complaint that the applicant had failed to assist her in obtaining vacant possession of 656 and is apparently refusing to do so.

[10] No facts were asserted by the applicant as to why the suspension of the eviction order pending the applicant taking the very same step was a violation of the principle of the separation of powers. The order granted must be analysed within the context of the rights of both the applicant (in its role of assisting Ms Sedipe) and the respondent.

[11] It is common cause that the respondent is the owner of House 656 Johandeo and that there are illegal occupants in those premises. The respondent had repeatedly sought the applicant's assistance to evict the unlawful occupiers from her home. The applicant, however, has ignored such request and elected to evict the respondent from the present home which she occupies.

[12] The applicant contends that the respondent never approached them for assistance in regard to the eviction of unlawful occupiers from her home. On a proper application of the principles in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) I

accepted the respondent's version where she asserted that she has repeatedly requested the applicant to assist her in evicting the unlawful occupiers from her home so that she can make the transition to 656.

[13] During the course of argument it was submitted by counsel on behalf of the respondent that the applicant should assist the respondent by ordering the applicant to give vacant possession to 656. Although there was not a formal counter application in this regard, I granted the request based on the jurisdictional facts I found to be proved viz. that the respondent had repeatedly asked the applicant for assistance and that her financial position was severely compromised based on all the money she had expended on the improvements effected by the respondent.

[14] In *Machele and others v Mailula and others* 2010 (2) SA 257 (CC) para 13, an order had been granted in favour of the owner of the property. Skweyiya J stated in regard to eviction proceedings that:

"No regard was had to any of the provisions of the Constitution, in particular s 26, or to the provisions of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (PIE), a statute enacted to give effect to rights and values in the Constitution."

15] And at para 26

"In my view, an eviction from one's home will always raise a constitutional matter. Further, in the *Jaftha* case, Mokgoro J said that 'at the very least, any measure which permits a person to be deprived of existing access to adequate housing, limits the rights protected in s 26(1)'.

- [16] In Port Elizabeth Municipality v Various Occupiers 8 2005 (1) SA 217 (CC) at para 11:

“The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE) was adopted with the manifest objective of . . . ensuring that evictions, in future, took place in a manner consistent with the values of the new constitutional dispensation. Its provisions have to be interpreted against this background.’

[15] The application of PIE is not discretionary. Courts must consider PIE in eviction cases. PIE was enacted by Parliament to ensure fairness in and legitimacy of eviction proceedings and to set out factors to be taken into account by a court when considering the grant of an eviction order. Given that evictions naturally entail conflicting constitutional rights, these factors are of great assistance to courts in reaching constitutionally appropriate decisions.

[16] That the High Court authorised the eviction without having regard to the provisions of PIE is inexcusable. PIE is of great importance, given that there are still millions of people in our country without shelter or adequate housing and who are vulnerable to arbitrary evictions.”

- [17] The order granted was mindful of the above principles. The applicant has submitted that the effect of the suspension violated the constitutional principle of separation of powers. The applicant contends that the court has improperly interfered with the functioning and powers of the executive (presumably meaning the provincial executive) by directing that the applicant should take a further legal step to avoid a consequential scenario where another bona fide homeowner would be without accommodation in circumstances beyond her control.

- [18] Harmony between the three arms of government is essential. It is not without tensions from time to time. Constructive tension however has value. The separation of powers is necessary in order to avoid excessive concentration of power in a single person or body. See The New Constitutional and Administrative Law Volume one Contributing editors Iain Currie and Johan de Waal Juta law 2001.

[19] The facts giving rise to the criticism levelled at this court's role in breaching this doctrine has not been provided and hence the difficulty in dealing with this new submission at the leave to appeal stage of the proceedings.

[19] The order is not one which directs the applicant to provide alternative accommodation for the respondent. The court has not entered into the arena of policy. The court has directed the applicant to take the very same procedural step which it accorded Ms Sedipe. The applicant has not advised why it cannot do so.

[20] Cognisance is taken of the delicate but important balance required between the courts and the provincial government. The order does not infringe on the applicant's policy on housing. The facts in this case as well as the order granted is distinguishable from the City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd And Another 2011 (4) SA 337 (SCA).

[21] Both parties in this application have been allocated homes by the applicant. It is a question of whether it is reasonable for the applicant to provide both parties vacant occupation to their homes. The order does not interfere with the day to day operations of the applicant being the province. The effect of the order is not an attack on policy issues. The applicant's conduct in assisting Ms Sedipe but not the respondent has

not been explained. If the respondent's requests were inadvertently not dealt with then the applicant could have immediately set about rectifying the situation by assisting the respondent. Instead it has taken the stance that it will not assist the respondent.

[22] The refusal by the applicant to assist the respondent is not a policy or political issue which is not justiciable. No policy argument was raised by the applicant so as to justify the applicant's inconsistent approach. The simple assertion in argument that the provincial authority can elect whomsoever it pleases to assist and therefore the court is contravening the separation of powers doctrine is not understood.

[23] Clearly the conduct of the applicant is justiciable in these particular circumstances. The effect of the court order emanating from one arm of government being the judiciary does not prevent or intrude on the applicant as another arm of government from performing its functions.

[24] On a proper interpretation and application of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE) and in the spirit of constitutional accountability full reasons have been given and it is emphasised that in the absence of detail and exactly how the separation of powers has been breached no fuller reasons for judgement can be provided. See *South African Liquor Traders' Association and others v Chairperson, Gauteng Liquor Board, and Others* 2009 (1) SA 565 (CC).

[25] I also find that the other grounds of appeal raised must fail. It is not reasonably possible that another court will come to a different conclusion in the circumstances of this case where the appeal is levelled at a breach of the separation of powers.

The order that I would therefore make is that the application is dismissed with costs.

BY THE COURT

VICTOR J

Counsel for the applicant: Adv. Manaka

Attorneys for the applicant: The State Attorney: Johannesburg

Counsel for the respondent: Adv. Liebenberg

Attorneys for the respondent: Muller & Nolte Attorneys