



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

Case No: 4610/2017

In the matter between:

ENDUMENI CIVIC ASSOCIATION	FIRST APPLICANT
MUZIWAKHE SITHEBE	SECOND APPLICANT
THABO MANYATHI	THIRD APPLICANT
BONGINKOSI MFEKA	FOURTH APPLICANT
ZANELE MOLOI	FIFTH APPLICANT
THOKOZANI NENE	SIXTH APPLICANT
SINDISIWE MANYATHI	SEVENTH APPLICANT
ZAMA ZIQUBU	EIGHTH APPLICANT
JABULANI NTOMBELA	NINTH APPLICANT
PHAKAMANI MIYA	TENTH APPLICANT
PHUMLANI ZAMA MASIMLA	ELEVENTH APPLICANT
PINKY MDULI	TWELFTH APPLICANT
NOKUTHULA KUNENE	THIRTEENTH APPLICANT

and

ENDUMENI LOCAL MUNICIPALITY	FIRST RESPONDENT
MEC, DEPARTMENT OF HUMAN SETTLEMENT KWAZULU NATAL	SECOND RESPONDENT

**MINISTER OF THE DEPARTMENT
OF HUMAN SETTLEMENTS**

THIRD RESPONDENT

JUDGMENT

Delivered on **09 February 2018**

POYO DLWATI J:

[1] This application concerns the enforcement of the right of access to housing.

[2] The first applicant is a voluntary association with its headquarters in Dundee in the Province of KwaZulu-Natal. One of its objects is to represent and protect the interests of a number of people who reside in Dundee with respect to service delivery there. All the other applicants are the first applicant's executive committee members.

[3] The first respondent is the local municipality in Dundee responsible, in particular, for all the housing needs for the people of Dundee. The second and third respondents are sufficiently described in the founding affidavit and I need not explain them any further. Furthermore, there is no relief sought against the second and third respondents; they are merely cited as they are the responsible political heads of the first respondent, provincially and nationally, respectively.

[4] The applicants had been approached by a number of RDP housing applicants in the Endumeni Local Municipal Area with the following complaints (this is not a limited list): that the first respondent had arbitrarily allocated RDP houses by manipulating the RDP housing list, the allocation

system and policies of the scheme were unclear, and that RDP housing allocation was corrupt. This resulted in the applicants accusing the first respondent and its officials of impropriety, fraud and corruption in the allocation of RDP houses within the first respondent's municipal district.

[5] Mr Muziwakhe Sithebe, the second applicant, who is also the chairperson of the first applicant averred in the founding affidavit that some of the RDP housing applicants had not been informed about their prospects of having decent shelter over their heads, whilst some people were occupying houses that they were not supposed to occupy due to the misallocation. The application, therefore, was brought in anticipation of a scuffle that might break out between people who have been wrongly allocated houses and those that were supposed to be allocated the said houses.

[6] According to Mr Sithebe, these problems were brought to the attention of the first respondent's officials but no attempt was made to resolve same. Various meetings were held between the officials of the first respondent, the members of the first applicant, councillors of ward 4 and 5, officials from the office of the second respondent and the affected community members. Even though at some meetings it was agreed that those beneficiaries of the RDP houses who had submitted their applications late would be eligible to benefit from the RDP housing subsidies, this did not come to fruition.

[7] However, during June 2016 further complaints arose when it was discovered that the sites and houses situated in section 19 had been swapped between various residents without their prior knowledge or consent. For instance, some RDP applicants would discover that their houses were already occupied by unknown people. Whilst this was temporarily resolved by allocating alternate houses to those RDP applicants, still further disputes arose.

This led to the members of the first applicant requesting for a list reflecting the names of those who had applied for RDP housing and the subsequent residential addresses. Mr Sithebe, in the founding affidavit, averred that even though this list was furnished it was, however, incomplete and seemed to have been tampered with.

[8] It further emerged that other RDP houses were rented out to various people desperate for housing, allegedly by members of the ward committees. A meeting was arranged on 30 May 2016 to address this issue. At the meeting it was resolved that the first respondent's legal department would investigate the allegations that had been addressed and would report back to the members of the first applicant before 3 June 2016. This did not happen. Even though subsequent meetings were held, nothing much was achieved. On 7 July 2016 the first respondent's council resolved to refer the issues of RDP housing swapping and rental to the second respondent's forensic department to conduct a forensic investigation.

[9] The members of the first applicant, however, believed that the investigation might not yield any positive results and might instead be a cover up of the corrupt activities of the first respondent's officials. As a result, members of the first applicant assisted affected beneficiaries to open up criminal cases against the first respondent and its suspected officials. These matters are still under investigation by the Dundee police services.

[10] With the assistance of its current attorneys of record, the applicants requested further information regarding the RDP housing lists from the first respondent. They received various lists relating to the RDP housing subsidies, as well as the RDP housing applicants with their details and the status of their applications. Various shortcomings were identified on these lists. There were

numerous discrepancies and inaccuracies in the lists. For instance, some applicants appeared to have withdrawn their applications, yet this was not the case. Furthermore, some sites were allocated to more than one person and the list of housing applicants did not tally with the first respondent's Housing Review Plan of 2012/13 to 2016/17.

[11] The list of examples demonstrating the inaccuracies and discrepancies is endless in the housing lists furnished by the first respondent. Furthermore, Mr Sithebe demonstrated in detail in his founding affidavit the plight of the RDP housing applicants and the effects and potential harm that could be caused by these inaccuracies and discrepancies. As a result, the applicants were of the firm view that the lists have been either tampered with or manipulated by the first respondent's officials in order to hide the truth as to what is happening with the RDP housing allocations.

[12] It is against this brief history that the applicants averred that the actions of the first respondent, namely, its failure to provide adequate housing to RDP applicants living within its jurisdiction, retards the progressive realisation of the right of access to adequate housing in the Dundee area. Furthermore, the first respondent had failed to adhere to the principles of good governance and accountability in its allocation of the RDP houses.

[13] Finally, the applicants averred that since the first respondent's actions and conduct of failing to provide housing were administrative actions in terms of the Promotion of Administrative Justice Act 3 of 2000 (PAJA), they were therefore procedurally and substantively unfair, taken in bad faith, arbitrary and capriciously. They were therefore reviewable since most actions had failed to comply with the Constitution and the relevant legislative prescripts.

[14] It is therefore the applicant's case that the court should evaluate the first respondent's conduct against the principles of legality, reasonableness, good governance, justice, equity, impartiality, fairness, equitability and objectively in order to establish whether the first respondent has complied with its constitutional obligation of providing social housing to those successful applicants qualifying for RDP housing. The applicants submit that the first respondent acted against these principles and therefore violated the first applicant's members' constitutional rights.

[15] Disappointingly, considering the importance of the matter to constitutional and basic human rights and the duty to engage meaningfully, the second respondent filed a notice to abide by the court's decision. I take it that they do not challenge anything that has been averred about them in the applicant's founding and replying affidavits. Equally disconcerting is the third respondent election not to participate in the matter.

[16] The first respondent, however, has opposed the application. Whilst it accepted that there are problems with its allocation of RDP houses and a solution ought to be found, it averred that the orders sought by the applicants do not constitute a proper and appropriate solution to the problem. Although it was conceded that the process of delivering RDP houses to those who had qualified was bedevilled by irregularities and unlawful conduct of some of the officials of the first respondent, the first respondent has complained that the orders sought were too vague, too broad to have a meaningful purpose and undefined. It was submitted on behalf of the first respondent that the declaratory order sought had to be formulated with proper precision so that the order could have some practical effect on the parties or others.

[17] Furthermore, the first respondent conceded that the matter needed to be investigated further and where applicable those found responsible for any irregularities, fraud and corruption should be brought to book. It, however, disputed the suggestion that an external auditor outside government should be appointed as this would result in incurring unbudgeted costs. Instead, it recommended that the investigative units within government should be used to unearth these problems. The first respondent further contended that it would be inappropriate for the court to involve itself in a monitoring process as this would be time consuming and would be over a long period.

[18] It was further submitted that the order seeking to review and set aside the arbitrary allocation of RDP houses by the first respondent ought not to be granted as it would undo everything that the first respondent has done in the allocation of RDP houses generally. This, so went the submission, would affect even areas where there were no complaints of any irregularities. It therefore submitted that for all these reasons, the application should be dismissed with costs.

[19] It is therefore common cause that the provision of RDP houses in the first respondent's municipality is bedevilled by various irregularities and needs to be fixed. The only issue in dispute is how to fix it. The applicants sought an amended order from that which was initially sought in their notice of motion. This was filed into court immediately prior to the hearing of the matter. The gist of what is sought in that order is to declare the first respondent's actions in failing to provide RDP houses to the qualifying beneficiaries as invalid and in breach of the constitution. Furthermore, the applicants sought an order reviewing and setting aside the arbitrary, irrational and unreasonable allocation of the RDP houses especially in ward 4 and 5 of the first respondent. The applicants also sought a detailed report regarding the allocation of RDP houses

and for this court to play a supervisory role in bringing in to order the allocation of RDP houses. In support of these arguments, the applicants relied on various case law authorities and in particular, Constitutional Court cases dealing with declaratory relief and monitoring or supervisory roles usually played by the courts. The applicants abandoned the order seeking the appointment of external auditors in their revised draft order.

[20] In my view it was necessary for the applicants to approach the court in order to get adequate and appropriate responses from the first respondent. This became more evident when the first respondent, in its answering affidavit, acknowledged that there were problems in its allocation of RDP houses without any offer of how to resolve those problems. Despite numerous meetings to try and resolve the issues, nothing has come to fruition. This concession and the failure by the first respondent to properly regularise its allocation of RDP houses is clear evidence of the first respondent's failure to comply with its constitutional obligation of providing adequate houses to the qualifying RDP applicants. The applicants, therefore, were justified to come to court to enforce their rights as enshrined in the constitution and the various pieces of legislation referred to in the draft order.

[21] The next question to be answered is what remedies should the court award. In *Minister of Health and Others v Treatment Action Campaign and Others* (No.2) 2002 (5) SA 721 (CC) para 106 the court held that

‘[w]here a breach of any right has taken place including a socio-economic right, a court is under a duty to ensure that effective relief is granted. The nature of the right infringed and the nature of the infringement will provide guidance as to the appropriate relief in a particular case. Where this is necessary this may include both issuing of a *mandamus* and the exercise of supervisory jurisdiction.’

[22] Are the declaratory orders sought by the applicants are vague, too broad to have any meaningful content? Mr *Blomkamp SC* referred this court to a quote from *The Minister of Justice and Constitutional Development vs Southern Africa Litigation Centre and others* 2016 (3) SA 317 (SCA) para 107 that ‘a broad statement that conduct was inconsistent with the Constitution did little to define where the shortcoming lay’. This passage does not assist the first respondent in the face of the applicant’s founding affidavit where it outlined the glaring shortcomings in the first respondent’s allocation of RDP houses.

[23] This went to the extent that criminal charges were laid against some employees of the first respondent. This was after the first respondent failed to investigate the allegations of misconduct against its employees. This evidence was never refuted or challenged by the first respondent. Furthermore, despite numerous meetings being held with the first respondent in order for it to sort out the issues, these were fruitless. Where the first respondent fails to discharge its duties and obligations towards its residents, it cannot be said to be consistent with the constitution.

[24] Furthermore, as held in *Economic Freedom Fighters vs Speaker, National Assembly and others* 2016 (3) SA 580 (CC) para 103,

‘[d]eclaring law or conduct inconsistent with the constitution and invalid is plainly an obligatory power vested in the court as borne out by the word “must”. ... [Declaring such conduct or law to be inconsistent with the Constitution] is not reserved for special cases of constitutional invalidity’.

In my view, therefore, the conduct of the first respondent in failing to allocate appropriately RDP houses to rightful and qualifying recipients, to prevent fraudulent activities and manipulation of the RDP housing lists, to resolve all the disputes relating to the allocation of the RDP houses including contradictory

RDP housing lists and to take steps to resolve these issues is inconsistent with the first respondent's obligations as outlined in section 26 of the Constitution and section 9 of the Housing Act 107 of 1997 and various other related legislation.

[25] Mr *Blomkamp* argued that it would not be appropriate for this court to grant a declaratory order as no consequential relief had been sought in the event of such order being granted. This is not correct. There are various consequential remedies sought by the applicants as indicated in the draft order. One is a structural relief which Mr *Blomkamp* has opposed on the basis that it can only be granted where there has been a failure to comply with court orders and further that this court should not involve itself in the process of monitoring steps to be taken to remedy the problematic situation. His concession is a clear indication that this court should do or have something done to remedy the situation.

[26] Section 172(1)(b) of the Constitution enjoins the courts to make any order that is just and equitable after a finding of inconsistency with the Constitution has been made. As held in *Kenton-on-Sea Ratepayers Association and others vs Ndlambe Local Municipality and others* 2017 (2) SA 86 (ECG) para 115 it is appropriate in certain matters to grant the structural interdict also referred to as a supervisory order. This is so especially where there is a reason to believe that the government (the municipality) will not comply completely with the order which is very likely in this application as the municipality has failed to comply with its constitutional obligations. The court, therefore, has a duty to ensure that the conduct and the actions complained of are remedied. Since the first respondent has not been co-operating with the applicants, it is necessary to grant a supervisory order. In the circumstances the court has a duty in terms of section

172(1)(a) of the Constitution to declare the conduct of officials of the first respondent to be unlawful.

[27] It follows therefore that where there has been improper performance of an administrative function, the aggrieved party is entitled to an appropriate relief. Moseneke DCJ emphasized in *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 CC para 29 that

‘In each case the remedy must fit the injury. The remedy must be fair to those affected by it and yet vindicate effectively the right violated ... The purpose of a public law remedy is to pre-empt or correct or reverse an improper administrative function ... Ultimately the purpose of a public remedy is to afford the prejudiced party administrative justice, to advance efficient and effective public administration compelled by constitutional precepts and at a broader level to entrench the rule of law.’

In light of the importance of the right to housing and the impact on and potential prejudice to a large number of beneficiaries, it is, in my view, in the public interest that the RDP houses are allocated properly. In these circumstances it is appropriate to impose a structural interdict requiring the first respondent to report back to this court at various stages of such allocations.

[28] The applicants have succeeded in their application for the various orders it sought. I see no reason why the costs should not follow the result.

Order

[29] Accordingly I grant the following order:

1. The first respondent’s action is inconsistent with and in breach of the Constitution of the Republic of South Africa, particularly in terms of

sections 1, 9, 10, 25, 26, 33, 41 and 195 and is declared invalid in that it manifests the following:

- 1.1 Arbitrary application and manipulation of the reconstruction and development programme (RDP) housing waiting lists;
 - 1.2 Unclear RDP housing allocation system and policies; and
 - 1.3 Corrupt allocation of RDP houses to RDP housing applicants.
2. The first respondent's action regarding the arbitrary, irrational and unreasonable allocation of RDP houses in wards 4 and 5 of the first respondent is reviewed and set aside in terms of Promotion of Administrative Justice Act No. 3 of 2000.
 3. The first respondent is directed to file a report with this court within two (2) months of the date of this order.
 - 3.1 The report shall:
 - 3.1.1 Identify all the applications for RDP houses pertaining to ward 4 and 5 within the first respondent's jurisdiction;
 - 3.1.2 For each application for RDP house, indicate whether it has been:
 - 3.1.2.1 Approved or rejected;
 - 3.1.2.2 If rejected, indicate why it was rejected; and
 - 3.1.2.3 What the applicants for RDP housing subsidy should do in order for their applications to be approved.
 - 3.1.2.4 Explain the steps the first respondent will take in order to process and finalize applications for RDP houses and allocate houses to the correct applicants;
 - 3.1.2.5 Explain the steps and criterion the first respondent will take in order to ensure that people who are not

eligible for allocation of houses are removed from occupation of houses;

3.1.2.6 Set measurable, periodic deadlines for progress.

4. The said report shall be served on the applicants and be made available on the first respondent's website. The parties, including the second and third respondents, and any other interested parties, shall engage meaningfully on the report with a view to identifying and agreeing on further remedies that would conduce to granting access to housing.
5. The parties shall submit preferably a joint report and failing that individual reports to the court regarding further remedies that would conduce to granting access to housing.
6. On receipt of the report(s) referred to in the preceding paragraphs by 30 April 2018, the court may, at any stage of its own accord or at the request of any party, after having considered the submissions by the parties, make any further directions or orders as it deems fit to enable the right of access to housing.
7. The applicants, and any other interested party, shall be entitled to comment on these monthly reports within 30 days after the date on which they are filed and published on the first respondent's website.
8. The first respondent shall pay the costs of this application.

APPEARANCES

Date of Hearing	:	27 November 2017
Date of Judgment	:	09 February 2018
Counsel for Applicant	:	Mr Gama
Instructed by	:	The Legal Resources Centre c/o Mzila Inc.
Respondent	:	Mr Blomkamp SC
Instructed by	:	Acutt & Worthington Inc. c/o Tomlison Mnguni and James Inc.