THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

MEDIA SUMMARY – JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

1 June 2011

STATUS: Immediate

MAPHANGO V AENGUS LIFESTYLE PROPERTIES (611/2010)

Please note that the media summary is intended for the benefit of the media and does not form part of the judgment of the Supreme Court of Appeal

The Supreme Court of Appeal (the SCA) today dismissed the appeal.

The 18 appellants are lessees of flats in a ten storey building. The respondent is the owner of the building. The respondent brought an application in the South Gauteng High Court (the court a quo) for the eviction of the appellants and their families from the flats on the basis that their leases had been duly terminated by notice on its behalf. The appellants opposed the application, essentially on two grounds. First, that the respondent's purported termination of the leases was invalid. Second, that, even if the leases were validly terminated, it would not be just and equitable to evict them from the flats, for this ground they relied on the provisions of s 4(6) of the Prevention of Illegal Eviction from Unlawful Occupation of Land Act 19 of 1998 (PIE).

When the application came before Van der Riet AJ in the court a quo, the respondent conceded that the leases of two of the appellants, Ms Siguca and Ms Masemola, had not been validly terminated. With regard to the sixteen other leases involved, Van der Riet AJ upheld the respondent's contention that the termination was valid. He further held that, in respect of nine of the appellants, that there were no grounds of justice and equity, as contemplated in s 4(6) of PIE, that would justify the refusal of their eviction. These nine appellants were therefore evicted. As to the other seven appellants, he concluded that an eviction order would render them homeless and would thus not be just and equitable as contemplated in s 4(6). He postponed the application for three months so as to afford them the opportunity to join the City of Johannesburg as a party to the proceedings and to obtain a report

from the latter, setting out what steps it could take to provide them with alternative accommodation. As to costs Van der Riet AJ decided that since the matter involved constitutional issues, the parties should pay their own costs.

The issues before the SCA were whether the leases were validly terminated; and whether Ms Siguca and Ms Masemola should pay their own costs. From about September 2008, the respondent gave written notice of termination of the leases to each of the appellants. The notices called upon them to vacate their flats on different dates during the period from November 2008 to March 2009. The notices also informed the appellants that if they wished to remain in their flats beyond the stipulated dates, they would have to enter into new lease agreements at rentals which were between 100 per cent and 150 per cent more than what they were paying at the time. The appellants refused to accept the termination of their agreements, could not afford to pay the increased rent, and accordingly remained in occupation and continued to pay the rental amounts they were paying at the time. The respondent's explanation as to why it gave these notices was that its business model is to acquire buildings in the Johannesburg CBD that are often derelict, which it then renovates and rents out to tenants. This business model requires it to be able to generate sufficient income from rental in order to service the acquisition and renovation costs of the building. After acquisition of the building, the respondent spent an amount of R1 million on renovation and maintenance, these expenses were advantageous to the tenants. But the result of these expenses was that rent paid by the appellants was insufficient to cover the costs of bond finance, renovation and maintenance and the project was consequently running at a loss.

Against this background the appellants advanced the following reasons as to why the leases were not validly terminated: first, they contended that each lease agreement contained a tacit term which forbid the use of the termination clause to effect an increase in rental beyond the increment provided for in the respective agreements; second, they contended that to allow the respondent to terminate the agreements for the sole purpose of allowing it to implement a rent increase would be contrary to public policy. For the latter argument they relied on three grounds, namely: that the termination would be unreasonable and unfair; that it would constitute an infringement of their constitutional right to have access to adequate housing in terms of s 26(1) of the Constitution; and that it constituted an 'unfair practice' as contemplated in the Rental Housing Act 50 of 1999 read with the Gauteng Unfair Practice Regulations 2001, promulgated under that Act (the Act and its promulgations). Relying on the officious bystander test the appellants contended that a tacit term is necessary to ensure the efficacy of the agreements, without which the landlord could demand an increase in excess of that agreed upon by simply threatening to terminate the contract. Moreover, they argued, there would be no consensus on an essential term of the contract. The SCA found these arguments logically unsound as during the currency of the lease, business efficacy does not require an incorporation of the proposed tacit term and after termination of the lease, the proposed tacit term would be of no consequence. The SCA stated that as formulated by the appellants, the question posed by the officious bystander would introduce the consideration of motive in the exercise of a contractual right, while that consideration is generally irrelevant. In addition, the SCA stated, acceptance of the appellants' argument would mean that the landlord had entered into a lease of infinite duration without being entitled to terminate the agreement, even when the

enterprise cease to be commercially viable. In support of the appellants contention that the termination was unreasonable and unfair and should therefore not be enforced on grounds of public policy, they argued that it had been decided by the Constitutional Court in *Barkhuizen v Napier* 2007 (5) SA 323 (CC) that, as a matter of public policy, our courts will not give effect to the implementation of a contractual provision that is unreasonable and unfair. However, the SCA held this statement to be fundamentally flawed since reasonableness and fairness are not freestanding requirements for the exercise of a contractual right. Accordingly, a court cannot refuse to give effect to the implementation of a contract simply because that implementation is regarded by the individual judge to be unreasonable and unfair, and strictly speaking the enquiry into the reasonableness and fairness of the respondent's termination of the contract of the leases is therefore unnecessary. As to the impact of s 26(1) of the Constitution, the appellants contended that the termination provisions are not in themselves inimical to the rights enshrined in s 26(1), but their implementation resulted in an infringement of their right to security of tenure to the flats that are their homes, and in consequence the respondent was bound to exercise its right under the termination provisions in a reasonable and fair manner. The SCA stated that their argument lost sight of the fact that a lessee of property has no security of tenure in perpetuity. The parties agreed at the outset that the lessee's tenure could be terminated on notice, which in effect amounted to an agreement that the lessee's security of tenure would never endure beyond the end of the notice period. It therefore could not be said that termination in accordance with the leases, constituted an infringement of their right to security of tenure. As to the appellants' contention that termination of the leases was contrary to public policy because it constituted an unfair practice in contravention of the Act and its promulgations, the SCA stated that the provisions of the Act and the regulations are directed against a 'practice', which did not contemplate unacceptable conduct by the landlord on an isolated occasion. It envisages incessant and systematic conduct by the landlord that is oppressive or unfair and termination of the lease would therefore not qualify as a practice, and the respondent's terminations of the leases could not in the circumstances be denounced as unreasonable and unfair, let alone oppressive.

As to the costs of Ms Siguca and Ms Masemola in the court below, the SCA stated that since the impugned costs orders were made in the exercise of its discretion by the court a quo, the SCA could only interfere on the basis that the discretion had not been properly exercised. The SCA did not believe the appellants had made out that case. The court a quo held that, since the appellants raised important constitutional issues, they should not be burdened with costs and made no order as to costs. The SCA believed it should adopt the same approach with regard to the costs of appeal.

-- ends --