CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 12/12
[2012] ZACC 9

In the matter between:

THE OCCUPIERS OF SARATOGA AVENUE	Applicant
and	
CITY OF JOHANNESBURG METROPOLITAN MUNICIPALTY	First Respondent
BLUE MOONLIGHT PROPERTIES 39 (PTY) LTD	Second Respondent

Heard on : 30 March 2012

Order granted : 30 March 2012

Reasons for judgment : 24 May 2012

REASONS FOR JUDGMENT

FRONEMAN J (Yacoob ADCJ, Cameron J, Jafta J, Khampepe J, Maya AJ, Nkabinde J, Skweyiya J, van der Westhuizen J and Zondo AJ concurring):

[1] On Friday 30 March 2012 this Court dismissed an urgent application brought by the applicants (Occupiers) seeking compliance with, or variation, of the order this

Court granted in *Blue Moonlight I*.[1] We made no order as to costs and indicated that we would provide reasons in due course.

[2] In brief the reasons are that:

(a) This Court was the inappropriate forum in which to bring the application; and

(b) In any event, no case of non-compliance or variation was made out.

Orders on appeal

[3] *Blue Moonlight I* was an application for leave to appeal to this Court against the decision of the Supreme Court of Appeal which, in turn, had heard it as an appeal from the South Gauteng High Court, Johannesburg (High Court). In the Supreme Court of Appeal the structural interdict and compensation order granted in the High Court were set aside, but the eviction order was upheld.[2] In this Court the first respondent (City) sought leave to appeal against those parts of the Supreme Court of Appeal's order that declared its housing policy unconstitutional and ordered it to provide temporary emergency accommodation to the Occupiers. This Court granted leave to appeal, but dismissed the appeal.[3] The order at issue in this application resulted from the Occupiers' conditional cross-appeal.

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[1] *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* [2011] ZACC 33; 2012 (2) SA 104 (CC); 2012 (2) BCLR 150 (CC).

[2] *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* 2011 (4) SA 337 (SCA) at paras 69-71 and 77.

[3] The full order granted, at para 104, reads:

"(a) The application for leave to appeal is granted.

(b) The appeal is dismissed.

[4] In the cross-appeal the Occupiers asked that any order of eviction be linked to the provision of suitable alternative accommodation by the City, and that the City be ordered to take appropriate steps to remedy its housing policy. This Court granted leave to cross-appeal and upheld the cross-appeal to the extent that the City was ordered to provide

> "those Occupiers whose names appear in the document entitled 'Survey of Occupiers of 7 Saratoga Avenue, Johannesburg' filed on 30 April 2008 with temporary accommodation in a location as near as possible to the area where the property is situated on or before 1 April 2012, provided that they are still resident at the property and have not voluntarily vacated it."[4]

The Occupiers were ordered to vacate by no later than 15 April 2012.[5]

(c) The application for leave to cross-appeal is granted.

(d) The cross-appeal is upheld to the extent set out below.

(e) Paragraphs 5.1 to 5.4 of the order of the Supreme Court of Appeal are set aside and replaced with the following:

(i) The first respondent in the South Gauteng High Court, Johannesburg and all persons occupying through them (collectively, the Occupiers) are evicted from the immovable property situate at Saratoga Avenue, Johannesburg, and described as Portion 1 of Erf 1308, Berea Township, Registration Division IR, Gauteng (the property).

(ii) The Occupiers are ordered to vacate the property by no later than 15 April 2012, failing which the eviction order may be carried out.

(iii) The housing policy of the second respondent in the South Gauteng High Court, Johannesburg, the City of Johannesburg Metropolitan Municipality, is declared unconstitutional to the extent that it excludes the Occupiers and other persons evicted by private property owners from consideration for temporary accommodation in emergency situations.

(iv) The City of Johannesburg Metropolitan Municipality must provide those Occupiers whose names appear in the document entitled "Survey of Occupiers of 7 Saratoga Avenue, Johannesburg" filed on 30 April 2008 with temporary accommodation in a location as near as possible to the area where the property is situated on or before 1 April 2012, provided that they are still resident at the property and have not voluntarily vacated it.

(f) The applicant is ordered to pay the costs of the first and second respondents, including the costs of two counsel, in this Court."

[4] Id at (e)(iv).

[5] Id at (e)(i) and (ii).

[5] The Occupiers launched an urgent application in this Court on 8 March 2012. The application was heard on 30 March 2012 and dismissed on the same day. The application was based on an anticipated non-compliance by the City with its obligation to provide temporary accommodation. The non-compliance was said to lie in the City's failure to provide temporary accommodation to both the specific occupiers mentioned in the order and their close relations occupying the premises through the Occupiers. The Occupiers sought compliance in relation to all, either on the basis of the order as it stood, or, if the original order did not include those occupying the premises through the Occupiers, on the basis that the order should be varied to include them.[6]

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[6] The orders sought in the notice of motion read, in relevant parts:

> "2. Varying the order of this Court in *City of Johannesburg v Blue Moonlight Properties* [2011] ZACC 33, handed down on 1 December 2011 ('the Order') in the following respects:
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> 2.1 by extending the date in paragraph 104(e)(ii) of the Order to 15 June 2012;
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> 2.2 by extending the date in paragraph 104(e)(iv) of the Order to 1 June 2012; and
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> 2.3 by inserting the words '*and all persons occupying through them*' after '30 April 2008' in paragraph 104(e)(iv) of the Order.
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> 3. Ordering the first respondent forthwith to engage meaningfully with the applicants on:
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> 3.1 the nature of the temporary accommodation to be provided to the applicants in terms of the Order as amended, including but not limited to the needs of families who desire to live together in family accommodation;
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> 3.2 the location of the temporary accommodation to be provided to the applicants in terms of the Order as amended; and
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> 3.3 the details of the process (including the timetable) of relocating the applicants from their current accommodation at Saratoga Avenue to the temporary accommodation in terms of the Order as amended.
>
> 4. Ordering the first respondent to pay the costs of this application on the attorney and client scale, including the costs of two counsel."

[6] In addition, the Occupiers sought a two-month postponement of the date of eviction stipulated in the original order, namely 15 April 2012. Shortly before the hearing of the matter, the Occupiers and the City entered into a settlement agreement. Its terms included a postponed eviction date. The second respondent, the owner of the building (building owner), was not consulted by either the Occupiers or the City in this process.

[7] It is usual that in a successful appeal, the appellate court may make the order that the court of first instance should have made. That order then becomes the order of the court of first instance.[7] Execution and enforcement of the order should then take place in that court.

[8] This Court has jurisdiction to hear matters other than as a court of appeal.[8] *Blue Moonlight I* was, however, not that kind of case. It was an appeal against the judgment of the Supreme Court of Appeal. Paragraph (e) of the order made it clear that it was the usual 'set aside and replace' kind of order made in an appeal.[9] It effectively became an order of the High Court.

[9] The reason for enforcing orders in the original court is logical and practical. The order on appeal merely corrects the original order and the court of first instance is usually best equipped to deal with matters relating to the enforcement of that order.

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[7] *General Accident Versekeringsmaatskappy Suid-Afrika Bpk v Bailey NO* 1988 (4) SA 353 (A) at 358H.

[8] Section 167(4), (5) and (6)(a) of the Constitution of the Republic of South Africa, 1996.

[9] Above n 3.

[10] The Occupiers contended, however, that in the circumstances of this case they would not have been able to obtain the relief they sought in the High Court, namely a just and equitable variation of the order based on changed circumstances. *Zondi*[10] and *Residents of Joe Slovo Community*[11] are the two decisions of this Court that may be invoked for this submission.

[11] When a court decides a constitutional matter within its power, section 172(1)(b) of the Constitution allows it to make any order that is just and equitable. In *Zondi* the question that arose was whether this Court, having considered it just and equitable to suspend an order declaring a statute invalid, could extend the period of suspension. The Court held that it could.[12] In *Residents of Joe Slovo Community* it was stated that:

> "The essence of the judgment in *Zondi* . . . is that a court that makes a section 172(1)(b) order that is just and equitable can also vary that order when justice and equity require. Although that case is confined to section 172(1)(b) orders, the case of *Zondi* is strong support for the proposition that where an order is made on an assessment of the circumstances that existed at a particular time, a court retains the power to vary that order if these circumstances change."[13]

[12] It is important to remember, however, the kind of orders sought to be varied in *Zondi*, and discharged in *Residents of Joe Slovo Community*. In *Zondi* a statute had

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[10] *Zondi v MEC, Traditional and Local Government Affairs, and Others* [2005] ZACC 18; 2006 (3) SA 1 (CC); 2006 (3) BCLR 423 (CC).

[11] *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others (Centre on Housing Rights and Evictions and Another as Amici Curiae)* [2011] ZACC 8; 2011 (7) BCLR 723 (CC) (*Residents of Joe Slovo Community*).

[12] *Zondi* above n 10 at para 39.

[13] *Residents of Joe Slovo Community* above n 11 at para 23.

been declared constitutionally invalid and under the just and equitable remedy provision of section 172(1)(b) this Court had suspended the order of invalidity. In *Residents of Joe Slovo Community* the eviction order made by this Court was "coupled with a detailed supervisory order . . . concerning the execution of that order".[14] These were both cases where this Court made just and equitable orders that made it clear that the Court itself chose to regulate and oversee their execution.

[13] That is not the case here, and will rarely be in appeals heard by this Court. There is no indication in the *Blue Moonlight I* order of any continued oversight by this Court. In the absence of a clear indication of this kind, it must be accepted that the order this Court makes on appeal becomes the order of the court of first instance.

[14] The application should thus have been brought in the High Court.

Lack of merits

[15] In its opposing affidavit the City contested the Occupiers' allegation that it could not provide the accommodation ordered in *Blue Moonlight I.* It must be remembered that the application was launched some 23 days before 1 April 2012, the date by when the City had to provide the temporary accommodation. The hearing also took place two days before that date. During the hearing counsel for the City also gave an unequivocal assurance and undertaking that the accommodation would be

[14] Id at para 1.

provided in time. In view of this, the anticipated non-compliance by the City with the order could not realistically be sustained on the papers before us.

[16] The Occupiers relied strongly on the argument that the order incorporated an implicit obligation on the City to engage meaningfully with the Occupiers in the process of eviction. Any eviction process must take place with due regard to the dignity of the persons who are being evicted.[15] But whether that obvious requirement entails a more substantive requirement of "meaningful engagement", which would entitle all evictees to contest the quality of temporary accommodation being provided to them, need not be decided here. This is because the Occupiers, on the papers before us, will be provided with accommodation and they will not be rendered homeless by the eviction.

[17] Meaningful engagement as a legal requirement has thus far been ordered by this Court only in cases where the state was the party seeking eviction and was ordered to provide alternative accommodation.[16] In this matter there is an important third party involved, namely the building owner. It is clear that neither the Occupiers nor the City "meaningfully engaged" the building owner in the process of finding alternative accommodation and about the date of eviction.

[15] *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg and Others* [2008] ZACC 1; 2008 (3) SA 208 (CC); 2008 (5) BCLR 475 (CC) (*Olivia Road*) at para 16.

[16] *Olivia Road* above n 15; *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others (Centre on Housing Rights and Evictions and Another, Amici Curiae)* [2009] ZACC 16; 2010 (3) SA 454 (CC); 2009 (9) BCLR 847 (CC).

[18] Even if meaningful engagement should be the norm in tripartite cases like the present, about which it is not necessary to make any finding, the engagement cannot be meaningful without the participation of one of the essential parties. This failure is another reason why the application cannot succeed on the merits.

[19] The application was therefore dismissed.

For the Applicants:	Advocate P Kennedy SC, Advocate H Barnes and Advocate S Wilson instructed by The Centre for Applied Legal Studies.
For the First Respondent:	Advocate JJ Gauntlett SC and Advocate F Pelser instructed by Moodie & Robertson Attorneys.
For the Second Respondent:	Advocate MSM Brassey SC instructed by Schindlers Attorneys.