

SOUTH AFRICA / JUDGMENT

Nelson Mandela Metropolitan Municipality v Mcanyanga and Others (CA 45/2019) [2020] ZAECHGHC 143 (8 December 2020) [2020] ZAECHGHC 143

COURT

Eastern Cape High Court, Grahamstown

BEFORE

M Makaula, I Schoeman, B Pakati

CASE / FILE NUMBER

CA 45/2019

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IN THE HIGH COURT OF
SOUTH AFRICA
EASTERN
CAPE DIVISION – GRAHAMSTOWN
REPORTABLE/NOT
REPORTABLE
Case
No: CA 45/2019
In

the matter between:

THE
NELSON MANDELA METROPOLITAN MUNICIPALITY Applicant
and
ANDILE
MCANYANGA
First Respondent
QWELA
VUYANI
Second Respondent
ZANELE
MBANE
Third Respondent
WELE
MHUSA
Fourth Respondent
SYLVIA
BATIMANI
Fifth Respondent
SAKHIWO

GQOZO
Sixth Respondent
MZWABANTU
NADODI
Seventh Respondent
MZIWOXOLO
WELCOME APRIL
Eight Respondent
NOMAWETHU
NIYABO
Ninth Respondent
LINDA
VENA
Tenth Respondent
NOKUZOLA
RODOLO
Eleventh Respondent
NOMHLE
DURUWE
Twelfth Respondent
JULIAN
MTUTUZELI
KOLISI
Thirteenth Respondent

JUDGMENT

MAKAULA J

A.

Introduction:

[1] On 15 May 2013, the applicant (appellant herein) brought an application against the respondents in terms of section 4 of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (the Act). The matter served before Chetty J who dismissed the application with costs. The matter is before us with the leave of the Supreme Court of Appeal.

B. Grounds of Appeal:

[2] Essentially the appeal is against the whole judgment of Chetty J. However on appeal, the appellant relied primarily on these grounds viz:

1. That Chetty J erroneously took the view that the appellant's conduct in seeking the eviction of the respondents was "ignominious" a view which coloured the remainder of his reasoning.

2. He failed to have sufficient regard to the fact that the respondents were only ever entitled to occupation of the houses on a temporary basis; and
3. He failed to have regard to the interests of the identified beneficiaries who are the legal owners of the thirteen houses.

B. Common Cause Facts:

- [3] The common cause facts are that in 2006, the applicant commenced preparations for the construction of low-cost houses for the benefit of people that it had identified as beneficiaries in an area known as “Kuwait” situated in Zwide Township, Port Elizabeth. According to the applicant the construction of the houses was completed in 2010. This is however, disputed by the respondents who alleged that the houses were completed between the years 2008 and 2009. Nothing turns on this dispute. At the time the applicant was allocating the houses, thirteen of the identified beneficiaries could not be traced. The applicant allowed the respondents to occupy the thirteen houses on a temporary basis whilst trying to locate the beneficiaries in fear that if the houses remained unoccupied they would be vandalised.
- [4] The applicant eventually found some of the beneficiaries and sought to put them in the houses which were temporarily allocated to the respondents. The applicant identified a site to which the respondents were to be relocated upon their vacation. On 1 April 2011, the applicant wrote to the respondents calling them to a meeting with the intent to discuss their relocation to an area called Chetty Township, which is located in the Northern Areas. A meeting was held, the outcome of which was that the respondents refused leave to the proposed area raising numerous issues.

D. The Applicant’s Case:

- [5] The applicant in the court a quo advanced as reasons various aspects for the termination of the respondent’s temporary occupation of the houses. It

argued that the beneficiaries were available to take occupation as rightful owners of the properties. The applicant argued that the action of the respondents in refusing suitable alternative accommodation was unjust and inequitable in the circumstances where the beneficiaries, in terms of the housing policy, would not qualify for RDP houses because of the previous allocation.

- [6] In a nutshell, the applicant argued in the court below that the respondents have no title to remain in occupation of the properties and an order relocating them should be granted.

E. The Respondents’ Case:

- [7] The respondents opposed the application. They firstly brought to light that they did not know the forth, tenth and eleventh respondents. Furthermore, the third and seventh respondents had passed away. The respondents dealt with the background to how their occupancy came about. They alleged that they lived in Kuwait from 1993 as backyard dwellers, (i.e. they erected informal dwellings in the back yards of property owners in lieu of payment of rent).
- [8] The respondents averred that between the years 2008 and 2009, Mr Made an employee of the applicant, approached and advised them that thirteen (13) built houses were standing empty and were being vandalized because the beneficiaries were untraceable. Mr Made sought thirteen people to occupy the houses as caretakers to prevent further vandalism. Indeed, the respondents moved to the houses which were quite in a state due to the vandalism that had already taken place. A year later, they were requested by Mr Made to sign letters confirming the circumstances of their occupancy.

As at the time of the launch of the application, the respondents refused to vacate the properties contending that they had spent

considerable amounts of money and effort in renovating them and after five (5) years of occupancy they regarded the property as their homes. The respondents' basis for refusal to vacate was further premised on the contention that they were being relocated to a vacant land in Chetty Area which was a considerable distance from Kuwait, a factor which was inconceivable and unconstitutional.

They stated that it would be unjust and inequitable to do so.

- [9] In reply, the applicant argued that the respondents failed in their answering papers to offer information about people amongst them who had special needs as it is required in law to do so. The applicant, however, acknowledged its responsibility to accommodate people with special needs and undertook to provide for them once such information came to hand.
- [10] What is telling in the reply of the applicant is the following contention.

"Given the passage of time since the gesture for relocation was extended to the respondents and the length of time this litigation is taking together with the fact that development of low cost housing is a moving target, it is impossible to provide this Honourable court with definite information on the future location of the respondents". (Emphasis added).

- [11] The applicant however undertook to provide for the approval of the court a quo full information about the location of the houses to be allocated to the respondents, how people with special needs and vulnerable people would be accommodated and the availability of essential amenities and utilities and basic infrastructure in the intended location.
- [12] In reply, the applicant further testified that:

“Given that this issue has been protracted over a long period the applicant submits that instead of committing to this court where the respondents would be located, that issue should be considered at the time of the finalisation of the application at that point. The applicant would be able to indicate where the respondents could be located to”. (Sic)

[13] Ms Ndileka Mase filed a supporting affidavit on behalf of the applicant. She is one of the beneficiaries. Chetty J correctly characterised the filing of the “supporting affidavit” in reply by the respondent as follows:

“... , are Ms Mase (sic), deposed to a supporting affidavit which, quite inexplicably and without condonation being sought therefore, was filed to augment the replying affidavit”.

She confirmed the evidence of the respondents that the houses were allocated to them between the years 2008 and 2009. She

testified that prior to the launch of the present application, the applicant prevailed upon them as beneficiaries to abandon the claim to the properties occupied by the respondents subject to an undertaking that the beneficiaries would be relocated to the new houses that were being developed by the applicant in other areas. That proposal was repeated when the application was opposed by the respondents. The contention by Ms Mase was that the proposal was made in light of the fact that the respondents have been in occupation of these houses for a while and also the houses are no longer in a pristine condition. According to her the proposal was rejected because ‘we can no longer trust that the applicant will make good on this promise’. Furthermore, their refusal was premised on the fact that they could not be made to endure the uncertainty that we have suffered over the years.

[14] On 21 September 2017, Chetty J issued an order by agreement between the parties postponing the application sine die. Further, the applicant was ordered to commission an impact assessment report on the proposed eviction of the respondents, their families especially with regard to women, children, and elderly people and those affected by HIV Aids and disability. The report would have to include information with regard to the availability of alternative accommodation and adequate infrastructure, including water, sanitation and essential services, the availability and access to clinics, schools, hospitals and transportation routes of both busses and taxis. It was expected of the applicant to include in the report when it would provide a government subsidised house. If the applicant was unable to provide subsidised houses before relocation, then the applicant would have to report on what temporary measures are to be taken to provide the respondents and their families’ appropriate shelter and accommodation.

[15] The applicant completed its impact assessment report albeit late. In essence the report identified that there were women and children amongst the families of the respondents that would not be adversely affected, as alternative accommodation could be afforded. In respect of the alternative accommodation, the report stated that they shall be provided with temporary structures until such time that their applications for subsidised houses were approved and the houses

built. The report highlighted that in terms of the National Housing Policy there shall be no automatic allocation of subsidised

houses. The respondents would have to subject themselves to the processes and procedures prescribed for in terms of the National

Housing Policy. The report concluded by stating that the applicant was unable to make a commitment as to when the respondents

would receive subsidised houses.

[16] On receipt of the report Chetty J delivered his judgment on 31 May 2018 dismissing the application with costs.

F. Argument:

[17] Mr Rorke, counsel for the applicant, argued in respect of the first ground that the findings of the court a quo are unsupported by the facts. He submitted that whilst the delays for the prosecution of the application are difficult to

understand, the applicant was faced with a difficult situation and thus requested the beneficiaries to accept relocation and occupation

of other premises due to the refusal of the respondents to vacate the properties even though they were in unlawful occupation. The applicant argued that the court a quo's negative and unwarranted characterisation of the appellant coloured the remainder of his reasoning.

[18] In respect of the second ground, the applicant argued that the court a quo ignored the applicable law in that it was common cause between the parties that the respondent's right to occupation of the properties was only ever temporary. The applicant submitted that when the respondents were allowed temporary accommodation by the applicant, they should not have expected it to become permanent contrary to the relevant municipality's procedures and rules that are applicable. The applicant argued that the respondents could not gain an unfair advantage over all the other members of the public who lawfully and patiently waited for the allocation of permanent houses to them.

[19] Lastly, the applicant submitted that the court a quo failed to give any consideration to the interests of the beneficiaries. The submission went on to state that the court a quo failed to take into account factors which are relevant to a determination of what is just and equitable. The argument by the applicant is that effectively the beneficiaries, as a result of the

judgment of the court a quo, are permanently deprived of state housing due to their previous housing allocation. In summary, the applicant averred that the court a quo did not take into account the interests of the beneficiaries and its refusal of the relief sought is not just and equitable in respect of them.

- [20] Mr Naidu, counsel for the respondent, held a contrary view regarding the criticism of the judgment of the court a quo. He submitted that the attack by the applicant of the judgment is myopic and ignores the facts. His argument was that the delay (which the applicant conceded is difficult to defend) in prosecuting the eviction application had a significant bearing on the circumstances of this case when regard is had to determining the issues of whether it was just and equitable to have warranted the eviction of the respondents.
- [21] Based on the facts, Mr Naidu, submitted that the court a quo was correct in censuring the actions of the applicant which are ignominious because the respondents had been living in the houses for five years when the applicant decided to launch the proceedings. His argument went on to state that it had been ten years at the time the matter was argued before the court a quo since they had taken occupation of the houses. He argued that even the impact assessment report that was compiled by the applicant supports the view that it was just and equitable for the court a quo to have refused the application. He contended that the argument the court a quo erred in not paying regard to that the respondents' occupation of the properties was only temporary is misconstrued because it was never the argument of the respondents that they were lawfully entitled to the properties. The issue was whether it would be just and equitable to remove them.

G.

Analysis:

- [22] Firstly, the timeline of the events leading up to the launch of the application in the court a quo is key. Though, as stated before, there is a dispute regarding when the houses were temporary given to the applicants, I accept the version of the respondents that it was between the years 2008 and
2009. I do so based on the confirmation of Ms Mase. At the time of the launch of the application on 16 May 2013, the respondents had been in occupation of the properties for five (5) years. The order taken by agreement, authorising the commissioning of the assessment report was made on 27 September 2017, nine years after the respondents were in occupation of the properties. The judgment was delivered on 31 May 2018 i.e. ten
- (10) years after the respondents were in occupation of the properties. The delay in prosecuting the application remains

unexplained by the applicant. Hence the admission by Mr Rorke that the delays which were experienced in prosecuting the application are difficult to defend. The period the respondents have been in occupation of the houses is certainly a factor to be considered in determining whether it is just and equitable to evict them without them being provided with alternative accommodation? As shown, the delay by the applicant in bringing the application is inconsiderate.

[23] Secondly, I must have regard to the bona fides of the applicant in the handling of the issues i.e. the reasons why the application was launched late, the availability of alternative accommodation to the respondents and the beneficiaries etc. Ms Mase's affidavit contradicts the applicant in various ways. She attested to the fact that the applicant had located the beneficiaries even before the application was launched. She stated in her affidavit that:

"Prior to bringing the present application, the applicant prevailed upon us to abandon our claim to the houses occupied by the respondents

subject to an undertaking that we will be relocated to new houses that are currently being developed by the applicant in the areas

wherein these developments are currently taking place".

[24] The contention above conflicts with the assertion made by the applicant. The applicant categorically stated that in terms of the Housing Policy, the beneficiaries are precluded from having further houses being allocated to them. It is inconceivable therefore that the applicant would have intimated to the beneficiaries that they should agree to being allocated houses elsewhere, if the Housing Policy precluded that such an allocation.

[25] Thirdly, as alluded to, the issue of the respondents not wanting to leave the houses dates back to 2013, at which time the applicant undertook to allocate houses to them. The applicant has done nothing since then to ameliorate the plight of the respondents. It is common cause that the respondents had established themselves in the area of Kuwait for about eight (8) years prior to the launch of the application. They were living in houses made of brick and mortar and their children were attending schools built in the proximity of their houses. I agree with the finding of the court a quo in that:

"In contradiction, their proposed relocation is to barren land approximately eight (8) kilometres from their present settled abode.

The brick and mortar houses they currently occupy are to be supplanted by still to be constructed corrugated iron and wood structures on the outer periphery of the site in an informal settlement".

[26] What crowns it all, is the fact that even to date the applicant has not identified any houses which would meet the standard of houses which were temporary allocated to the respondents. That is borne out by what is said by the applicant as reflected in paragraphs 10 and 11 above. The relocation to the new area of the respondents is indefinite. I say so

because the applicant is not certain how long it would take for them to be allocated subsidised housing. This should be viewed in the backdrop of the time period that had lapsed to date. The statement by the applicant that “(t)hey will be accommodated in temporary structures until such a time that their applications for subsidised houses are approved and their houses have been built” is telling. There is no certainty that is guaranteed. Furthermore, the applicant concluded the impact assessment report by emphatically stating that:

“The municipality is not able to make as to when the respondents will receive subsidised houses” (Sic)

- [27] This is how non-committal the applicant is in trying to resolve the plight of the beneficiaries and the respondents. How can the applicant be trusted if for so many years it has failed to provide suitable accommodation to about eight (8) respondents (because the others have since passed away and other houses are not occupied by some of the respondents). The sentiments expressed by the applicant’s witness is also profound in the circumstances. Ms Mase made the following remarks about the applicant:

“We rejected this proposal because we can no longer trust the applicant, will make good on this promise”.

- [28] Section 6(3) of the Act explains what is regarded as just and equitable as follows:

“3. In deciding whether it is just and equitable to grant an order for eviction, the court must have regard to -

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

- [29] As for compliance with paragraph 6(3)(a) of the Act, the circumstances as to how the respondents came to occupy the houses has been well ventilated and need no repetition. Suffice to say that the respondents did not erect any structure, the houses were provided on a temporary basis by the applicant.

- [30] In respect of section 6(3)(b), the applicants have now been in occupation of the houses for about twelve (12) years. As adumbrated, the applicant has been non-committal as to when suitable accommodation is to be allocated to the respondents. That merits no repetition.

- [31] The contention by the applicant that the judgment of the court a quo did not balance the interests of the respondents and those of the beneficiaries is not supported by the facts of the matter, and the judgment itself. Running the risk of repeating myself, the applicant pleaded with the beneficiaries to accept new houses elsewhere but because they did not trust the applicant due to empty promises made before, refused the offer. Therefore, the

applicant's contention that the beneficiaries cannot be afforded subsidised houses cannot be correct. The court a quo had regard to all the issues and found, correctly in my view, that it would be just and equitable to allow the respondents to remain in the houses.

[32] Consequently, I make the following order.

1. The appeal is dismissed with costs.

M MAKAULA

Judge of the High Court

SCHOEMAN J: I Agree.

I SCHOEMAN

PAKATI J: I Agree.

B PAKATI

Appearances:

Counsel for the Appellant:

Adv SC Rorke (SC)

Adv N James

Instructed by:

Pumeza Bono Inc. Port Elizabeth

c/o Dold & Stone Inc. Grahamstown

Attorney for the Respondents:

Mr V Naidu

Instructed by:

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