



New insights from the Constitutional Court bench – the “just and equitable” requirement in eviction proceedings

On 8 June 2017, the Constitutional Court of South Africa handed down a landmark judgment with regards to the rights of illegal occupants in eviction proceedings in *Occupiers of Erven 87 and 88 Berea and Christiaan Frederick De Wet and another*.<sup>1</sup>

Some media publications’ analysis of the judgment could lead one to believe that in circumstances where homelessness is the fate of a potential evictee, an eviction may not be granted by a court under any circumstances. However, the true legal position is slightly more complex and cannot be summarised in such simple terms.

In the present case, the applicants comprised of 184 residents, 23 of which were children, who brought an application to have an eviction application granted by the High Court rescinded. Most of the applicants were either unemployed, or of a low income bracket.

The main legal question to be decided by the bench was whether or not an eviction order handed down by the High Court pursuant to a settlement between the parties should be rescinded. In the circumstances, the court decided that the order should indeed be rescinded due to various reasons, including the fact that there was in fact no agreement between some 182 of the 184 occupants and the lessor to vacate the property.

The court further held that even in instances where there is true consensus between the parties with regards to settlement terms to vacate a property, the court has a duty to probe the parties for all relevant facts to ascertain whether or not an eviction order would be in line with Section 26 of the Constitution (the right to housing) and the Prevention of Illegal Eviction Act.

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<sup>1</sup> 2017 ZACC 18

Therefore, even in instances where both the occupant and the lessor are represented by attorneys and agree on a date for the eviction of the occupant, the court may, and indeed should, refuse to grant an eviction order if it is not satisfied that to do so would be just and equitable in the circumstances.

In order to determine whether or not such an order would be just and equitable, the court is burdened with considering various factors, some of which would include whether or not there are any elderly people or minor children living in the property, whether or not there is alternative accommodation available for the occupants, and of course, whether or not an order for the occupants' eviction would subject them to life on the streets.

However, it is not the duty of the lessor in an eviction application to provide a possibly homeless evictee with alternative accommodation. In the present case, the court stressed the duty of local government in such scenarios, and that their involvement in eviction proceedings is mandatory where the court is burdened with enquiring whether or not the evictee will have a roof over their head should they grant an order for their eviction.

It is indeed the duty of the city to take reasonable measures within its available resources to alleviate homelessness. The failure of the lessors in the present case to join the city to its application for an eviction was a fatal error, which, if not made, may have resulted in an entirely different verdict being handed down.

Lastly, the court stressed the fact that the granting of an eviction order is a balancing act to be performed by the court, namely the rights of the landowner versus the rights of the illegal occupant, enshrined in sections 25 and 26 of the Constitution respectively.

The effect of eviction legislation and the constitutional right to housing afforded to illegal occupants is not and should not be to effectively expropriate the rights of the landowner in favour of the illegal occupant, and the landowner may rely on its constitutional right not to be arbitrarily deprived of its property.

In instances where eviction proceedings are approached carefully and correctly, with due consideration for the strict constitutional test to be applied by the courts and the duty of other organs of state such as municipalities to provide emergency relief

accommodation, there is no reason why a landowner should fear the effect that this most recent judgment will have on future eviction applications.