

**IN THE SUPREME COURT OF APPEAL**

Case no 213/2003

In the matter between

**PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA AND OTHERS** Appellants

and

**MODDERLKIP BOEDERY (PTY) LTD** Respondent

**NKUZI DEVELOPMENT ASSOCIATION AND OTHERS** Amici curiae

**AGRI-SA** Amici curiae

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**HEADS OF ARGUMENT ON BEHALF OF THE AMICI CURIAE  
NKUZI DEVELOPMENT ASSOCIATION  
COMMUNITY LAW CENTRE, UWC AND  
PROGRAMME FOR LAND AND AGRARIAN STUDIES, UWC**

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1 It appears to be common cause that:

- 1.1 there is currently no provision in the Ekurheleni area for short-term relief for the people who are subject to the order of eviction, and that therefore
- 1.2 if they are evicted, there will be nowhere for the almost 40,000 occupiers to go. They will be literally homeless.

**Record** Van der Westhuizen Vol 1 p 77 para 13.5  
Duvenage Vol 2 p 142 para 12.3; p 143 para 14.3

2 Section 26 (3) of the Constitution provides as follows:

- (1) *Everyone has the right to have access to adequate housing.*
- (2) *The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.*
- (3) *No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.*

3 The connection between these subsections has been explained as follows:

*[34] Subsections (1) and (2) are related and must be read together. Subsection (1) aims at delineating the scope of the right. It is a right of everyone including children. Although the subsection does not expressly say so, there is, at the very least, a negative obligation placed upon the state and all other entities and persons to desist from preventing or impairing the right of access to adequate housing. The negative right is further spelt out in subsection (3) which prohibits arbitrary evictions....*

*[38] Subsection (2) speaks to the positive obligation imposed upon the state. It requires the state to devise a comprehensive and workable plan to meet its obligations in terms of the subsection. However subsection (2) also makes it clear that the obligation imposed upon the state is not an absolute or unqualified one. The extent of the state's obligation is defined by three key elements that are considered separately: (a) the obligation to "take reasonable legislative and other measures"; (b) "to achieve the progressive realisation" of the right; and (c) "within available resources."*

**Government of the Republic of South Africa and others v Grootboom and others**  
(‘Grootboom’) 2001 (1) SA 46 (CC)

- 4 Section 7(2) of the Constitution obliges the state to ‘respect, protect, promote and fulfil’ these rights. Each of these obligations has a specific content.

### **The government’s negative obligation under sections 7(2) and 26(1) of the Constitution**

- 5 The United Nations Committee on Economic, Social and Cultural Rights has concluded, in its General Comment 14, that the duty to ‘respect’ a right requires the state to refrain from interfering, directly or indirectly with the enjoyment of the right. The duty to respect existing access requires the state not to take any measures that result in preventing such access. The state is obliged to refrain from conduct which prevents access to the right.

*General Comment 14*, E/C.12/2000/4, paragraph 33

*General Comment 12*, E/C.12/1999/5, paragraph 15

Craven **The International Covenant on Economic, Social and Cultural Rights** (Clarendon, Oxford, 1995) at 110

- 6 The significance of the UN Committee and its General Comments was explained by the Constitutional Court in **Grootboom** at para 29 to 31 and at para 45. In dealing with the meaning of ‘*progressive realisation*’, the Court found that the General Comments are ‘*helpful*’ in understanding our Constitution. The meaning ascribed to that phrase in the relevant General Comment

*‘is in harmony with the context in which the phrase is used in our Constitution and there is no reason not to accept that it bears the same meaning in the Constitution as in the document from which it was so clearly derived.’*

**Grootboom** at para 45

- 7 Similarly, the interpretation given by the Committee, in its General Comments, of the requirement that a State should ‘respect’ a right, is in harmony with the context in which that term is used in our Constitution, and there is no reason not to accept the meaning given to it by the Committee.

**City of Cape Town v Rudolph** 2003 (11) BCLR 1236 (C) at 1266J, where Selikowitz J by the same reasoning concluded that there is no reason not to accept the meaning given by the Committee to the obligation on the state to 'protect' a right.

8 If the occupiers are evicted under current circumstances, they will be deprived of their existing housing or shelter, and will be deprived of access to any housing at all. They will be truly homeless. What the respondent requires is that the state should act, at its expense, to bring about this result.

9 If the state so acts, it will have taken measures that prevent existing access, and will have interfered directly with the enjoyment of the right to housing. Its conduct will have prevented access to the right to housing. It will have accordingly have failed to comply with its negative obligation to 'respect' the right of access to housing. It follows that the state will *prima facie* be in breach of its constitutional obligations.

10 This does not mean that a court may never order an eviction where the result will be homelessness because the occupiers will not be able to find alternative accommodation. All rights are limited by other rights, and they may also be limited by laws of general application which comply with the requirements of section 26 of the Constitution. But there must be circumstances which justify the limitation of the right.

11 It is not possible to compile a definitive list of such circumstances. However some examples of such circumstances are:

11.1 where the occupiers have occupied the land in order to coerce a state structure into providing housing on a preferential basis:

**Grootboom** at [92]; or

11.2 where the occupation creates a genuinely urgent or pressing danger:

**Groengras Eiendomme (Pty) Ltd v Elandsfontein Unlawful Occupants and others**  
2000 (1) SA 125 (T) at 141 B-E; or

11.3 where there are two competing groups of homeless people who seek access to the same piece of land, and a choice must be made as to which of them will occupy it.

**City of Cape Town and another v The occupiers of Erf 4832 Philippi** CPD case no 5746/2000, unreported judgment of Brand J, at page 12

12 In this case, the only countervailing circumstance is the property right of the respondent. The determination of which rights and obligations must give way to the other, at least on a temporary basis, requires a balancing of the rights in question. We deal below with the balancing of rights and interests.

**The government's positive obligations under section 26(2) of the Constitution**

13 The occupiers are people in desperate need because their homes are under threat of demolition. If their homes are demolished and they are evicted, they will be people in desperate need because they will have no access to land, and no roof over their heads.

**Grootboom** at [52]

14 The state is under an obligation to make and implement a reasonable programme which provides temporary relief for people in desperate need. Such a programme must ensure that a significant number of people in desperate need are afforded relief, but not all of them need receive it immediately.

**Grootboom** at [68], [69], [99] 2 (a)

15 For the reasons set out above (paragraph 1), there is plainly no program on the East Rand (Ekurhuleni) which meets the needs of people in desperate need such as the occupiers.

See also the affidavit of Chainee, who describes in detail the programmes of the municipality, but does not suggest that there is any short-term provision for the occupiers or others in desperate need: **Record** Vol 3 p 316-330

- 16 Eviction under the current circumstances will therefore also lead to, or trigger the consequences of, a large-scale breach by the government of its positive obligations under section 26 of the Constitution, and a serious violation of human dignity.

### **Balancing the rights and interest**

- 17 The balancing and reconciling of rights and interests is an essential element of the constitutional principle of proportionality.
- 18 It cannot be assumed that the rights of the landowner will ‘trump’ the rights of the homeless in every circumstance.

Andre van Der Walt ‘Exclusivity of Ownership, Security of Tenure and Eviction orders: A Critical Evaluation of Recent Case Law’ (2002) 18 **SAJHR** 37

- 19 In the **Kyalami** case, the rights and interests in conflict were on the one hand the interest of the residents of a well-established area in the value of the property and in a peaceful environment, and on the other hand the interests of homeless flood victims to be accommodated at a place reasonably close to the place where they had previously been living. The Constitutional Court held as follows:

*‘The fact that property values may be affected by low cost housing development on neighbouring land is a factor that is relevant to the housing policies of the government and to the way in which government discharges its duty to provide everyone with access to housing. But it is only a factor and cannot in the circumstances of the present case stand in the way of the constitutional obligation that government has to address the needs of homeless people, and its decision to use its own property for that purpose.’*

**Minister of Public Works and others v Kyalami Ridge Environmental Association and another (Mukwevho intervening)** 2001 (3) SA 1151 (CC) at [107]; see also [101] to [103]

20 We recognise that the facts in this case are different. In **Kyalami**, the government was planning to use its own land to accommodate homeless people. However, this case too involves the balancing of competing rights and obligations, and it is submitted that **Kyalami** demonstrates both the need for balancing as part of the proportionality exercise, and the way in which this is to be undertaken.

21 On the respondent's version, even before the land was occupied it made only limited use of the property, and received limited income from it:

21.1 The respondent owns the Remaining Extent of the farm Modder East 72 (the land in issue in this case) and certain other portions of the same farm.

**Record** Duvenage Vol 1 p 8 para 11, 12(a)

21.2 The respondent's income consists of rental which it charges to the people who use its land.

**Record** Duvenage Vol 1 p 9 para 12(d); Vol 4 p 381 para 14.3

21.3 Before the land was occupied, it was no longer used for cultivating cash crops or for cattle farming. It was used only for the cultivation of grazing:

**Record** Duvenage Vol 1 p 11 para (d); Vol 4 p 394 para 31.2

21.4 Occupation of part of the Remaining Extent (one of the farms owned by the respondent) commenced in May 2000 with the erection of 50 structures, and by October 2000 had grown to 4000 structures. In the tax year ending on 28 February 2001, the total income of the respondent from all of its property was R3010.

**Record** Wessels Vol 4 p 425 para 6.2

22 In drawing attention to these facts, we do not seek to deny that there has been a breach of the rights of the applicant. Rather, we seek to identify the scale and consequences of that breach, so that the

balancing exercise which the Constitution requires can be undertaken.

- 23 Eviction under the current circumstances will lead to 40 000 people being left truly homeless, and to a breach of both the negative and positive obligations of the state.
- 24 Eviction under the current circumstances will inevitably lead to a further unlawful occupation of land - either a re-occupation of the respondent's land, or occupation of other land in the area. It will therefore in any event provide the respondent with only the most limited security.

**Record** Van der Westhuizen Vol 1 p 77 para 13.5  
Duvenage Vol 2 p 142 para 12.3; p 143 para 14.3  
Mayende Vol 2 p 173 lines 12-15  
Raath Vol 3 p 248-9 para 4.1

- 25 It is submitted that a court will not lightly make an order which it knows will lead to a *prima facie* breach of the Constitution, or human suffering resulting from such a breach. The question is how to resolve the tension between the various rights which are in issue, in a manner which best gives effect to the Constitution.
- 26 The state has already given effect to the rights of the respondent through the High Court having made an order for eviction, and through the actions of the legislature and executive in creating and making available a system and machinery for executing that order. (We do not enter upon the question of whether the order by Marais J was correctly made, and the *amici* have not sought to be admitted in respect of the application for leave to appeal against that judgment.)
- 27 The appellants have submitted (in effect) that the duty of the state is limited to establishing the statutory framework and mechanisms for the enforcement of judgments. We do not understand the respondent to dispute that in general this satisfies the obligations of the state. The respondent appears to accept that in general, it is the duty of a litigant to see to the execution of a judgment in its favour. As we understand it, the respondent's case is that the facts of this particular case justify a deviation from the usual approach.

**Record** Duvenage Vol 2 p 130 para 15.3

28 We submit that if in law there are exceptional cases which justify placing this exceptional burden on the state, this is not one of those cases. The Constitution does not oblige the state to perform acts which lead to a breach of its negative and positive constitutional duties, or which trigger the consequences of an existing breach of its duties.

29 We therefore submit that in this case, as a matter of constitutional principle there is no basis for any exception to the general rule that a litigant is responsible for the costs of executing a judgment which it has obtained.

30 We submit further that even if it can be contended that there is potentially a basis for an exception to the general rule in a case such as this, the decision whether to make such an order on the state requires a balancing of the rights which are in tension with each other:

30.1 On the one hand, there is the right of the owner to vacant occupation of its land;

30.2 On the other hand, there is the right of some 40 000 people to access to housing, and to reasonable provision while they are in a desperate need.

31 We have previously submitted that on the respondent's version, even before the occupation of the land it made limited use of the property, and received limited income from the property.

32 We submit that a reasonable balancing of the competing constitutional rights in question leads to the conclusion that under these particular circumstances the rights of the owner should temporarily give way to the rights of the 40 000 homeless people, while the state makes reasonable provision for them or for people in their position.

33 The owner may have a claim against the state for its failure to make reasonable provision for people in desperate need, which is a direct cause of the unlawful occupation and its temporary loss of the use of its land.

**Hefer v Van Greuning** 1979 (4) SA 952 (AD) 960D

## **APPROPRIATE RELIEF**

- 34 We submit that for the reasons set out above, the respondent has not made out a case for the state to be obliged to carry out the order of court at its expense.
- 35 We submit that if the court orders the state to ensure that it is executed at the cost of the state, the court should:
- 35.1 order that the execution of the eviction order be stayed until the state has made reasonable provision for the occupiers or generally for people in their position.
- 35.2 make an appropriate order for the state to report back to the High Court on what it has done to make such provision.
- 35.3 authorise the applicant (the respondent in this appeal) to renew its application, on the same papers as appropriately supplemented, either:
- 35.3.1 for an order that the eviction should be executed, if it contends that the state has now made such reasonable provision, or
- 35.3.2 for other relief, if it contends that the state has still not complied with its obligations to make such reasonable provision.
- 36 Although there has been some debate over the source of the power, our courts have consistently over the years asserted and exercised the power to suspend orders of eviction. This appears to be part of the inherent power of the courts to control execution, which is part of its process. Under the common law, a stay will generally be granted where real and substantial justice requires a stay, or where injustice would otherwise be done. The power to suspend the execution of orders is now expressly addressed by Rule 45A.

**Lovius and Shtein v Sussman** 1947 (2) SA 241 (O)

**Voortrekker Pers Bpk v Rautenbach** 1947 (2) SA 47 (AD)

**Potgieter v Van der Merwe** 1949 (1) SA 361 (AD)

**Van Reenen v Kruger** 1949 (4) SA 27 (W)

**Strime v Strime** 1983 (4) SA 850 (C)

37 In the alternative, we submit that before deciding any of the matters before it, or before deciding the appeal in the 'execution' matter, the court should refer the matter back to the High Court in order for that court to receive evidence and argument on whether the government is in breach of its obligations under section 26 of the Constitution.

**G M BUDLENDER**

Constitutional Litigation Unit

Legal Resources Centre

23 January 2004

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**LIST OF AUTHORITIES**

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**REPORTED DECISIONS:**

1. **Government of the Republic of South Africa and others v Grootboom and others** 2001 (1) SA 46 (CC).
2. **City of Cape Town v Rudolph** 2003 (11) BCLR 1236 (C).
3. **Groengras Eiendomme (Pty) Ltd v Elandsfontein Unlawful Occupants and others** 2000 (1) SA 125 (T).
4. **Minister of Public Works and others v Kyalami Ridge Environmental Association and another (Mukwevho intervening)** 2001 (3) SA 1151 (CC).
5. **Hefer v Van Greuning** 1979 (4) SA 952 (AD).
6. **Lovius and Shtein v Sussman** 1947 (2) SA 241 (O).
7. **Voortrekker Pers Bpk v Rautenbach** 1947 (2) SA 47 (AD).
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**UNREPORTED DECISIONS:**

11. **City of Cape Town and another v The occupiers of Erf 4832 Philippi** CPD case no 5746/2000.

**INTERNATIONAL HUMAN RIGHTS INSTRUMENTS:**

12. *General Comment 14*, E/C.12/2000/4.

13. *General Comment 12*, E/C.12/1999/5.

**TEXT BOOKS:**

14. Craven **The International Covenant on Economic, Social and Cultural Rights** (Clarendon, Oxford, 1995).

**ARTICLES:**

15. Andre van Der Walt 'Exclusivity of Ownership, Security of Tenure and Eviction orders: A Critical Evaluation of Recent Case Law' (2002) 18 **SAJHR** 372.