

# Evictions, municipalities

## The right

### Case One

#### *Ross vs South Peninsula Municipality*

In the case of *Vanessa Ross v South Peninsula Municipality* (1999) JOL 5298 (C), the municipality was seeking an eviction order against Mrs Ross and her children from a flat in Lotus River that she had been leasing from the municipality since early 1997. In their summons, the municipality made three simple allegations:

- (1) It was the owner of the property;
- (2) Mrs Ross was in occupation of the property; and that
- (3) She and all the people living with her were occupying the property illegally, as there was no agreement that entitled her to occupy the property.

Mrs. Ross's attorneys noted an exception to the summons on the basis that it did not disclose a valid cause of action under the Constitution, particularly in terms of section 26(3). This judgment is an appeal from the decision of the Magistrate's Court, dismissing the exception.

The municipality's form of pleading was in accordance with established common law principles. The owner of a property is entitled to possession of the property. In an ejectment application, it is therefore sufficient for the owner simply to allege ownership of the property in question and that the respondent is in unlawful possession.

The main issue in this appeal was whether section 26(3) of the Constitution has altered these established common law principles. In other words, has the

Constitution now placed an onus on an owner of land to inform the court of circumstances justifying the eviction of a person in possession of the owner's property if it is the occupier's home? Section 26(3), which forms an integral part of the right of access to adequate housing, reads as follows:

*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.*

The court held that it was beyond question that the incidence of the onus could be affected by a constitutional requirement. Experience and fairness would determine where the onus should be placed.

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#### **The plaintiff's duty to plead 'relevant circumstances'**

In terms of section 26(3), a court can only grant an eviction order after it has considered *all* the 'relevant circumstances'. How should these circumstances be placed before the court? The court observed that in inquisitorial legal systems, a judicial officer is able to call for and gather whatever information is required. In adversarial systems, it is up to the parties to place the relevant information before the court. The onus of proof becomes very important in this context as it prescribes which party must place particular facts and circumstances before the court and therefore what has to be alleged in pleadings or affidavits.

The effect of section 26(3) in an adversarial legal system such as our own is that the plaintiff (owner) must place the information that it considers relevant before the court. The defendant (occupier) can plead by answering these allegations, and can also raise additional issues that it con-

siders relevant. The plaintiff can respond to any new allegations raised by the defendant in reply. In this way the pleadings will introduce the issues and define them, and the evidence will provide the substance and detail. The court will be able to exercise its discretion after having considered all the relevant circumstances. The court itself could presumably also call for amplification of the issues if it deems it necessary.

Since the Constitution only protects eviction from a 'home', section 26(3) would not apply in the case of eviction from, for example, business premises.

#### **Default judgment applications**

Section 26(3) of the Constitution prescribes that an eviction order can only be made in terms of an order of court. This means that an eviction order may not be issued by, for example, a clerk of the Magistrate's Court or the Registrar of the High Court, in an application for default judgment. Only the presiding officer can issue such an order and then only after considering all the relevant circumstances.

Where the defendant does not indicate that he or she wants to defend the matter and the plaintiff seeks judgment by default, the defendant would not have the opportunity to place facts that he or she considers relevant before the court. The plaintiff would still bear the burden of alleging and proving the 'relevant circumstances' that would justify the court in granting an eviction order. However, less evidence would be required from a plaintiff in relation to knowledge which is mainly within the knowledge of the defendant.

#### **What are 'relevant circumstances'?**

The court held that it was beyond the scope of the appeal to consider what circumstances will be regarded as 'relevant' in an eviction context. However, it said that some guidance could be obtained from the provisions of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (see, eg section 4(6) and (7)). Of particular relevance was the legislature's concern that the rights of the elderly, children, disabled

# and the Constitution

## to housing

persons and households headed by women should be protected in an eviction context.

The Court could also have referred to General Comment No. 7 (1997) adopted by the UN Committee on Economic, Social and Cultural Rights during its sixteenth session. This General Comment elaborates on aspects of the right to adequate housing protected in article 11 of the International Covenant on Economic, Social, and Cultural Rights. This important human rights treaty has been signed, but not yet ratified, by South Africa. The General Comment deals specifically with the considerations that are relevant to forced evictions, and also highlights the need to provide special protection to disadvantaged and vulnerable groups (see eg paras. 11 and 17).

### A fundamental change

This judgment is important as it affirms that section 26(3) of the Constitution has fundamentally changed the common law of evictions. It is no longer sufficient for an owner of property in an eviction application to allege that persons who are occupying the property as their home are in illegal possession. The owner-plaintiff must allege and prove 'relevant circumstances' that would entitle it to an eviction order. The exact nature of the circumstances that the plaintiff must allege is still uncertain. Some guidance can be obtained from the factors a court must have regard to in deciding whether it is 'just and equitable' to grant an order for eviction under the Prevention of Illegal Eviction From and Unlawful Occupation of Land Act, 1998. Section 26(3) thus appears to confer a broader equitable discretion on a court in a context where people are being evicted from their homes. This potentially represents a significant shift in the balance of power between landlords and tenants, by providing greater protection to tenants against unfair, arbitrary evictions. The *Ross* case highlights how socio-economic rights can alter the established common law and provide greater protection to vulnerable and disadvantaged groups.

## Case Two

### *Grootboom vs Oostenberg Municipality*

In the case of *Grootboom and Others v Oostenberg Municipality, Cape Metropolitan Council, Premier of the Province of the Western Cape, National Housing Board and Government of the Republic of South Africa* (Case no: 6826/99), Ms Irene Grootboom was one of a number of persons who were evicted from private land within the Oostenberg Municipality where they had settled informally. As a result of the eviction, their building materials had been destroyed and they were left with no place where they could settle with some degree of security. They ended up squatting in appalling conditions on the periphery of the Wallacedene Sports Grounds.

An urgent application was brought on their behalf in the Cape High Court for an order, directing one or more of the respondents to provide basic temporary shelter for the applicants and their children, pending them obtaining permanent accommodation. On 4 June 1999, Acting Justice Mr Josman ordered temporary relief in the matter by requiring the respondents to accommodate the applicants' children, free of charge, in the Wallacedene Community Hall.

The application was argued in full before Justices Comrie and Davis on 7, 8 and 9 September 1999. Judgment in the matter was reserved, and has not been delivered at the date of writing.

### Assessment

This case represents a major test case on the scope of the constitutional right of access to adequate housing (s 26(1) and (2)), and the right of every child to shelter (s 28(1)(c)). The major issue to be determined is whether municipalities, provincial governments or the

national government have a constitutional obligation to ensure that people in the applicants' position have at least temporary shelter, pending the taking of longer term measures to ensure the progressive realisation of their right of access to adequate housing. Applicants' counsel argued that this represented the minimum core duty imposed on the State by section 26 of the Constitution, and is also the unqualified right of every child in terms of section 28(1)(c) of the

Constitution. The respondents argued that such a minimum core duty could not be read into section 26 of the Constitution. They also argued that the Child Care Amendment Act 96 of 1996 gave effect to the right of every child to shelter. 'Shelter' in this context means the temporary care of children in especially difficult circumstances, and does not extend to the provision of temporary accommodation for homeless families such as those in the applicants' position.

A noteworthy feature of the arguments presented by the applicants in this case was their reliance on international human rights law to interpret the scope of

the relevant socio-economic rights in the South African Bill of Rights. Counsel referred particularly to the International Covenant on Economic, Social and Cultural Rights (1966), the General Comments issued by the Committee on Economic, Social and Cultural Rights under this Covenant as well as the Convention on the Rights of the Child (1989).

This case is an important test case on the scope of the positive duties imposed on relevant organs of State by the socio-economic rights in the Constitution. The judgment will be crucial in the slowly unfolding jurisprudence on socio-economic rights, and will have significant implications for litigation strategies relating to these rights in South Africa.

Sandra Liebenberg,  
Socio-Economic Rights Project,  
Community Law Centre, UWC

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