

CASE REVIEW

Judicial Overreach in Protecting the Right to Housing in South Africa? A Review of Fisher v Unlawful Occupiers, Erf 150, Philippi

Tinashe Kondo

On 30 August 2017, the Western Cape High Court dismissed an application by three owners of neighbouring properties to evict 60,000 people who invaded their land to establish what became known as the 'Marikana settlement'. The judgment in the case, *Fisher v Unlawful Occupiers*, is a landmark decision on the right to access to housing in South Africa. The Court had to balance two competing interests: the right to property of the owners, and the settlers' right to access to housing. This balancing exercise had to be undertaken mindful of the historical context in which the housing challenge arises, a challenge which is perhaps the largest social crisis in democratic South Africa.

The housing crisis in South Africa

The housing crisis has become one of the most pernicious issues in South Africa. Its origins are largely historical, stemming from the legacy of apartheid. Under this regime, black people were subjected to living in 'homelands' in terms of the Native Land Act 27 of 1913. The Act apportioned 92 per cent of the country's land to the white minority, whilst the black majority was relegated to the fringes in what land remained. This disenfranchised them, stripping them of the right to free and equal citizenship. While the percentage of land allocated for use by black people was increased in later years to 13 per cent by the Native Development and Trust Act 18 of 1936, this did little to ameliorate their living conditions or bring about justice.

After the dawn of independence, many of these structural inequalities persist. Black people are still trapped in communal lands, while white people own

vast tracts of farming land. Within urban areas, white people continue to predominate in the upmarket leafy suburbs, whereas black people are squashed into townships devoid of basic services and quality of life. Many in the townships live in backyards in depressing conditions, where they are unable to cope with continual rent increases. Although land and housing programmes have been initiated, these are slow and riddled with corruption and nepotism. As a result, a gap has emerged, one which the masses are now filling by means of land invasions.

General principles of law

At the heart of the matter in this case are two constitutional provisions. The first is section 25 of the Constitution, which concerns the applicant's right to property. Section 25(1) of the Constitution provides that no one may be arbitrarily deprived of property except in terms of the law of general application. Further to this, no law may permit the arbitrary deprivation of property. The second provision is section 26 of

the Constitution. It sets out in subsection (1) that everyone has the right to have access to adequate housing. Subsection (3) further provides that no one may be evicted from his or her home without an order of the court made after considering the relevant circumstances. Accordingly, the provision concludes that no law may permit arbitrary evictions.

However, to determine whether or not there was a violation of rights, the full constitutional matrix had to be considered. In other words, these provisions could not be read in isolation. As a point of departure, then, consideration had to be given to section 7(2) of the Constitution, which raises the state's constitutional obligation. It provides that the 'state must respect, protect, promote and fulfil the rights in the Bill of Rights'. Accordingly, this provision imposes an obligation on the state to respect the rights enshrined in both sections 25 and 26 of the Constitution.

Another provision falling within the purview of the Court's decision was section 38 of the Constitution, which lists the persons or entities that can approach the courts for relief. Its wide-ranging nature protects a large number of interests. Seemingly, section 38 is to be read in conjunction with section 7(2): while section 7(2) imposes an obligation to respect and give effect to the rights in the Bill of Rights, section 38 concerns those who can claim these rights.

The Constitution aside, various codes, policies and pieces of legislation also had to be considered. The first was the Housing Act 107 of 1997, section 9 of which denotes the functions of municipalities. It grants a municipality the power to expropriate any land it requires for purposes of housing development in terms of any national housing scheme. This is done by way of notice in the Provincial Gazette.

However, a number of preconditions have to be met. To begin with, expropriation may take place only where the municipality fails to purchase the land from the owner on reasonable terms. In addition, it can occur only after permission has been granted by the relevant Member of the Executive Council (MEC). This permission has to precede the publication of the notice in the Provincial Gazette. A final requirement is that the notice in the Government Gazette has to be published.

The second legal document considered was the National Housing Code. Chapter 13 of the Code

provides that municipalities may receive grants for upgrading settlements. To ensure the success of such a project, all members of the informal settlement are meant to benefit from it.

Thirdly, the National Housing Programme also deals with the issue of housing, and in similar terms. It provides in Chapter 12 for housing assistance in emergency situations. Pursuant to this provision, funds may be released to a municipality where it does not own alternative land for settlement. In this regard, the National Housing Programme provides a framework for the acquisition of land. It dictates that where land is required in emergency housing situations, such land should first be sought from land identified in Spatial Development Frameworks that supplement Integrated Development Plans.

Significantly, the Programme notes that when acquiring such land, preference should be given to state-owned land, with private land being acquired as a last resort. Where private land is indeed to be acquired, a market-related price is established by three independent evaluators. On this basis, the price is negotiated with the seller with a view to concluding a purchase. It is only upon the failure of these parties to reach an agreement that expropriation of the land can be considered in terms of the provisions and procedures of the Expropriation Act 63 of 1975.

The High Court decision

In coming to its decision, the High Court noted that the social and economic context of this matter could not be overlooked. As such, the Court had to be alert to the fact that the occupiers found themselves in the contested land after having been evicted from other areas where they had lived under desperate conditions. A main consideration was thus that these families, unlike many others in Cape Town, held such a low position in society that they were unable to exercise proper agency in choosing where they reside. Hence, it could be said that their occupation of the properties was borne of a desperate need to secure shelter for their families.

The Court then turned to the immediate issue of the presence or not of a constitutional infringement. It was of the view that, given the large number of people involved, the City had not advanced any plausible reasons why the land occupied by the

settlers could not simply be acquired. This was particularly important in the light of the City's own admission that there was nowhere else that the occupiers could be accommodated. On this basis, the Court made the interesting argument that under the circumstances it was only reasonable that the occupiers remained on the land in enforcement of their rights under section 26 of the Constitution.

It is at this point that the Court was confronted with a balancing dilemma. The central question was, How could the occupiers enforce their right to access to housing without encroaching on the right to property of the owners? Closely connected to it was the further question of how this balancing exercise could be accomplished without ordering the parties to perform in a certain manner – and thus without overstepping the boundaries established by the doctrine of the separation of powers. The Court was cautious to avoid such overstepping as occurred in the case of *Nokotyana & Others v Ekurhuleni Municipality*.

In view of this difficulty, the Court had to consider the arguments advanced in the matter at hand. It found that the City's position that they had placed the occupiers on lists for emergency housing, thereby fulfilling their constitutional obligations, was not reasonable as no indication had been given of exactly what that meant at a practical level, except that accommodation might be available to some of the occupiers in two years' time. Moreover, it was unlikely that the City would be, at any point in time, be able to accommodate all the occupiers – thus supporting the view that the City's position was not a reasonable one.

The Court further noted that it was not reasonable for the City to argue that housing the settlers would disrupt its existing housing plans, as it was constitutionally bound to make provision for emergency situations as a matter of priority. The Court stated that the City could acquire land reactively in cases of unlawful occupation, thus steering away from an interruption of existing plans. This 'reactive land acquisition' would be set against the framework detailed in section 25(3) of the Constitution, in which market value is considered as a factor, among others, in acquiring the land. The Court noted, moreover, that there are many funds on which the City could draw for such acquisitions.

Importantly, the Court dismissed the argument that the land was not suitable for human settlement. It proffered a counterargument that the Emergency

Housing Programme did not require permanence. Furthermore, the City was already using land close by for its housing programmes. In a similar vein, the argument that it would be unfeasible to build noise-insulated housing, given that the land is within the airport's noise corridor, was also found to be without merit. The Court noted the existence of millions of people in adjacent townships who reside in the area. It then emphasised that the obligation to provide emergency accommodation remained in place on the City, and accordingly, even if the land were unsuitable for housing, it could still be used on a temporary basis.

The main finding of the Court relevant to this discussion was that the City had acted unreasonably. As a result, the state was in breach of its constitutional duty in terms of section 7(2) of the Constitution as read with sections 25 and 26. This constitutional breach could be cured only by an appropriate remedy.

In attempting to award such a remedy, the Court had to consider the relevant legal principles and judicial precedents. It relied heavily on the approaches adopted in *Fose v Minister of Safety and Security* (1996) and the *Ekurhuleni Municipality* case. It was noted that in terms of Fose there is an obligation on the Court to determine what 'appropriate relief' is on a case-by-case basis. It was further noted that, as per Fose, where such remedies do not exist, the Court has to forge new, more creative, and effective remedies in order to cure the infringement of a constitutional right.

In seeking to craft such a remedy, the Court sought to draw lessons from previous matters. It looked at the *Ekurhuleni Municipality* case, which dealt with the issue of destitute people and the failure of the local authority to address their plight timeously. The Court noted, however, that despite the similarities between the two cases, a number of factors distinguished them from each other.

The first was the number of people involved. The *Ekurhuleni Municipality* case dealt with a small group who were easily capable of being relocated to other housing programmes, but this did not seem feasible in the matter at hand. Secondly, in the *Ekurhuleni* matter, the provision of alternative accommodation was only speculated upon. However, in the current matter, it was clear that the City could not provide alternative accommodation. Finally, in the *Ekurhuleni*

matter, the issue of expropriation was not explored.

Given the fact that three separate properties had been invaded, the Court also applied its mind to the question of whether the relief granted in all three properties should be the same. In this regard, the Court proposed that the relief would be the same except in relation to the prices of the different properties of the applicants.

On the question of whether the relief granted should be different, the Court proposed that variances could be made only in negotiating the price of the different properties of the applicants. One of the properties at issue (that owned by a Mrs Fisher) had been inherited and was to be valued differently from the other two, which had been acquired for commercial use; with regard to the occupiers, though, the relief given had to be the same. As to the question of expropriation as an appropriate relief, the Court observed the arguments in the case of *President of the Republic of South Africa and Another v Modderklip Boerdery* (2005), where it was contended that such a remedy would violate the doctrine of separation of powers.

The Court then decided to fashion its own remedy. It reasoned that in order to give effect to the owners' rights in terms of section 25, as well as to the right of the first respondent in the case in terms of section 26 of the Constitution, the City had to enter into good-faith negotiations to obtain the land. The Fisher land negotiations had to be concluded within a month, while negotiations regarding the other two properties had to be concluded in two months.

With regard to the Fisher land, were the negotiations to be unsuccessful, the City had to report back to the Court and explain why it could not value her property, given that the land was vacant. For the other two properties, the City had to report back on whether expropriation in terms of section 9(3) of the Housing Act had been considered. The Court then ordered the National Minister of Housing and the Provincial Minister of Housing (Western Cape) to provide funds to the City should it exceed its budget. The applications for eviction were accordingly dismissed.

Exploring a case of judicial overreach

In addressing the two competing interests – the right to property of the owners, and the settlers'

right to access to housing – both interests had to be addressed delicately. In so doing, the Court was perhaps grappling with a broader question of judicial overreach. Judicial overreach occurs when courts act beyond their jurisdiction and delve into matters that fall in the purview of the executive or legislature.

In South Africa, there have been instances where the court has arguably overreached in its decisions. A recent case in point is *Economic Freedom Fighters and Others v Speaker of the National Assembly and Another* (2017). This case concerned the Nkandla judgement of the Constitutional Court and the failure of former President, Jacob Zuma, to implement the Public Protector's report after a lengthy period of time had passed since the report was released. The parties involved sought various orders, including: (1) an order declaring that the National Assembly had failed to put in place measures and processes to hold the President accountable for failing to implement the Public Protector's report; (2) an order declaring that the National Assembly had failed to hold the President accountable for the same conduct since the judgement of the Constitutional Court; and (3) an order compelling the National Assembly to establish a committee to assess whether the former President had participated in any impeachable conduct in terms of section 89 of the Constitution.

The majority judgment found that there were no rules governing the section 89 process and that the National Assembly was duty-bound to place proper rules. The Court also held that the National Assembly, in failing to properly evaluate whether the former President had breached section 89(1), had failed to discharge its duty under section 43(3) of the Constitution to scrutinise and oversee the actions of the executive. The Court then directed the National Assembly to initiate a process under section 89(1) in terms of the newly developed rules.

In a dissenting judgement, Chief Justice Mogoeng characterised the majority judgment as a textbook case of judicial overreach – a constitutionally impermissible intrusion by the judiciary in the exclusive domain of parliament. Mogoeng argued that the matter at hand was a complex, controversial one. This case is significant in that it has a judge on record confirming the existence of a practice so often said not to exist.

Bearing these points in mind, one must consider whether the Court found itself overreaching in the

matter under review. The question is of fundamental importance because judicial overreach signifies unaccountable judicial power. The power to govern is inherent in decision-making. If political decisions are made by courts, this usurps the power of government organs – whereas the separation of powers is the cornerstone of South Africa's democracy. As Montesquieu observes in *The Spirit of the Laws*:

[T]here [is no] liberty if the power of judging is not separate from legislative power and executive power. If it were joined to legislative power, the power over the life and liberty of the citizens would be arbitrary, for the judge would be the legislator. If it were joined to executive power, the judge could have the force of an oppressor.

Against this backdrop, one could make a case that the majority judgement in this matter tied the power to judge with legislative power by ordering the City Council to acquire the land via negotiations or expropriate it. As sensible as this argument might be, in my view it can be easily overridden by one which asserts that there was neither judicial activism nor judicial overreach, but rather an enforcement of the law by the Court. It is the duty of judges to evaluate the facts of a matter and furnish appropriate remedies. Importantly, therefore, it is vital to note that a court does not overreach its powers in each and every matter where it finds the conduct of the state to be unlawful or unreasonable.

To my mind, what is instead at issue in this instance is a question of what a just and equitable order is. There is a need to develop jurisprudence on just and equitable orders in cases of breach of rights. This is because, where an order is made, as in this case, that seems far-fetched relative to what the norm is, it is then viewed as an overreach by the courts, rather than as an exceptional remedy to an extraordinary circumstance.

Significance of the decision

This case is significant for a number of reasons. First, it clarifies the extent of the municipality's obligation to provide for housing. It prescribes a clear responsibility to municipalities to be proactive in acquiring housing, particularly in emergency housing situations. Secondly, it extends the existing

understanding of what can be considered a just and equitable order when there is a violation of rights.

Furthermore, it sheds light on the issue of compensation by reinforcing the principle that the use of a plot of land is vital in determining its value. The case also provides insight into the tensions in the various organs of state. In this regard, it continues the debate on the powers of judges and when they could be said to have violated the doctrine of separation of powers.

Finally, the case highlights the key role judges are playing in society by giving priority in their decision-making to the historical and social context of the people of South Africa. This approach sets the stage for deliberation on humanities considerations that could be incorporated in legal decisions.

Tinashe Kondo is a lecturer at the Mercantile Law Department, Faculty of Law, University of the Western Cape. This work was conducted as part of his postdoctoral fellowship with the Centre for Humanities Research, funded by the Andrew Mellon Foundation.

References

Economic Freedom Fighters and Others v Speaker of the National Assembly and Another (CCT76/17) [2017] ZACC 47; 2018 (3) BCLR 259 (CC); 2018 (2) SA 571 (CC) (29 December 2017)

Fisher v Unlawful Occupiers (Erf 150, Philippi) (297/2014) [2014] ZAWCHC 32; 2014 (3) SA 291 (WCC)

Fose v Minister of Safety and Security 1997 (3) SA 786 (CC)

Nokotyana & Others v Ekurhuleni Metropolitan Municipality & Others [2009] ZACC 33; 2010 (4) BCLR 312 (CC)

President of The Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd (Agri SA and Others, Amici Curiae) 2005 (5) SA 3 (CC)

Rugege S (2004) 'Land reform in South Africa: An overview.' *International Journal of Legal Information*, 32