

A compelling judgment



Nic Madge examines the way in which the South African Constitutional Court approaches human rights issues, and summarises *Port Elizabeth Municipality v Various Occupiers* [2004] ZACC 7, 1 October 2004, where the court considered whether the municipality had a constitutional obligation to provide satisfactory alternative accommodation when trying to evict squatters.

Introduction

Can a law report ever be a good read? In 1961, Lord Birkett, a retired English judge, wrote that 'the law reports are ... a great treasury of literature'.¹ But a compelling judicial page turner? A law report that is impossible to put down? The answer must be 'no', unless you are a complete legal anorak.

But there are exceptions. I was going to summarise *Port Elizabeth* in this month's 'Recent developments in housing law', but Sachs J's judgment is far too important to be confined to housing lawyers.

Sachs J started off by reviewing South African property law in a historical, political and social context. The judgment demonstrates how, in the pre-democratic era, law was a tool of oppression used against poor black people but now gives them positive rights. It explores the duty of judges to balance human rights and property rights. It counter poses the obligations of the state and the rights of individuals. Above all, the judgment demonstrates the way in which South African statutes have to be considered against the background of the Bill of Rights in the South African Constitution – an illuminating comparison with the position here, as we await the latest House of Lords' decision on whether, and to what extent, possession claims come within the ambit of article 8 of the European Convention on Human Rights (see *Leeds CC v Price* [2005] EWCA Civ 289; [2005] 3 All ER 573) and the likely rebranding of the House of Lords as a British Supreme Court. *Port Elizabeth* is recognisable as a judgment rooted in the traditions of the British common law, but it shows that the South African Constitutional Court has branched out far beyond the approach of the British courts.

Recent decisions

This judgment is typical of the ground-breaking decisions of the South African Constitutional Court since it was established in 1994. In its first ruling, it declared that the death penalty was inconsistent with the constitution (see *S v Makwanyane and another* 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC)). It returned to the subject last year, stating that the substitution of appropriate alternative punishments for the death penalty had taken far too long (of about 400 people who were estimated to have been on death row at the time of the earlier judgment, the death sentences of 62 people had not been replaced – see *Sibiya and others v Director of Public Prosecutions* [2005] ZACC 5, 7 October 2005). In another early decision, the court declared that President Mandela's Proclamation laying down the rules and regulations for South Africa's first democratic local government elections was invalid.

In recent months the Constitutional Court has considered:

- The validity of the Domestic Violence Act 116 of 1998 which provides for the making of protection orders authorising the issue of arrest warrants against violent partners (see *Omar v Government of the Republic of South Africa* [2005] ZACC 6, 7 October 2005);

- An application for parole by a prisoner suffering from HIV-AIDS (see *Mnguni v Minister of Correctional Services* [2005] ZACC 2, 26 September 2005);

- A complaint that the government had failed to implement legislation aimed at containing pollution, and to prosecute an iron and steel corporation for causing pollution (see *Kock v Minister of Water Affairs and Forestry and others* [2005] ZACC 1, 26 September 2005);

- The validity of regulations

limiting the prices that pharmaceutical companies can charge for drugs (*Minister of Health v New Clicks South Africa (Pty) Ltd* [2005] ZACC 3, 30 September 2005); and

- The failure of the law to permit gay and lesbian marriages. *Lesbian and Gay Equality Project v Minister of Home Affairs* [2005] ZACC 8, 1 December 2005, another erudite and superbly written judgment from Sachs J, starts:

Finding themselves strongly attracted to each other, two people went out regularly and eventually decided to set up home together. After ... more than a decade, they decided that the time had come to get public recognition and registration of their relationship, and formally to embrace the rights and responsibilities they felt should flow from and attach to it. Like many persons in their situation, they wanted to get married. There was one impediment. They are both women.

Port Elizabeth v Various Occupiers

What follows is a summary of *Port Elizabeth*. It is, though, no substitute for the full judgment, which, like all recent decisions of the Constitutional Court, is available online.²

The judgment was given by Sachs J. Some *Legal Action* readers will be familiar with Albie Sachs from his visits to this country. As an advocate, the bulk of his work involved defending people charged under racist statutes and repressive security laws. He was subjected to banning orders and eventually placed in solitary confinement, without trial, for two prolonged spells. In 1966, he went into exile.

After spending 11 years studying and teaching law in England, he worked for a further 11 years in Mozambique as a law professor and legal researcher. In 1988, he was blown up by a bomb placed in his car in Maputo by South African security agents, losing an arm and the sight of

an eye. In 1990, he returned to South Africa as a member of the Constitutional Committee and the National Executive of the African National Congress. After the first democratic election in 1994, he was appointed by President Nelson Mandela to serve on the newly established Constitutional Court.

In *Port Elizabeth* some 68 people, including 23 children, occupied 29 shacks which they had erected on privately owned land. Some 1,600 people, including the owners of the property, petitioned the Port Elizabeth Municipality. As a result, the municipality sought an eviction order in the South Eastern Cape Local Division of the High Court. After various appeals the matter came before the Constitutional Court.

Giving the judgment of the court, Sachs J reviewed the legal position, initially from a historical perspective. In the pre-democratic era:

Once it was determined that the occupiers had no permission to be on the land, they not only faced summary eviction, they were liable for criminal prosecution ... The process was deliberately made as swift as possible: conviction followed by eviction ... For all black people, and for Africans in particular, dispossession was nine-tenths of the law.

However, the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (PIEUOLA) 19 of 1998 not only repealed the earlier legislation, but inverted it. Squatting was decriminalised and the eviction process was made subject to a number of requirements. South African courts now have 'to hold the balance between illegal eviction and unlawful occupation'.

Reapplications under the homelessness legislation

HOUSING

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CONSTITUTIONAL LAW

The Bill of Rights s25 provides:

Property

(1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.

However, s26 states:

Housing

(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.

Sachs J stated that s26(3):

... evinces special constitutional regard for a person's place of abode. It acknowledges that a home is more than just a shelter from the elements. It is a zone of personal intimacy and family security. Often it will be the only relatively secure space of privacy and tranquillity in what (for poor people in particular) is a turbulent and hostile world. Forced removal is a shock for any family, the more so for one that has established itself on a site that has become its familiar habitat.

He pointed out that ss25 and 26 create a broad overlap between land rights and socio-economic rights, emphasising the duty on the state to seek to satisfy both. The courts must maintain a balance between land hunger, homelessness and respect for property rights. The constitution counter poses to the normal ownership rights of possession, use and occupation, a new and equally relevant right not arbitrarily to be deprived of a home.

The judicial function in these circumstances is not to establish

a hierarchical arrangement between the different interests involved, privileging in an abstract and mechanical way the rights of ownership over the right not to be dispossessed of a home, or vice versa. Rather it is to balance out and reconcile the opposed claims in as just a manner as possible taking account of all the interests involved and the specific factors relevant in each particular case.

Turning to the PIEUOLA, he noted that s6 (eviction at instance of organ of state) provides that: 'An organ of state may institute proceedings for the eviction of an unlawful occupier from land which falls within its area of jurisdiction.' In such cases, the 'court may grant such an order if it is just and equitable to do so ... [and] it is in the public interest to grant such an order': s6(1). In deciding whether it is just and equitable to grant an order for eviction:

- (3) ... 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.

Considering this section, Sachs J stated that:

The public interest requires that the legislative framework and general principles which govern the process of housing development should not be undermined and frustrated by the unlawful and arbitrary actions of a relatively small group of people. Thus the well-structured housing policies of a municipality could not be allowed to be endangered by the unlawful intrusion of people at the expense of those inhabitants who may have had equal claims to be housed on the land earmarked for development

by the applicant. Municipalities represent all the people in their area and should not seek to curry favour with or bend to the demands of individuals or communities, whether rich or poor. They have to organise and administer their affairs in accordance with the broader interests of all the inhabitants.

He noted that s6(3) states that the availability of suitable alternative accommodation is something to which regard must be had, not an inflexible requirement. In general terms, however, a court should be reluctant to grant an eviction against relatively settled occupiers unless it is satisfied that a reasonable alternative is available. There is nothing in s6 to suggest that the three specifically identified circumstances are intended to be the only ones to which the court may refer in deciding what is just and equitable. They are peremptory but not exhaustive. It is clear both from the open-ended way in which they are framed, and from the width of decision-making involved in the concept of what is just and equitable, that the court has a very wide mandate and must give due consideration to all circumstances that might be relevant. This is precisely why, even though unlawfulness is established, the eviction process is not automatic and why the courts are called on to exercise a broad judicial discretion on a case by case basis.

Sachs J approved the analysis of s6 by Horn AJ in *Port Elizabeth Municipality v Peoples Dialogue on Land and Shelter* 2000 (2) SA 1074 (SECLD). He pointed out that in matters brought under the PIEUOLA:

... one is dealing with two diametrically opposed fundamental interests. On the one hand there is the traditional real right inherent in ownership reserving exclusive use and protection of property by the landowner. On the other hand there is the genuine despair of people in dire need of adequate accommodation.

He held that the statute also implies that a court, when deciding on a matter of this nature, would be obliged to break away from a purely legalistic approach and have regard to extraneous factors such as morality, fairness, social values and implications and circumstances which would necessitate bringing out an equitably principled judgment. Sachs J stated that:

The judiciary cannot of itself correct all the systemic unfairness to be found in ... society. Yet it can at least soften and minimise the degree of injustice and inequity which the eviction of the weaker parties in conditions of inequality of necessity entails.

He noted that there had been no effective mediation in this case. Given the special nature of the competing interests involved in eviction proceedings launched under s6, '... absent special circumstances it would not ordinarily be just and equitable to order eviction if proper discussions, and where appropriate, mediation, have not been attempted'.

He concluded that: 'In the light of the lengthy period during which the occupiers have lived on the land in question, the fact that there is no evidence that either the Municipality or the owners of the land need to evict the occupiers in order to put the land to some other productive use, the absence of any significant attempts by the Municipality to listen to and consider the problems of this particular group of occupiers, and the fact that this is a relatively small group of people who appear to be genuinely homeless and in need, I am not persuaded that it is just and equitable to order the eviction of the occupiers.'

■ Nic Madge is a circuit judge.

- 1 Foreword to *The law as literature: An anthology of great writing in and about the law*, Louis Blom-Cooper, 1961.
- 2 At: www.saflii.org.