CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 19/11
[2011] ZACC 34

In the matter between:

NTHABISENG PHEKO — First Applicant

OCCUPIERS OF BAPSFONTEIN INFORMAL SETTLEMENT — Second to 777th Applicants

and

EKURHULENI METROPOLITAN MUNICIPALITY — Respondent

and

SOCIO-ECONOMIC RIGHTS INSTITUTE OF SOUTH AFRICA — Amicus Curiae

Heard on : 15 September 2011

Decided on : 6 December 2011

JUDGMENT

NKABINDE J:

Introduction

[1] The state recognises the distress occasioned by natural disasters that pose a threat to life, health and safety or result in forced removals from disaster-stricken areas. To

address these emergency situations, it has enacted the Disaster Management Act[1] (DMA) and introduced remedial measures through certain programmes to provide temporary assistance.[2]

[2] The applicants seek leave to appeal directly to this Court. They challenge the correctness of the decision of the North Gauteng High Court, Pretoria[3] (High Court) dismissing their application for certain relief and holding that the forcible relocation and demolition of their homes, consequent upon a decision to declare an informal settlement a "disaster area", was lawful.

[3] Neither the decision to declare the informal settlement a "disaster area" nor the constitutionality of the provisions of the DMA is in question. Primarily, this application for leave to appeal turns on the lawfulness of the removal of the applicants and the demolition of their homes. More pointedly, it requires us to determine whether the circumstances of this case warranted forcible removal and demolition without an order of court.

[4] The applicants, the former residents of the Bapsfontein Informal Settlement (Bapsfontein), are currently with no secure tenure and only temporary housing. The

[1] 57 of 2002.

[2] See the Housing Act 107 of 1997 (Housing Act) read with The National Housing Code, Part 3: Emergency Housing Programme, Part A: Housing Assistance in Emergency Circumstances (Housing Policy).

[3] *Nthabiseng Pheko and 777 Others v Ekurhuleni Metropolitan Municipality*, Case No 5394/11, North Gauteng High Court, Pretoria, 9 June 2011, as yet unreported (judgment of the High Court).

respondent is the Ekurhuleni Metropolitan Municipality (Municipality) in whose municipal area Bapsfontein is situated. The Municipality authorised the relocation of the residents of Bapsfontein including the applicants and the demolition of their homes. The Socio-Economic Rights Institute of South Africa[4] (SERI), whose written submissions have been most helpful and for which we are grateful, was admitted as an amicus curiae.

Factual background

[5] Bapsfontein covers 25 hectares of privately owned land. In January 2004 the Municipality received information regarding the development of sinkholes in the area. The Municipality then commissioned civil engineers[5] to conduct an investigation. Their report (J & W's first report) was sent to the Municipality in June 2005. This report identified the development of sinkholes in the vicinity of Bapsfontein. It recommended that a further study of the area be conducted.

[6] Further investigation by the same consultants was commissioned and their report (J & W's second report), dated September 2005, was submitted to the Municipality in November 2005. This report confirmed the prior findings following the investigation in 2004. It identified unstable dolomite formation as the cause of sinkholes "to a surfaced

[4] SERI is a law clinic registered with the Law Society of the Northern Provinces and is an "approved Law Centre" by the Johannesburg Bar Council. SERI deals with cases concerning the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE), the upgrading of informal settlements and provision of basic services.

[5] Jones & Wagener (J & W) were appointed as specialist consultants to investigate. A report was then compiled by Jasper Müller Associates.

road near Bapsfontein". The Municipality was advised that the depression with its perimeter sinkholes is about 100m from the primary school in Bapsfontein. In particular, observations of occurrence of various sporadic sinkholes, depressions and cracks within the settlement were made. It found that the area around Bapsfontein is unstable and recommended that the area "should be avoided for mass housing".

[7] Following J & W's second report, the Municipality relocated approximately 150 families from Bapsfontein during 2005. However, new occupiers subsequently erected shelters in the area. In 2009, consulting geologists, VGI Consult Projects (Pty) Ltd, were commissioned to conduct a further study on the area. Their report (VGI report), delivered to the Municipality on 8 December 2009, makes findings similar to those made earlier. It recommended that the residents "be evacuated and relocated to an area at least 3 km to the north-east of [Bapsfontein]".[6]

[8] In July 2010 the Municipality's Roads and Transport Portfolio Committee recommended that the Bapsfontein Community be relocated. This recommendation was adopted by the Mayoral committee on 18 August 2010. On 10 December 2010, the Municipality issued a notice[7] declaring Bapsfontein "a local state of disaster" due to the dolomite instability of the area in terms of section 55(1) of the DMA.[8]

[6] According to the VGI report, the underlying geology of suitable land 3 km to the north-east of Bapsfontein, represents no risk for the formation of sinkholes. It is reported that the land is known to have thick deposits of shale and quartzite of the Timebal Hill Formation of the Pretoria Group of the Transvaal Supergroup.

[7] The notice read in relevant part:

[9] It emerged from a letter dated 13 January 2011 addressed to the Municipality on behalf of the applicants that the latter were "faced with a forced eviction" on that date. The letter reveals also that three meetings were convened by the officials of the Municipality on 14, 16 and 23 December 2010 at which the applicants were informed about the impending relocation scheduled to take place on 27 December 2010. The letter advised the Municipality that the relocation "amounts to an eviction" and that "[e]viction without a court order is unlawful." The Municipality was asked to produce an eviction order or to promise that it would not continue with the eviction. The applicants threatened to apply to court on an urgent basis for an interdict if their demands were not met by noon on the same day.[9]

> "Notice is hereby served in terms of the Disaster Management Act that the Bapsfontein Informal Settlement of 25 hectares, bordered by the R25 Provincial Road to the East and approximately 300 metres to the North of the R25 Provincial Road within the Ekurhuleni Metropolitan Municipal Area has been declared a Local Disaster Area in terms of section 55 of the Disaster Management Act due to dolomite instability.
>
> Further be advised that persons residing in the above mentioned area will be moved to a suitable alternative area as the current area in Bapsfontein they occupy is highly unstable and not safe for human settlement."

This notice was published in part in the *Provincial Gazette Extraordinary* No 220 Local Authority Notice 1643, 10 December 2010.

[8] Section 55(1) provides:

> "(1) In the event of a local disaster the council of a municipality having primary responsibility for the co-ordination and management of the disaster may, by notice in the provincial gazette, declare a local state of disaster if—
>
> (a) existing legislation and contingency arrangements do not adequately provide for that municipality to deal effectively with the disaster; or
>
> (b) other special circumstances warrant the declaration of a local state of disaster".

[9] The letter by Gilfillan Du Plessis Incorporated reads:

> "1. We refer to the above matter and confirm that we act for and on instruction of residents of Bapsfontein informal settlement.
>
> 2. Our clients inform us that on the 14th of December 2010, one councilor Mfukeni called for a community meeting at which he told them about their pending relocation.

[10] On 17 January 2011 the Municipality advised that: (a) the relocation of the applicants to N12 Highway Park[10] was temporary; (b) it had consulted meaningfully with the applicants; (c) the Municipality drafted letters of consent and provided each resident with the letter to consent to temporary relocation; (d) buses had been provided for school children; and (e) basic services were already in place where the applicants were to be relocated. The Municipality denied that the applicants had been forcibly relocated and maintained that no eviction order was required.

[11] On 17 February 2011 a directive in terms of section 55(2)(d) of the DMA was issued. It advised the applicants that Bapsfontein had been declared a local state of

---

3. On the 16th of December 2010, one Vivian Chauke also called for a meeting at which she told them that they were to be relocated on the 27th of December 2010. The same Vivian Chauke addressed them again on the 23 December 2010 and indicated that they will be moved to Bapsfontein and that such relocation was non-negotiable.

4. Our clients indicated to Vivian Chauke that they would consider relocation to Bapsfontein.

5. To their surprise they were recently informed that they were to be relocated to Cloverdene.

6. Cloverdene is too far from where our clients work, attend school, and access basic services. Our clients therefore object to being relocated to Cloverdene.

7. As you will be aware, on the 27th of December 2010, our clients staged a protest to register their displeasure with the intended relocation.

8 Relocating our clients without genuine and meaningful consultation with them amounts to an eviction. Eviction without a court order is unlawful.

9. It is our clients' instruction that they do not object to being relocated as such but insist that such relocation be preceded by genuine and meaningful consultation between the municipality and the residents.

10. This morning we were informed by our clients that they are faced with a forced eviction. We demand that you immediately either fax us a copy of the eviction order or give us an undertaking that you will not continue with the eviction.

11. If our demand has not been met by 12h00, 13 January 2011 we will apply to the High Court on a very urgent basis for an interdict." (Emphasis removed.)

[10] The area, according to the Municipality, is "bounded by Putfontein Road on the western boundary, the N12 highway on the southern boundary, Chief A Luthuli Park extension 2 and 3 on the northern boundary and Benoni Road on the eastern boundary."

disaster due to dolomite instability, and that all residents in the area be evacuated to temporary shelter for the preservation of life. The directive also anticipated resistance to the relocation by warning that "[p]ersons refusing to be relocated temporarily will be relocated by the authority of this directive in terms of section 55 of the [DMA]."[11] Because of the resistance to the relocation, the Municipality enlisted the services of the "Red-Ants"[12] to demolish the homes of the applicants on 5 March 2011. On the same day the applicants applied to the High Court for urgent interdictory relief.

In the High Court

[12] The applicants sought urgent relief restraining the Municipality from demolishing their homes, thus rendering them homeless, and from unlawfully evicting and intimidating them to vacate Bapsfontein. They asked the Court to order the Municipality to provide them with alternative accommodation and to pay the costs of the application.[13]

---

[11] The directive issued by the office of the City Manager reads in relevant part:

> "This serves to advise you that in terms of section 55(2) of the Disaster Management Act, Act 57 of 2002, and the City Manager of Ekurhuleni Metropolitan Municipality is hereby issuing the following directive in terms of the above section:
>
> That the Bapsfontein Informal Settlement . . . has been declared a local state of disaster in terms of section 55 of the Disaster Management Act due to dolomite instability.
>
> According to section 55(2)(d), Council is issuing a directive that all persons residing/squatting/renting or leasing in the abovementioned area be evacuated to temporary shelter due to the declared disaster and for the preservation of life.
>
> Persons refusing to be relocated temporarily will be relocated by the authority of this directive in terms of section 55 of the Disaster Management Act 57 of 2002."

[12] The "Red-Ants" is a colloquial term for a private security company contracted by the South African government to help with evictions and forced removals. They wear red uniforms, hence their name "Red-Ants".

[13] The relief sought read:

> "1. That the Respondent be restrained and interdicted from demolishing and/or further demolishing accommodation and shelters of the Applicants;

[13] The applicants contended that they were being unlawfully and forcibly evicted from their homes and that their homes were being demolished. The forcible eviction and demolition of their homes without an order of court, they argued, not only violated their constitutional rights in relation to housing[14] but also their right to have their dignity respected and protected.[15] The applicants also contended that the conduct of the Municipality was not in line with PIE. Also, they argued that they were intimidated by the "Red-Ants", hence their urgent interdictory application.

[14] The Municipality disputed these contentions arguing that it "evacuated" the residents pursuant to the area being declared a local state of disaster and thus posing a threat to human life. The relocation, the Municipality argued, was authorised in terms of section 55 of the DMA for the preservation of life.

[15] The High Court, per Makgoba J, dismissed the application with costs. It held that the application lacked urgency and that PIE was not applicable. In justifying the lawfulness of the forced removal the Court likened the situation in Bapsfontein to a

---

2. That the Respondent be restrained and interdicted from intimidating the Applicants to vacate the property;

3. That the Respondent be restrained and interdicted from unlawfully evicting the Applicants and/or those Applicants;

4. That the Respondent be ordered to provide alternative accommodation to Applicants and/or those Applicants whose accommodation and shelters had been demolished;

5. That the Respondent be ordered to pay the costs of this application;

6. That further and/or alternative relief."

[14] Section 26 of the Constitution is set out in [34] below.

[15] Section 10 of the Constitution provides: "Everyone has inherent dignity and the right to have their dignity respected and protected."

situation of a person burning in a fire and refusing to be rescued. The Court held that it had "a duty to protect their life" and could not "let them stay in a danger zone where they can be swallowed by the earth as it is."[16] Having been refused leave to appeal, the applicants applied for leave to appeal directly to this Court.

In this Court

[16] The applicants ask that we: (a) grant them leave to appeal directly to this Court; (b) condone the late filing of the High Court judgment and their written submissions; (c) disregard the evidentiary material annexed to the opposing papers and make a special adverse cost order against the Municipality; and (d) order that the costs of this application be costs in the appeal. Additionally, they seek the following order:

> "5. Setting aside the order of the High Court granted on 11 March 2011 under case number 5394/2011 and replacing it with the following order:
>
> 5.1 That the Respondent be interdicted from evicting the Applicants and their dependants from the Bapsfontein Informal Settlement;
>
> 5.2 That the Respondent be interdicted from demolishing the Applicants' shelters and from destroying the Applicants' property;
>
> 5.3 Declaring that the eviction of those Applicants and their dependants who were in fact evicted from the Bapsfontein Informal Settlement was unlawful;
>
> 5.4 Ordering the Respondent to restore the evicted Applicants' possession of the land that constituted the Bapsfontein Informal Settlement and to restore all the demolished structures to the condition they were in prior to demolition;

[16] Above n 3 at 5 lines 19-21.

5.5 Alternatively, ordering the Respondent to relocate the Applicants and their dependants to an area in the near vicinity of the Bapsfontein Informal Settlement area and to make alternative accommodation available in the Bapsfontein area;

5.6 Further alternatively, ordering the Respondent to implement a lawful relocation process after having engaged the Applicants meaningfully and after having obtained the informed consent of all the Applicants;

6. That [the] Respondent pay the costs of the application."

[17] In its directions, this Court called for submissions from the parties to address the circumstances in which a person could be evicted from his or her home without an order of court, having been made after considering all the circumstances, as required by section 26(3) of the Constitution. The Court also directed the parties to state whether the required circumstances exist in this case.[17]

[18] The main thrust of the applicants' complaint is that in invoking the DMA, the High Court inappropriately authorised the unlawful eviction and demolition of their homes, thereby violating their rights under sections 26 and 10 of the Constitution in circumstances not warranting evacuation. SERI argues that the DMA was not properly engaged and that the situation ought to have been dealt with in terms of PIE. It also contributed a different perspective regarding the alleged unlawfulness of the removal.[18]

[17] Paragraph 5 of the directions, dated 2 August 2011, further asked the parties: "What is the relationship between the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 and the Disaster Management Act 57 of 2002?"

[18] SERI contends that the removal of the applicants without an order of court or their informed consent was unlawful. Even if the applicants had consented, SERI argues, it is doubtful that a constitutional right is capable of being waived. It argues further that the Municipality failed to discharge the onus regarding such waiver. Relying on *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others*

[19] The Municipality argues that leave to appeal directly to this Court should be refused because the Supreme Court of Appeal should have been petitioned for leave to appeal due to the new facts raised in the replying affidavit in the High Court. It argues further that although constitutional issues are broached, the issues are not important because this Court has already pronounced on them. The Municipality contends that the relief sought in paras 5.1 to 5.3 in [16] above has largely become moot as the applicants and their dependants have already been "evacuated" from Bapsfontein. It is argued that the restorative relief sought in para 5.4 and the alternative prayers in paras 5.5 and 5.6 in [16] above, are not competent.

[20] On the merits, the Municipality remains steadfast that it acted lawfully in "evacuating" the applicants from Bapsfontein under section 55 of the DMA. It contends that evacuation as a result of a "disaster" or "situation of emergency" is not an eviction within the contemplation of section 26(3) but a legitimate response to a crisis to save life or property. The "imminent" disaster, it is argued, occurring "surprisingly" or "unexpectedly", could not practically be dealt with by way of a court order.

[21] The Municipality relies on *City of Johannesburg v Rand Properties (Pty) Ltd and Others* (*Rand Properties*)[19] to justify the eviction of the occupiers without having

---

[1998] ZACC 17; 1998 (12) BCLR 1458 (CC); 1999 (1) SA 374 (CC) at para 56, SERI argues also that the principles in respect of the rule of law protected in section 1(c) of the Constitution are central to exploring the questions raised.

[19] 2007 (6) SA 417 (SCA). In this case the appellant relied on section 12(4)(b) of the National Building Regulations and Building Standards Act 103 of 1977 (NBRA). It sought the eviction of the respondents, who resisted evictions

complied with the relevant factors contemplated in section 26(3) of the Constitution. It sought to demonstrate that the removal is an administrative act requiring no order of court. The Municipality argues that section 26(3) has two parts: the first dealing with evictions that are subject to control by means of a court order and the second part dealing with legislation which permits an eviction but requires an eviction not to be arbitrary. It is argued that in interpreting section 26(3), one part cannot be subordinated to the other and that the section therefore permits legislation to authorise an eviction without a court order.

[22] It is contended that the relocation was a temporary arrangement until further relocation "to either state subsidised houses . . . or to some other land". The demolition, it is contended, enabled the Municipality to carry out the directive and prevent the applicants from returning to Bapsfontein. Additionally, the Municipality argues that PIE does not apply because none of the applicants contend that their occupation of Bapsfontein was unlawful.

Issues

[23] There are two preliminary issues. These are whether condonation should be granted and whether we should disregard the evidential material forming part of the

---

on the ground, among other things, that the appellant had failed to follow the procedures prescribed by PIE and that the eviction would not be just and equitable. The Supreme Court of Appeal held that the occupiers were in an emergency situation and that fire and health hazards existed in the occupied buildings. It held further that the provisions under PIE did not apply in the context of that case (i.e. to the evacuation under the provisions of the NBRA).

annexed expert reports as being irregular. Additionally, two issues concerning whether leave to appeal should be granted relate to mootness and whether the other courts should have been bypassed.

[24] The key issue concerns whether the removal that occurred in this case was an evacuation under section 55 of the DMA as contended for by the Municipality. Related to this are questions of the proper interpretation of the DMA and appropriate relief.

Condonation applications

[25] The application for leave to appeal was lodged in this Court on 15 March 2011, however, the judgment of the High Court, handed down on Friday 11 March 2011, was only lodged in this Court on Wednesday 20 July 2011 after a request was made by the Registrar of this Court to secure a copy. Accompanying the judgment was an application for condonation for its late filing.[20] The applicants explained the steps they took to obtain the transcribed judgment. It is evident that the blame for the delayed filing of the judgment cannot be placed at their door.

[26] The applicants applied for condonation for the late filing of their written submissions. These submissions were late by only one day. According to the applicants, this was occasioned by immense pressure faced by their counsel due to deadlines set in

[20] Rule 19(3)(a) of the Rules of this Court requires that an application for leave to appeal to this Court shall contain "the decision against which the appeal is brought and the grounds upon which such decision is disputed".

another matter in this Court on the same day. The one-day delay is negligible. In any event, the Municipality has not been prejudiced by the lateness and does not oppose the applications. Condonation sought should therefore be granted.

[27] Regarding the alleged irregular step, it may well be that the Municipality could have selected and annexed only parts of the reports that were indeed relevant rather than annexing the entire reports. However, this does not warrant a disregard of the expert evidence contained in the reports filed.

Should leave to appeal be granted?

[28] It is well established that leave to appeal will be granted if a constitutional issue is raised and if it is in the interest of justice.[21] We would be hard-pressed not to find that this matter raises constitutional issues. The Constitution provides protection against arbitrary evictions which, by their own nature, implicate the right to have access to adequate housing in section 26.[22] The applicants' right under section 10, the right to have their dignity respected and protected, is also implicated. Moreover, we are required to interpret the DMA in light of the Constitution. The Municipality does not contest that the matter raises constitutional issues. However, it contends that it is not in the interests of

[21] Section 167(3)(b) of the Constitution provides that the Court "may decide only constitutional matters, and issues connected with decisions on constitutional matters". Regarding the requirement of the interests of justice see *Fraser v Naude and Others* [1998] ZACC 13; 1998 (11) BCLR 1357 (CC); 1999 (1) SA 1 (CC) at para 7 and *Minister of Public Works and Others v Kyalami Ridge Environmental Association and Others* [2001] ZACC 19; 2001 (7) BCLR 652 (CC); 2001 (3) SA 1151 (CC) at para 28.

[22] Section 26 is set out in full at [34] below. See also *Machele and Others v Mailula and Others* [2009] ZACC 7; 2009 (8) BCLR 767 (CC); 2010 (2) SA 257 (CC) at para 26.

justice to grant leave directly to this Court because the applicants should first seek relief in the full court of the High Court or the Supreme Court of Appeal before approaching this Court. Alternatively, it is argued that the relief sought has become moot.

[29] Generally, it is preferable for litigants seeking to appeal a decision of the High Court to approach the Supreme Court of Appeal before coming to this Court. However, the fact that the applicants wish to appeal directly to this Court is in itself not decisive. This factor is simply one of the considerations relevant to the enquiry in deciding whether it is in the interests of justice for leave to appeal to be granted.[23] The applicants were forcibly relocated from Bapsfontein to a transit area and their dwellings were demolished without an order of court. A final determination of the issues will avoid the legal uncertainty created by the decision of the High Court.

[30] There can be no doubt that petitioning the Supreme Court of Appeal for leave to appeal would have taken longer and rendered the litigation more costly before the matter reaches finality, while the rule of law remains imperilled. The matter raises issues of public importance regarding forcible removal of a community from an informal settlement. Additionally, there are reasonable prospects of success.

[23] The interests of justice must be determined in the light of the facts of each case. These include the prospects of success, albeit not determinative, and the importance of the issues raised as well as the public interest.

[31] Important to the interests of justice is the question of mootness. However, it too is but one of the factors that must be taken into consideration in the overall balancing process.[24] In *Independent Electoral Commission v Langeberg Municipality*,[25] this Court, per Yacoob J and Madlanga AJ, held that:

> "[T]he Court has discretion to decide issues on appeal even if they no longer present existing or live controversies. That discretion must be exercised according to what the interests of justice require. A prerequisite for the exercise of the discretion is that any order which the Court may make will have some practical effect either on the parties or on others. Other factors that may be relevant will include the nature and extent of the practical effect that any possible order might have, the importance of the issue, its complexity and the fullness or otherwise of the argument advanced."[26]

Indeed, if the applicants' rights were not infringed and are no longer threatened,[27] or the applicants have no interest in the adjudication of the dispute,[28] it will not be in the interests of justice to grant leave to appeal directly to this Court.

---

[24] See *Van Wyk v Unitas Hospital and Another (Open Democratic Advice Centre as Amicus Curiae)* [2007] ZACC 24; 2008 (4) BCLR 442 (CC); 2008 (2) SA 472 (CC) at para 30.

[25] [2001] ZACC 23; 2001 (9) BCLR 883 (CC); 2001 (3) SA 925 (CC).

[26] Id at para 11. See also *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* [1999] ZACC 17; 2000 (1) BCLR 39 (CC); 2000 (2) SA 1 (CC) at n 18 where this Court stated that "[a] case is moot and therefore not justiciable if it no longer presents an existing or live controversy which should exist if the Court is to avoid giving advisory opinions on abstract propositions of law."

[27] Section 38 of the Constitution provides in relevant part:

> "Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights."

[28] See *Abahlali Basemjondolo Movement SA and Another v Premier of the Province of KwaZulu-Natal and Others* [2009] ZACC 31; 2010 (2) BCLR 99 (CC) (*Abahlali Basemjondolo*) at para 13.

[32] It is beyond question that the interdictory relief sought will be of no consequence as the applicants have already been removed from Bapsfontein.[29] Although the removal has taken place, this case still presents a live controversy regarding the lawfulness of the eviction. Generally, unlawful conduct is inimical to the rule of law[30] and to the development of a society based on dignity, equality and freedom.[31] Needless to say, the applicants have an interest in the adjudication of the constitutional issue at stake. The matter cannot therefore be said to be moot. It is also live because if we find that the removal of the applicants was unlawful, it would be necessary to consider their claim for restitutionary relief.

[33] For these reasons, it is in the interests of justice that leave to appeal directly to this Court should be granted. Next for determination is whether the DMA authorises eviction and demolition of homes without an order of court.

Does the DMA authorise eviction and demolition without a court order?

[34] The determination of this issue requires us to interpret section 55(2)(d) of the DMA consistently with section 26(3) of the Constitution. However, it is necessary to

[29] This Court in *JT Publishing (Pty) Ltd and Another v Minister of Safety and Security and Others* [1996] ZACC 23; 1996 (12) BCLR 1599; 1997 (3) SA 514 (CC) at para 15 remarked:

> "A corollary is the judicial policy governing the discretion thus vested in the Courts, a well-established and uniformly observed policy which directs them not to exercise it in favour of deciding points that are merely abstract, academic or hypothetical ones." (Footnote omitted.)

[30] Section 1(c) of the Constitution provides: "The Republic of South Africa is one sovereign, democratic state founded on the following values . . . [s]upremacy of the Constitution and the rule of law."

[31] See *Abahlali Basemjondolo* above n 28 at para 18.

deal first with the Municipality's understanding of section 26 of the Constitution. This section provides:

> "(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."

Section 26(3) is couched in prohibitory terms. Notionally, the right entrenched in it can only be limited in terms of the limitation clause.[32]

[35] The Municipality's understanding of section 26(3) as set out above[33] is incorrect. The Municipality's proposition simply turns section 26(3) on its head. Section 26(3) must be read as a whole. It does not permit legislation authorising eviction without a court order.

---

[32] Section 36 of the Constitution provides:

> "(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—
>
> (a) the nature of the right;
>
> (b) the importance of the purpose of the limitation;
>
> (c) the nature and extent of the limitation;
>
> (d) the relation between the limitation and its purpose; and
>
> (e) less restrictive means to achieve the purpose.
>
> (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights."

[33] See [21] above.

[36] Section 55(2)(d) of the DMA provides that evacuation is limited to cases where temporary action is necessary for the preservation of life. It provides:

> "If a local state of disaster has been declared in terms of subsection (1), the municipal council concerned may, subject to subsection (3), make by-laws or issue directions, or authorise the issue of directions, concerning—
>
> . . .
>
> (d) the *evacuation to temporary shelters* of all or part of the population from the disaster-stricken or threatened area if such action is necessary *for the preservation of life*". (Emphasis added.)

[37] This section must be interpreted narrowly. A wide construction may adversely affect rights in section 26. The language used in section 55(2)(d) is critical. The text must be interpreted in the context of the DMA as a whole, taking into consideration whether its preamble[34] and other relevant provisions[35] support the envisaged construction.[36]

[34] The preamble of the DMA reads:

> "To provide for—
>
> - an integrated and co-ordinated disaster management policy that focuses on preventing or reducing the risk of disasters, mitigating the severity of disasters, emergency preparedness, rapid and effective response to disasters and post-disaster recovery;
> - the establishment of national, provincial and municipal disaster management centres;
> - disaster management volunteers; and
> - matters incidental thereto."

[35] See for example section 1 of the DMA in respect of the meaning of "disaster" set out in n 39 below, section 2(1) set out in n 38 below and section 55(1) set out in n 8 above.

[36] See *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* [2004] ZACC 15; 2004 (7) BCLR 687 (CC); 2004 (4) SA 490 (CC) at paras 89 - 91.

[38] Properly construed and read in conjunction with other provisions, including sections 55(1)[37] and 2(1)[38] of the DMA, section 55(2)(d) does not authorise eviction or demolition without an order of court. On its wording, the DMA deals with "evacuation". The word "evacuate" is generally used to describe what is done in a situation where people's lives are at risk as a result of impending "disaster".[39] "Evacuate" means to "remove from a place of danger to a safer place."[40] The people concerned therefore require immediate removal to a safe temporary shelter, away from the disaster area, in order to preserve their lives.

[39] Section 55(2)(d) authorises the evacuation to temporary shelters for the preservation of life. This means that the DMA ordinarily applies only to temporary

---

[37] Above n 8.

[38] Section 2(1) of the DMA provides:

> "This Act does not apply to an occurrence falling within the definition of "disaster" in section 1—
>
> (a) if, and from the date on which, a state of emergency is declared to deal with that occurrence in terms of the State of Emergency Act, 1997 (Act No. 64 of 1997); or
>
> (b) to the extent that the occurrence can be dealt with effectively in terms of other national legislation—
>
> (i) aimed at reducing the risk, and addressing the consequences, of occurrences of that nature; and
>
> (ii) identified by the Minister by notice in the *Gazette*."

[39] "Disaster" is defined in section 1 of the DMA to mean "a progressive or sudden, widespread or localised, natural or human-caused occurrence which—

> (a) causes or threatens to cause—
>
> (i) death, injury or disease;
>
> (ii) damage to property, infrastructure or the environment; or
>
> (iii) disruption of the life of a community; and
>
> (b) is of a magnitude that exceeds the ability of those affected by the disaster to cope with its effects using only their own resources".

[40] See *Concise Oxford English Dictionary*, 11th edition (Oxford University Press, Oxford, 2009) 493.

removal from a disaster stricken area to a temporary shelter. It implies that those evacuated may return to their homes, if possible. This is not the case here. Evacuation is not the equivalent of eviction, much less of a demolition. On the Municipality's own admission, no purpose would have been served by removing the applicants without demolishing their homes because they would otherwise have returned to Bapsfontein. Evidently, this is not what section 55(2)(d) sanctions.

[40] An evacuation does not entail the demolition of peoples' homes or an indefinite removal. The DMA does not seek to achieve this. If the purpose of the DMA were to authorise demolition and eviction without an order of court, it would have said so. It does not. The forcible removal of the applicants amounts to an eviction, an indefinite removal from Bapsfontein. The deprivation is, in the circumstances, inimical to the right in section 26(3).

[41] It is true that the VGI report recommended that the residents of Bapsfontein be evacuated and relocated. The Municipality suggested that an unexpected or surprising disaster was imminent or simmering thus suggesting exigency. However, the facts do not suggest that there was any need for urgent evacuation at all. Conversely, the history of this matter shows that the Municipality never regarded the relocation of the applicants to be urgent to warrant drastic measures of unauthorised removal and demolition of shelters. This is fortified by the fact that Bapsfontein was identified as a hazardous area as early as 1986; its first sinkhole was identified in 2004; the first commissioned report was

delivered in June 2005 and the second report in September 2005; no action was taken in response to these reports for four years after they were delivered, until 2009, when another report was commissioned and delivered; and only in 2010 did the Municipality finally start taking action to relocate the residents from Bapsfontein.

[42] The Municipality's powers following upon the declaration of a local state of disaster must be exercised only to the extent that it is strictly necessary for the purposes set out in section 55(3).[41] This means that the powers concerned may not be used for purposes other than evacuation.

[43] The High Court failed to consider the relevant circumstances. These include whether: (a) the disaster was sudden to warrant the hasty relocation; (b) Bapsfontein could be rehabilitated; (c) the Municipality had established disaster management and relocation plans and strategies as well as their implementation; (d) there was loss of life or an imminent threat to life; (e) alternative land has been made available or could reasonably be made available; and (f) the applicants are long term occupiers in

[41] Section 55(3) of the DMA provides:

> "The powers referred to in subsection (2) may be exercised only to the extent that this is necessary for the purpose of—
>
> (a) assisting and protecting the public;
>
> (b) providing relief to the public;
>
> (c) protecting property;
>
> (d) preventing or combating disruption; or
>
> (e) dealing with the destructive and other effects of the disaster."

Bapsfontein. The Court instead approached the matter on the assumption that the DMA was applicable and urgent removal was necessary. In the absence of evidence, the Court compared the situation of the applicants with that of people faced with sudden emergency but failed to assess whether the circumstances warranted evacuation under the DMA.

[44] It is noteworthy that there has been no loss of life as a result of the formation of sinkholes since 2004 when J & W's first report was completed, despite people having lived at Bapsfontein for decades. J & W's second report illustrates that no loss of life had been reported as a result of sinkholes since the early 1970s. There can be no doubt that the rushed destruction of the applicants' homes by the "Red-Ants" at the instance of the Municipality not only infringed their right under section 26(3) but also their right under section 10.[42]

[45] I conclude therefore that in engaging the DMA to evict the applicants and demolish their homes without an order of court, the Municipality acted outside the authority conferred by the DMA and contrary to section 26(3) of the Constitution.

[46] In the view I take of the matter, it is not necessary to decide the further questions raised including whether the forced removal was consensual and whether PIE applies.

[42] Section 10 is set out above n 15. In this regard see *Tswelopele Non-Profit Organisation and Others v City of Tshwane Metropolitan Municipality and Others* 2007 (6) SA 511 (SCA) at paras 15-6.

[47] It follows that the order of the High Court should be set aside and replaced with an appropriate remedy, a matter I now turn to.

Appropriate remedy

[48] In terms of section 172(1)(b) of the Constitution, a court "deciding a constitutional matter within its power . . . may make any order that is just and equitable". In *Fose v Minister of Safety and Security*[43] this Court held that—

> "[a]ppropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case the relief may be a declaration of rights, an interdict, a *mandamus* or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the courts may even have to fashion new remedies to secure the protection and enforcement of these all-important rights."[44] (Footnote omitted.)

[49] The removal of the applicants was unlawful. The Municipality has an obligation[45] to provide them with suitable temporary accommodation.

---

[43] [1997] ZACC 6; 1997 (7) BCLR 851 (CC); 1997 (3) SA 786 (CC).

[44] Id at para 19.

[45] Section 8(1) of the Constitution provides: "The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state."

In terms of section 152(1) read with section 153(a) of the Constitution, a municipality must provide services in a sustainable manner to the communities within its area of jurisdiction including the applicants. Section 153(a) enjoins a municipality to structure and manage its administration, budgeting and planning processes to give priority to the basic needs of the community, and to promote the social and economic development of the community.

> In addition, the Housing Act and the Housing Policy are legislative and policy instruments enacted to give effect to the housing obligations of the various organs of state, including municipalities. In particular, section 9(1) of the Housing Act provides, in relevant part, that a municipality—"must . . . take all reasonable and necessary steps within its framework of national and provincial housing legislation and policy to—
>
> (a) ensure that—

[50] The Municipality acknowledges that there is land in the vicinity of Bapsfontein. Despite the recommendation by the VGI report that the applicants be relocated to that land which was also identified by the applicants, the Municipality maintains that the land belongs to another state department which does not intend to relinquish. This does not absolve the Municipality from its obligations including its duty to identify and designate land for housing development for the applicants. The applicants are entitled to effective relief. It is, however, uncertain how long it will take for the Municipality to identify land for purposes of affording the applicants access to adequate housing. Supervisory relief is thus necessary in this case to enable the Municipality to report to this Court about, amongst other things, whether land has been identified and designated to develop housing for the applicants.

[51] The relief proposed by the applicants and partly consented to by the Municipality during oral argument is, in the circumstances and subject to necessary modification, just and equitable.

(i) the inhabitants of its area of jurisdiction have access to adequate housing on a progressive basis;

. . . .

(b) set housing delivery goals in respect of its area of jurisdiction;

(c) identify and designate land for housing development".

See also in this regard *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* (CCT 37/11) [2011] ZACC 33 (1 December 2011) at para 24.

Costs

[52] The applicants have asked for costs on the scale as between attorney and client. They have achieved substantial success. However, no case has been made out for the punitive costs sought. There are no reasons why the Municipality should not pay the applicants' costs, including the costs occasioned by the employment of two counsel. Accordingly, costs on a party and party scale will be just and equitable.

Order

[53] In the event, the following order is made:

1. Condonation is granted.
2. Leave to appeal directly to this Court is granted.
3. The appeal is upheld.
4. The order of the North Gauteng High Court, Pretoria under Case No 5394/11 is set aside.
5. It is declared that the removal of the applicants from their homes, the demolition of the homes, and their relocation by the Ekurhuleni Metropolitan Municipality were unlawful.
6. The Municipality must identify land in the immediate vicinity of Bapsfontein for the relocation of the applicants and engage meaningfully with them on the identification of the land.

7. The Municipality must ensure that the amenities provided to the applicants and people resettled in terms of this order are no less than the amenities and basic services provided to them as a result of the relocation of March 2011.

8. The Municipality must file a report in this Court confirmed on affidavit by no later than 1 December 2012 regarding steps taken in compliance with paragraph 6 of this order to provide access to adequate housing for the applicants.

9. The applicants may, within 15 days of the filing of the Municipality's report, lodge affidavits in response to the report.

10. The Municipality is ordered to pay the applicants' costs in this Court and in the High Court including, where applicable, costs of two counsel.

Mogoeng CJ, Moseneke DCJ, Froneman J, Jafta J, Khampepe J, Skweyiya J, Van der Westhuizen and Yacoob J concur in the judgment of Nkabinde J.

For the Applicants:	Advocate R Jansen, Advocate M Dewrance and Advocate I Oschman instructed by Gilfillan du Plessis Attorneys.
For the Respondent:	Advocate V Maleka SC Advocate Khaya Mnyandu and Advocate N Mji instructed by Bongani Khoza Attorneys.
For the Amicus Curiae:	Advocate S Wilson and Advocate I de Vos instructed by the Socio-Economic Rights Institute of South Africa.