REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 02752/2014

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

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SIGNATURE **DATE**

In the matter between:

MOHAU MELANI	First Applicant
LERATO MAROLE	Second Applicant
JOHANNES MTHEMBU	Third Applicant
FRANK MAPARA	Fourth Applicant
NALEDI NTOAHAE	Fifth Applicant
EDWARD PHOSWA	Sixth Applicant

MAPOLENKE MAKGOTHATSA	Seventh Applicant
JOHANNES MOSEHLA	Eighth Applicant
MAEBA MULALO	Ninth Applicant
SAMUEL MOTAUNG BOTIKINYANA	Tenth Applicant
GLORY BALOYI	Eleventh Applicant
EVA LESITA	Twelfth Applicant
THE FURTHER RESIDENTS OF THE SLOVO PARK INFORMAL SETTLEMENT	Thirteenth to Three Thousand Seven Hundred and Ninth Applicants

And

CITY OF JOHANNESBURG	First Respondent
MPHO PARKS TAU N.O.	Second Respondent
DANIEL BONAKELE BOVU N.O.	Third Respondent
THABO MARTIN MAISELA N.O.	Fourth Respondent
MEMBER OF THE EXECUTIVE COUNCIL FOR HUMAN SETTLEMENTS, GAUTENG	Fifth Respondent
MINISTER FOR HUMAN SETTLEMENTS	Sixth Respondent

J U D G M E N T

STRAUSS AJ

[1] The applicants approached this Court to review and set aside the first respondent, the City of Johannesburg's, failure or refusal to take a decision to apply to the fifth respondent, the MEC for Human Settlements Gauteng, for funding to upgrade Slovo Park, alternatively, to compel the City of Johannesburg to commence the process, the Urban Settlements Development Grant (USDG) and the Upgrading of Informal Settlement Policy (UISP) prescribed for upgrading the Slovo Park settlement, by applying to the MEC for the funding to do so.

[2] The 1st – 4th respondents in capacity as the City of Johannesburg the 1st respondent, oppose this application. The defence is mainly that the City's decision to relocate the residents to Unaville is a policy decision which is not susceptible to review. The defence raised that the applicants' attorney lacked the necessary authority to bring this application, was abandoned

FACTS NOT IN DISPUTE

[3] The applicants are approximately 10,000 very poor people living in 3,700 households in Slovo Park. They have been residing in Slovo Park for a period of up to 21 years. For all of this time they have lived in deplorable conditions, they have no access to electricity, shack fires break out at a rate of one every two months and are often fatal and ambulances refuse to collect the sick from Slovo Park because the roads are not formally demarcated, do not appear on a map, are not signposted and as a result individual residents cannot be located.

[4] For over 20 years officials at all levels of the State have advised the residents of Slovo Park that they would receive formal housing, planning schemes have been developed, environmental impact assessments have been done and steps have been taken to declare townships. Money has been earmarked and officials representing the fifth respondent, and the MEC, have visited Slovo Park to announce the imminent provision of housing.

[5] The first respondent, has issued documents to residents of Slovo Park confirming their rights to State subsidised housing. However, up to date nothing has actually been provided.

[6] The City and MEC are under an undisputed constitutional obligation to realise the right of access to adequate housing for all of those living under their areas of jurisdiction. In doing so they are bound by the legislative and policy framework set out in the National Housing Act, 107 of 1997 ("*the Housing Act*"). They are also bound by the National Housing Code 2009 ("*the Code*") and this Code is adapted in terms of Section 3(4) (g) and 4(1) of the Housing Act. It prescribes a wide range of procedures, plans and funding instruments, which are designed to facilitate delivery of adequate housing to people who, like the residents of Slovo Park, are in need of it.

[7] The city has taken a policy decision in 2015 to relocate the residents to a site called Unavalle, 11 km away from Slovo Park, provided that the residents qualify for housing.

APPLICANTS' CASE

[8] Slovo Park is situated on dolomitic ground and poses a risk to the residents.

[9] The applicants' case is that one of the instruments in which the City can provide adequate housing is making use of the UISP (Upgrading of Informal Settlement Policy). The UISP is a fully funded programme intended to ensure the upgrading of informal settlements in partnership with the people who live in them.

[10] The applicants have engaged with the terms of the UISP and have drawn up their own plans to facilitate the provision of housing and secure a tenure to all the residents of Slovo Park on the land they currently occupy or nearby. These plans have been presented to the City and strenuous efforts have been made to engage the City on its implementation.

[11] At the time this application was launched the City had neither refused to apply the UISP nor agreed to do so. The only decision by the City that has been taken, is to relocate the residents to Unaville, stating that this is suitable for development.

[12] The applicants' case is based on the fact that the Unaville plan of the City is at odds with the UISP's prescription, i.e. that upgrading *in situ* must wherever possible be preferred to relocation, and that housing developments under the UISP must include everyone living in a particular settlement, even individuals who would not normally qualify in terms of other housing programmes.

[13] The applicants' claim that the City's decision to relocate the residents to Univalle is unlawful, at least, for the following reasons:

[13.1] The UISP has the force of delegated legislation;

[13.2] It is the primary instrument through which the State is obliged to provide housing to people living in informal settlements;

[13.4] The UISP is a comprehensive flexible instrument, which exhaustively regulates the upgrading of informal settlements;

[13.5] Compliance with its precepts, the applicants argue, is not optional.

[14] The City is accordingly obliged to follow the procedures the UISP lays out to upgrade Slovo Park and its failure to take a decision to act in terms of the UISP, or its refusal to do so, are unlawful due to the fact that the City is in breach of the applicable statutory framework for the upgrading of informal settlements.

RESPONDENTS' SUBMISSIONS

[15] The City submit that the primary consideration in this application is whether the applicants have made out a case that an *in situ* development is feasible and such that the City could become obliged to apply for assistance under the UISP programme.

[16] The City, it says, has resolved to provide housing through the Unaville development and Slovo Park will form part of this development. The Unaville development is a means to discharge the City's obligation, land is being valued for acquisition and the development is budgeted for.

[17] The respondent's states that the applicants are incorrect in insisting that the City could only seek to provide housing by making application through the UISP programme.

[18] The City submits that it seeks to meet its obligations through the Unaville development and that the City made this determination in the exercise of its executive authority.

[19] The respondents submit that the City in deciding to pursue the Unaville route in the provision of housing took a decision, which properly construed, is not subject to review under PAJA.

[20] The submission of the applicants that the conduct of the City in pursuing the Unaville route amounts to a failure to implement legislation and is thus an administrative decision, ignores the fact that when a functionary such as the City performs a certain act in terms of an empowering legislative provision, it does not necessarily mean that the functionary is implementing legislation.

[21] The Court is therefore called upon to decide and determine if the City's decision on the Unaville development breaches the principle of legality and if it is rational and reasonable.

[22] The respondents argue that the City's decision to provide housing through the Unaville development is rational and it is a measure that will address the provision of housing in general and not only in relation to Slovo Park.

[23] In having regard to the City's decision to relocate the residents to Unaville this Court must decide if it was a policy decision, which is not susceptible to review, I will have regard to the fact that the mere branding of the decision as one of policy does not take it beyond review.

[24] Even though the formulation of broad executive policy is not administrative action, the decision to implement a policy in a specific case in a manner that affects the rights and legitimate expectations of specific people, is administrative action. This is set out in ***Permanent Secretary Department of Education and Welfare, Eastern Cape v Edu College PE*** *2001 (2) SA (1) (CC) at paragraph 80.*

[25] Further policy decisions which do not amount to administrative action are still susceptible to review under the Constitution if they are taken in

breach of fundamental rights or other constitutional provisions specifically under Section 26 (2) of the Constitution to realise the rights of persons to adequate housing.

[26] The factual basis on which the respondents appear to oppose the upgrade *in situ* is that the land of Slovo Park is dolomitic. The applicants, however, in regard to the sinkholes still insist that the City can develop Slovo Park *in situ* because the UISP programme sets out a range of fully funded options that address the problems identified by the City.

[27] The respondents argue that the applicants have not provided evidence to contradict the concerns raised by the City on sinkholes, in that the applicants do not show that the Council for Geosciences is satisfied that it is feasible to have a large scale development in Slovo Park.

[28] One of the primary considerations is if the applicants have made out a case that an *in situ* development is feasible that as such the City would become obliged to apply for assistance under the UISP programme.

[29] Several expert technical reports were referred to such as the Intatakhusa report commissioned by the MEC, the Arcus Gibb report as well as the Hadebe Khumalo report, and such reports indicated that the dolomite risk at Slovo Park, is low and they have at least concluded that the property is feasible to develop notwithstanding the presence of dolomite.

[30] The UISP programme expressly provides for upgrading to take place on land requiring rehabilitation such as sinkholes and that there is ample funding available to pay for technical solutions which will mitigate any risk posed by the presence of dolomite.

[31] The City has conceded that it is possible to develop the property *in situ* for at least 482 households, but the City does not confirm that it has

considered or engaged with the terms of the UISP. The City has decided not to apply this policy in preference to relocating qualified beneficiaries to Unaville.

[32] The National Housing Act 107/1997 apportions responsibility for housing development among the three spheres of government. In terms of Section 3(4)(g) of the Housing Act the sixth respondent must institute and finance national housing programmes. The Minister does so by publishing the code in terms of her powers under Section 4(1) of the Housing Act. The code must contain national housing policy and is distributed to all provincial and local governments. Crucially the code is binding on provincial and local governments, in other words, it is not open to the fifth respondent or the City to choose not to comply with it. Section 7(3) of the Housing Act requires the MEC to administer every national housing programme containing the code and to administer any provincial housing programme in a manner which is consistent with the code. In doing so the MEC must approve and provide finance for individual housing projects.

[33] Section 9(a)(i) of the Housing Act requires the City to take all reasonable and necessary steps within the framework of national and provincial housing legislation and policy to ensure that the inhabitants of its area of jurisdiction have access to adequate housing on a progressive basis. Accordingly the Housing Act requires the Minister to determine national housing policy, the MEC to administer national housing policy by approving projects which are consistent with it and the City to implement national housing policy.

[34] The UISP provides that informal settlements are to be upgraded *in situ* in partnership with their residents. The intent of the policy is to provide tenure security and a healthy environment to people living in informal settlements. I find that the UISP envisage a holistic development approach with minimum disruption or distortion of existing fragile community networks and support structures and encourages

engagement between local authorities and residents living within informal settlements.

[35] The UISP makes clear that relocation of informal settlements should be the exception and not the rule. It also states that relocation must take place at a location as close as possible to the existing settlement and within the context of community approved relocation strategies.

[36] In order to find that the respondents failed to consider the decision of *in situ* development instead of relocating the inhabitants to Unaville the Court had to consider whether this failure was an administrative action.

[37] The court held in ***Chirva v Transnet Ltd*** *2008 (4) SA 367 (CC)* that the definition of administrative justice in PAJA has seven requirements. (1) There must be a decision taken, or any failure to take a decision (2) by an Organ of State (3) exercising a public power or performing a public function (4) in terms of the Constitution {or legislation} (5) that adversely affects someone's rights or legitimate expectations, (6) which has a direct, external, legal effect and (7) that does not fall under any of the exclusions listed in section 1 of PAJA.

[38] As held in ***Grey's Marine Hout Bay (Pty) Ltd v Minister of Public Works 2005 (6) SA 313 (SCA):***

> "*The thrust of this definition is essentially that administrative action is any exercise of a public power that has the capacity to effect legal rights or legitimate expectations.*"

[39] As to the executive decision or policy decision of the City the Courts have dealt exhaustively with this kind of decision that are administrative in nature and subject to review and which are executive in nature and not reviewable. In the ***SARFU case 2001 (2) SA 1 (CC)*** the Constitutional Court observed that the tasks of formulating policy and initiating legislation are constitutional responsibilities of the Executive Branch and cannot be construed as an administrative action for the

purposes of Section 33. It distinguished these essentially political functions from the implementation of legislation where it is typically administrative.

[40] In the ***Department of Education and Welfare Eastern Cape v Edu College PE 2001 (2) SA 1 (CC)*** the Constitutional Court held that policy may also be formulated in a narrower sense where a member of the executive is implementing legislation. The formulation of policy in the exercise of such powers may often constitute administrative action.

[41] I find, that in the present case the residents are requesting the implementation of an existing policy, the UISP, and that this is a typical administrative function and is subject to review.

[42] I also find that the City's failure to apply the UISP is unlawful due to the following: This decision has been taken outside the legislative and policy framework intended to apply to informal settlements such as Slovo Park and on the facts of this case the decision is unreasonable and accordingly in breach of not only of the residents' rights to just administrative action, but also of the residents' rights of access to adequate housing in terms of Section 26(1) of the Constitution.

[43] The City had to at least have considered whether the UISP applies to Slovo Park without making a decision to completely ignore *in situ* upgrade and relocate the residents to Unaville. The City is required and obliged to act within the confines of the Housing Act and the Code, which lay down the framework intended to apply to informal settlements.

[44] The City's conduct is subject to a reasonableness criteria as well, and with reference to ***Government of Republic of South Africa v Grootboom 2001 (1) SA 46 (CC)*** the Constitutional Court stated that in assessing whether the Government is meeting its obligations to act reasonably under Section 26(2) of the Constitution, the measure it

adopts must be comprehensive, coherent, inclusive, balanced, flexible, transparent and be properly conceived and properly implemented. The measures must further clearly set out the responsibilities of the different spheres of government and ensure that financial and human resources are available for their implementation. They must be tailored to the particular context in which they are to apply, as what may be appropriate in a rural area may not be appropriate in an urban setting.

[45] The City's decision to relocate only qualifying beneficiaries to Unaville will exclude an unknown number of people from adequate housing. I find this to be unreasonable and not inclusive.

[46] The City has taken a decision to relocate the residents without any form of proper consultation and engagement in respect of the relocation. The decision taken also falls short having regards to the social disruption such a relocation could cause to the residents.

[47] The decision to unilaterally move the residents flies in the face of established constitutional *juris prudence* regarding the need to meaningful engagement in instances where the right to adequate housing is concerned.

[48] In deciding to relocate the residents without appropriate attention to their requirements as clearly set out in the Housing Code, that relocation is to be considered as a matter of last resort, all such seems to be unreasonable. The applicants have also been told for a period of more than 20 years that they will be upgraded *in situ*. This has left them to have a legitimate expectation, and the relocation flies in the face of this expectation that has been created over a very long period of time.

[49] I therefore find that the City's failure or refusal to apply the UISP Code and Practice must be reviewed and set aside.

[50] The Constitutional Court has also held that appropriate relief in cases such as this one, which implicates constitutional rights must be effective relief. It is therefore clear from the above that the only effective relief would be to direct the City to commence the process the UISP prescribes for the upgrading the Slovo Park settlement.

I therefore make the following order:

[1] The City's failure to take a decision to make an application to the Department of Human Settlements Gauteng for funding to upgrade the Slovo Park Informal Settlement in terms of the Upgrading of Informal Settlements Programme contained in the National Housing Code 2009 is reviewed and set aside;

[2] The City is directed to make an application to the MEC for funding to upgrade the Slovo Park Informal Settlement in terms of the Upgrading of Informal Settlements Programme within three months from date of this order.

[3] The second, third and fourth respondents shall within four months file with the Registrar of this Court, and on the residents' attorneys, a report or reports under oath setting out steps they have taken to comply with the court's order, including a copy of the application submitted to the MEC for the upgrading of Slovo Park Informal Settlement.

[4] The fifth respondent is directed to consider the application within a reasonable time from receipt thereof and to submit no later than three months of receipt of the application, a report or

reports under oath setting out what steps he has taken and will in future take to upgrade the Slovo Park Informal Settlement in terms of the Upgrading of Informal Settlements Programme.

[5] The first respondent is ordered to pay the costs of the application, including costs of two counsel.

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STRAUSS AJ
ACTING JUDGE OF THE HIGH COURT OFSOUTH AFRICA
GAUTENG LOCAL DIVISION,
JOHANNESBURG

Counsel for the Applicant/ Plaintiff: **ADV S WILSON**

ADV I DE VOS

ADV M STUBBS

Instructed by: **SERI LAW CLINIC (N ZONDO)**

Counsel for the Respondent/ Defendant: **ADV V MALEKA SC**

ADV O MOOKI

Instructed by: **PADI INC**

Date of Hearing: 12 November 2015

Date of Judgment: 22 March 2016