Breaking New Ground In Housing Delivery

human settlements

Department:
Human Settlements
REPUBLIC OF SOUTH AFRICA

houses, security and comfort

VISION: ***A NATION HOUSED IN SUSTAINABLE HUMAN SETTLEMENTS WITH ACCESS TO SOCIO-ECONOMIC INFRASTRUCTURE***

MISSION: ***TO ESTABLISH & FACILITATE A SUSTAINABLE PROCESS THAT PROVIDES EQUITABLE ACCESS TO ADEQUATE HOUSING FOR ALL WITHIN THE CONTECT OF AFFORDABILITY OF HOUSING & SERVICES & ACCESS TO SOCIAL AMENITIES & ECONOMIC OPPORTUNITIES***

RESIDENTS OF HARRY GWALA INFORMAL SETTLEMENTS

1. Introduction
2. Discussion
3. Joinder application
4. Grootboom Principles
5. Pre-hearing Consultations and hearing
6. Conclusion

INTRODUCTION AND BACKGROUND

- The Applicants in this matter are Johnson Matotoba Nokotyana and all the residents of Harry Gwala Informal Settlement, a class of persons contemplated in section 38 of the Constitution.

- They had originally brought an application before the Witwatersrand Local Division against the Ekurhuleni Metropolitan Municipality.

INTRODUCTION….

The applicants sought to obtain an interim order that, pending the decision on whether Harry Gwala Informal Settlement should be upgraded *in situ,* the Ekurhuleni Metropolitan Municipality should be ordered to comply with its constitutional and statutory obligations in terms of sections 26 and 27 of the Constitution of The Republic of South Africa Act 108 of 1996 and Chapters 12 and 13 of the Housing Code read with section 9 (1) of The Housing Act, 1997.

INTRODUCTION….

- Compliance with the aforementioned prescripts meant, according to the relief sought, that the Ekurhuleni Metropolitan Municipality provided to the Harry Gwala Informal Settlement, the following basic interim services:

- Communal Water Taps: for the provision of water in accordance with the basic standards required by Regulation 3(b) of the Regulations Relating to Compulsory National Standards and Measures to Conserve Water promulgated in Government Notice No. R. 509 dated June 2001 in terms of the Water Services Act, 108 of 1997;

INTRODUCTION….

- Temporary Sanitation Facilities;
- Refuse Removal Facilitation and
- High Mast Lighting in key areas to enhance community safety and access by emergency vehicles
- Further and/or alternative relief.
- Costs of suit.

INTRODUCTION

- The applicants all reside in informal dwellings in the Harry Gwala Informal Settlement situate on the eastern edge of Wattville Township.

- It appears that through negotiations, the Wattville Town Council once provided services in the form of a limited number of communal taps with reticulated water which were installed on stands at intervals through the settlement to provide residents with a water supply.

INTRODUCTION….

A refuse removal service in the form of a big plastic dustbin was also provided to the community and this continued from 1993 to 2005 when it was unilaterally discontinued by the Ekurhuleni Metropolitan Municipality who are the successor in law of the Wattville Town Council by virtue of the operation of Proclamation No.33 of 1994 issued under section 10 of the Local Government Transition Act, no 209 of 1993 and the Provincial Notice 6768 of 2000 issued in terms of the powers vested by section 12(1) and 14(2) of the Local Government Municipal Structures Act,1998.

DISCUSSION

- The Witwatersrand Local Division granted the applicants the relief sought in respects of communal water taps and refuse removal facilitation and dismissed their application for temporary sanitation facilities and high mast lighting.

- This matter has now come before the Constitutional Court by way of an application for leave to appeal against the decision of the Witwatersrand Local Division dismissing the application for temporary sanitation facilities and high mast lighting.

JOINDER APPLICATION

The Constitutional Court preliminarily issued an order joining the MEC for Local Government and Housing, Gauteng, the National Minister of Human Settlements and the Director-General of the National Department of Human Settlements as the second, third and fourth respondents respectively.

JOINDER APPLICATION

- The Constitutional Court deemed it appropriate to require the Minister and Director-General to furnish it with a response to the application. The Court required to be satisfied that the State's constitutional obligations have been complied with and, more particularly, the directions given by the Court in **Government of the Republic of South Africa v Grootboom 2001 (1) SA 46 (CC)**. The following principles were laid down in that case:

PRINCIPLES IN GROOTBOOM CASE

- The State is obliged to take positive action to meet the needs of those living in extreme conditions of poverty, homelessness or intolerable housing – at paragraph 24

- The poor are particularly vulnerable and their needs require special attention – at paragraph 36.

- The State's obligations depend upon context and may vary – at paragraph 37.

PRINCIPLES IN GROOTBOOM CASE

- The State is required to "**devise a comprehensive and workable plan to meet its obligations**". That obligation is not unqualified and is defined by the State's obligation to take reasonable measures to achieve the progressive realisation of the right within available resources – at paragraph 38.

- A reasonable programme must "**clearly allocate responsibilities and tasks to the different spheres of government and ensure that the appropriate financial and human resources are available**" – at paragraph 39.

PRINCIPLES IN GROOTBOOM CASE

- In the context of housing, "**a co-ordinated state housing programme must be a comprehensive one determined by all three spheres of government in consultation with each other**". Each sphere of government "**must accept responsibility for the implementation of particular parts of the programme but the national sphere of government must assume responsibility for ensuring that laws, policies, programmes and strategies are adequate to meet the State's … obligations**" – at paragraph 40.

PRINCIPLES IN GROOTBOOM CASE

- The measures in question must establish a coherent programme directed towards the progressive realisation of the right:
  - "**The programme must be capable of facilitating the realisation of the right. The precise contours and contents of the measures to be adopted are primarily a matter for the Legislature and the Executive. They must, however, ensure that the measures they adopt are reasonable.**" – at paragraph 41

PRINCIPLES IN GROOTBOOM CASE

- The State is required to take reasonable legislative and other measures to meet its obligations. Mere legislation is not enough:
  - "**These policies and programmes must be reasonable both in the conception and their implementation. The formulation of a programme is only the first stage in meeting the State's obligations. The programme must also be reasonably implemented. An otherwise reasonable programme that is not implemented reasonably will not constitute compliance with the State's obligations.**" – at paragraph 42

PRINCIPLES IN GROOTBOOM CASE

In determining whether a set of measures is reasonable, "**the programme must be balanced and flexible and make appropriate provision for attention to housing crises and to short, medium and long-term needs. A programme that excludes a significant segment of society cannot be said to be reasonable. Conditions do not remain static and therefore the programme will require continuous review**" – at paragraph 43.

PRINCIPLES IN GROOTBOOM CASE

- To be reasonable, "**measures cannot leave out of account the degree and extent of the denial of the right they endeavour to realise. Those whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril, must not be ignored by the measures aimed at achieving realisation of the right**" - at para 44.

PRE-HEARING CONSULTATIONS

The Department's Legal Team advised the Minister and the Director-General not to enter the merits of the immediate dispute between the applicants and the Municipality as the facts pertinent in the case were not within the knowledge of the National Ministry at all and had been dealt with by the Municipality. Moreover, there was no attack on chapters 12 and 13 of the Housing Code nor was there any attack on the constitutionality of our legislation.

PRE-HEARING CONSULTATIONS

It was anticipated that the Constitutional Court might well be concerned that the applicants in the present case have somehow fallen between the cracks, in that the High Court held that they did not qualify for emergency relief in terms of Chapter 12 of the Housing Code and that Chapter 13 of the Housing Code did not apply until such time as there was actual approval for the upgrading of an informal settlement. The question might therefore arise as to whether the policy, implemented by the Municipality, is sufficiently flexible (as required by **Grootboom**) to ensure compliance with constitutional obligations.

LEGAL ADVICE TO THE DEPARTMENT

– The legal team appropriately advised that the Answering Affidavit on behalf of the Minister should canvass at least the following:

- The State's response to the **Grootboom** judgment and, in particular, the formulation of Chapters 12 and 13 of the Housing Code.
- Whether there are any other policy initiatives apart from Chapters 12 and 13 of the Housing Code which are relevant.
- The legislation relevant to the present matter.

LEGAL ADVICE TO THE DEPARTMENT

- An overview of the problems in relation to housing and how these have been addressed, including statistics concerning progress in this sphere and an indication of the amounts of money involved and budgeted for.
- A contextualisation of the problems relating to housing in relation to poverty alleviation as a whole and the Government's endeavours to address these problems.

LEGAL ADVICE TO THE DEPARTMENT

- A contextualisation of the problems presented by the present case. In this regard, it was assumed that as dire as the position of the residents in HGS is, they are by no means untypical and are not the worst.

- An indication of the way in which housing policy is implemented and the degree of co-ordination between the national, provincial and local spheres of government.

LEGAL ADVICE TO THE DEPARTMENT

- Whether, in the context of the present case, there has been any liaison between the Municipality and the Ministry concerning the HGS settlement.

- It was considered prudent that the Court be presented with a clear indication of the level of commitment at national level to addressing problems of the sort that have arisen in the present application.

LEGAL ADVICE TO THE DEPARTMENT

It was clearly pointed out as advice to the Minister that both Chapters 12 and 13 of the Housing Code indicate that the National Department of Housing will maintain the programme policy "**and assist with interpretation thereof**". This raised a crucial question, namely, whether the Municipality (and the High Court) had correctly interpreted Chapter 12 of the Housing Code. The High Court held that the residents of the HGS did not fall within the appropriate definition of emergency assistance. This was the line of argument advanced by the Municipality.

LEGAL ADVICE TO THE DEPARTMENT

- If the Minister and the Director-General were to advance the argument that both the Municipality and the High Court had misinterpreted the Code, it would effectively be the end of the case. The legal team was very cautious in suggesting this approach because it would raise serious questions concerning the attitude adopted by the Municipality. In addition, however, there was a risk that expanding the scope of emergency assistance would create substantial difficulties for the housing programme as a whole.

LEGAL ADVICE TO THE DEPARTMENT

– The legal team opined that the problem should legitimately be approached in the following way:

- While there can be no doubt that those in the HGS are living in unacceptable conditions of poverty, their situation does not qualify as an emergency and there are those who are in fact worse off.
- The HGS may well, in due course, be upgraded in which event Chapter 13 of the Housing Code will apply.

LEGAL ADVICE TO THE DEPARTMENT

- Pending the upgrade, the Municipality had offered a reasonable alternative to the residents of the HGS.

- This was viewed to be the only realistic way of defending the national policy. The last component mentioned above, namely, the availability of a reasonable alternative, is critical. Absent a reasonable alternative, it seems that the policy may well be deficient. Alternatively, Chapter 12 would have to be interpreted broadly to accommodate the position of the HGS residents. This, however, may well so dilute the State's capacity to deal with real emergencies as to jeopardize the programme as a whole.

LEGAL ADVICE TO THE DEPARTMENT

- Before the Constitutional Court hearing, Counsel advised state institutions to provide immediate interim sanitation services and report to the Constitutional Court in the heads of argument. He further pointed out that the National Department bears overall responsibility to ensure that the adopted solution is consistent with the state obligation to provide everyone with access to adequate houses. It was therefore the National Department's responsibility to give direction and to coordinate the solution.

PRE HEARING CONSULTATIVE PROCESS

The National Department, the Provincial Department and the Municipality had a meeting with Counsel with a view of discussing solution in terms of providing immediate sanitation services. It emerged during discussions that the Municipality already has a plan for the provision of chemical toilets for all informal settlements in Ekurhuleni which are found to have pit latrines with hazard conditions. The Municipality has allocated R50 Million for this purpose in the current financial year and will begin a roll out in November .However, the Municipality plan only caters for the provision of one chemical toilet for every 10 households.

PRE-HEARING CONSULTATIVE PROCESS

The Municipality has determined that it would cost R1. 8 million to provide HGS with chemical toilets on the basis of one toilet per four households. The Municipality can only afford R 720 000.00 for the provision of chemical toilet in Harry Gwala Informal Settlement. The Provincial Department was therefore called upon to provide the shortfall of R1.1 million in order to ensure that the Municipality was able to provide chemical toilets to HGS on urgent basis.

ARGUMENT BY EKURHULENI MUNICIPALITY

- It was the Municipality case that they will only be in a position to provide only 1 toilet per family for all informal settlement in Ekurhuleni including Harry Gwala Informal Settlement.
- That the people of Harry Gwala should not be treated separately from other informal settlements in Ekurhuleni.
- That they will not be able to provide high mast lighting until the Provincial Department of Local Government and Housing has approved their request on whether Harry Gwala will be developed in situ or not.

ARGUMENT BY EKURHULENI MUNICIPALITY

- That they have submitted their application on whether Harry Gwala can be developed in situ to the Provincial Department in 2006 and to date they are still waiting for the approval of the MEC on such application.

ARGUMENT BY GAUTENG PROVINCIAL DEPARTMENT

- The Provincial Government argued that they were of the impression based on the initial report submitted to the Department by the PRT (which indicated that only 389 stands were developable in Harry Gwala itself) that the people in Harry Gwala were to be relocated to Chief Albert Luthuli.
- That the Court should afford them an opportunity to conduct further studies as requested by the Municipality in 2006 and that at least a period of a year will be required to conduct all the studied and to conclude on whether the Harry Gwala Informal Settlement can be developed in situ instead of only 389 stands.

ARGUMENT BY GAUTENG PROVINCIAL DEPARTMENT

- That due to the delay in this matter the Department will make an amount of 1.1 million available to the Municipality to assist the Municipality in provision of chemical toilets in Harry Gwala in a ratio of 1 per 4 families. The 1.1 million will be covering the short from the municipality since the Municipality has only R700 000 and they will need 1.8 million to provide 1 chemical toilet per 4 families.
- That the provision of bulk services falls squarely within the Municipality functions.

ARGUMENT BY THE NATIONAL DEPARTMENT

- Their argument was that the people of Harry Gwala should be treated as a special case since their application to upgrade in situ was delayed by the Province and that a ratio of 1 chemical toilet per 4 families should be applicable only to Harry Gwala community.
- The National Department was unaware of specific problems which had risen in HGS. National Department has been committed to finding a practical and equitable solution to those difficulties and it has initiated a process of engagement with the Province and the Municipality for this purpose.

ARGUMENT BY THE NATIONAL DEPARTMENT

- They also argued that their role as National Government is to facilitate and monitor any complaint of this nature and any other similar ones and to facilitate that a solution is reached.

FINANCIAL UNDERTAKING BY GAUTENG

- At the Court hearing on 15 September 2009, the Provincial Department, in addition to tendering a public apology to the residents for the unexplained delay in processing their application for upgrading, made an undertaking to provide the short fall of R1.1 million to HGS for the provision of immediate interim sanitation services on the basis of one chemical toilet per four households.

- The Constitutional Court has reserved its judgment on the matter.


THANK YOU!