The right to housing: challenges associated with the 'waiting list system' *Ekurhuleni Metropolitan Municipality v Various Occupiers, Eden Park Extension 5* 2014 3 SA 23 (SCA)*

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Abstract

The right to adequate housing is a constitutional imperative which is contained in section 26 of the Constitution. The state is tasked with the progressive realisation of this right. The allocation of housing has been plagued with challenges which impact negatively on the allocation process. This note analyses *Ekurhuleni Metropolitan Municipality v Various Occupiers, Eden Park Extension 5*[1] which dealt with a situation where one of the main reasons provided by the Supreme Court of Appeal for refusing the eviction order was because the appellants subjected the unlawful occupiers to defective waiting lists and failed to engage with the community regarding the compilation of the lists and the criteria used to identify beneficiaries. This case brings to the fore the importance of a coherent (reasonable) waiting list in eviction proceedings. This note further analyses the impact of the waiting list system in eviction proceedings and makes recommendations regarding what would constitute a coherent (reasonable) waiting list for the purpose of section 26(2) of the Constitution.

1 Introduction

Section 26(1) of the Constitution[2] affords every person the right to have access to adequate housing. Section 26(2) of the Constitution places an obligation on the state to take measures to progressively realise this right, these measures include

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[1]2014 3 SA 23 (SCA).

[2]Constitution of the Republic of South Africa, 1996 (Constitution).

legislative and other measures.[3] The Housing Act[4] gives effect to section 26(2) of the Constitution in that it constitutes a reasonable legislative measure and its implementation by national, provincial and local government in housing development amounts to *other measures* as contemplated in section 26(2) of the Constitution. In *Government of the Republic of South Africa v Grootboom*[5] the Constitutional Court held that housing policies and programmes must be reasonable both in their formation and application in order to constitute measures as envisaged in section 26(2) of the Constitution. It further held that the measures must establish a coherent housing programme directed towards the progressive realisation of the right to housing.[6] The Constitutional Court refused to accept the concept of minimum core obligations to assess the state's compliance with section 26 of the Constitution and instead developed a model of reasonableness review for adjudicating the duties imposed on the state by section 26 of the Constitution.[7] In terms of this model, a court tasked with considering reasonableness will not look into whether better measures could have been adopted by the state but will only look into whether the measures that have been adopted by the state are reasonable.[8] Liebenberg notes that the court's refusal to accept the concept of minimum core obligations in assessing the state's compliance has attracted considerable criticism.[9]

An integral part of a housing programme would be the allocation of houses to beneficiaries. This is the ultimate objective of a housing programme and its proper fulfilment amounts to discharging the obligation to provide housing as

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[3] In *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) (*Grootboom*) the Constitutional Court referring to s 26 of the Constitution held '[s]ubsection (2) speaks to the positive obligation imposed upon the state. It requires the state to devise a comprehensive and workable plan to meet its obligations in terms of the subsection. However subsection (2) also makes it clear that the obligation imposed upon the state is not an absolute or unqualified one. The extent of the state's obligation is defined by three key elements that are considered separately: (a) the obligation to "take reasonable legislative and other measures"; (b) "to achieve the progressive realisation" of the right, and (c) "within available resources"'(para 38).

[4] 107 of 1997 (Housing Act).

[5] (N 3).

[6] *Id* paras 41-42. Liebenberg *Socio-economic rights: Adjudication under a transformative Constitution* (2010) states at 187 that an interpretation of s 26 of the Constitution which places an obligation on the state to provide everyone with a basic level of socio-economic rights leads to the term 'progressive realisation' being interpreted to mean that the State has the obligation to gradually improve the quality of services to which people have access until the full realisation of the relevant socio-economic right is achieved.

[7] *Grootboom* (n 3) paras 32-33; Liebenberg (n 6) 151. Bilchitz *Poverty and fundamental rights: The justification and enforcement of socio-economic rights* (2007) states at 140 that although Yacoob J in *Grootboom* criticised the minimum core approach, he did not reject it outright thus leaving room for its adoption in future.

[8] *Grootboom* (n 3) para 41; Liebenberg (n 6) 151-152.

[9] Liebenberg (n 6) 163 and the sources listed in fn 188.

referred to in section 26(2) of the Constitution. One method of allocating houses is the use of a waiting list. A waiting list is a register used to record information of households in need of housing assistance. It is usually arranged from the oldest registration to the most recent one.[10] As the waiting list system forms part of the housing programme it should also be coherent and reasonable both in formation and application as required by *Grootboom*.[11] If it fails to meet these requirements then it will not amount to a measure capable of discharging the obligation to provide housing in section 26(2) of the Constitution.

It is a reality that people who are not listed on the waiting list as beneficiaries or those who are listed as beneficiaries but decide to jump the queue might occupy the houses from the housing programme unlawfully. This brings section 26(3) of the Constitution to the fore which prohibits an eviction without a court order made after all the relevant circumstances have been considered. The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act[12] gives effect to section 26(3) of the Constitution[13] and allows for an eviction order if same would be just and equitable.[14]

In *Port Elizabeth Municipality v Various Occupiers*[15] Sachs J stated that the right of access to housing and of not being evicted arbitrarily are closely intertwined.[16] It is no surprise then that a proper waiting list system both in formation and application is important for the state to discharge its housing obligations as well as when the eviction of unlawful occupiers are sought as section 26(1)-(2) of the Constitution is closely intertwined with section 26(3) of the Constitution. In *Ekurhuleni Metropolitan Municipality v Various Occupiers, Eden Park Extension 5*[17] the respondents decided to unlawfully occupy certain houses from the housing programme which was administered by the appellants.[18] The reason for the unlawful occupation was due to the respondents being subjected

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[10]Tissington *et al*'*Jumping' the queue', waiting lists and other myths: Perceptions and practice around housing demand and allocation in South Africa* (2013) 5. They note that in Gauteng the waiting list system has been replaced by the Housing Demand database (*ibid*).

[11]*Grootboom* (n 3) paras 41-42.

[12]19 of 1998 (PIE).

[13]Other statutes which give effect to s 26(3) of the Constitution are: the Extension of Security of Tenure Act 62 of 1997, the Land Reform (Labour Tenants) Act 3 of 1996 and the Rental Housing Act 50 of 1999.

[14]In *Port Elizabeth Municipality v Various Occupiers* 2004 12 BCLR 1268 (CC) (*Port Elizabeth Municipality*) the Constitutional Court held at para 14 that 'PIE has to be understood, and its governing concepts of justice and equity have to be applied, within a defined and carefully calibrated constitutional matrix'.

[15](N 14).

[16]*Id* para 19.

[17]2014 3 SA 23 (SCA) (*Ekurhuleni*).

[18]The first appellant was Ekurhuleni Metropolitan Municipality and the second appellant was the Gauteng Department of Housing.

to defective waiting lists over a period of nine years. The absence of a proper waiting list system weighed heavily against the appellants as the court found that the eviction would not be just and equitable for that reason and the eviction order was consequently refused.

Ekurhuleni is noteworthy as it deals with a situation where one of the main reasons provided by the Supreme Court of Appeal (SCA) for refusing the eviction order was that the appellants subjected the unlawful occupiers to defective waiting lists and failed to engage with the community regarding the compilation of the list and the criteria used to identify beneficiaries. This case brings the importance of a coherent (reasonable) waiting list to the fore in eviction proceedings.

The purpose of this note is threefold; first, to provide a brief overview of the case; secondly, to analyse the impact of the waiting list system in eviction proceedings; and, thirdly, to recommend what would constitute a coherent (reasonable) waiting list for the purpose of section 26(2) of the Constitution and would not weigh against the appellants when eviction orders are sought.

2 Factual matrix

The first appellant is the Ekurhuleni Municipality and the second appellant is the Gauteng Department of Housing responsible for the provision of housing within the Gauteng Province. The respondents had been divided into two groups, namely, the Eden Park Community Action Unit and the Remaining Occupiers of Eden Park Community. The appellants applied to the High Court for the eviction of the respondents from certain subsidised houses at Eden Park Extension 5. It is important to mention the background to the establishment of the subsidised houses. The establishment of the subsidised houses began as a local development project in 2000 after a proposal was made to the Alberton Town Council. The project intended to erect 3,500 houses with donor funding. Its purpose was to assist the Council to alleviate the housing backlog. The respondents alleged that these houses were to be allocated to the homeless people of Eden Park and other feeder areas. They further alleged that all beneficiaries were to be identified from the provincial departmental waiting list.[19]

The respondents further stated that officials of the municipality had assured them that their applications for housing would receive priority in respect of the development. During 2001 donor funding for the development project was withdrawn. As a result the first and second appellants took responsibility for the project. During 2003, 2,149 housing stands had been developed and only 77 thereof were earmarked for Eden Park applicants and other feeder areas in terms

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[19] *Ekurhuleni* (n 17) paras 1-2, 8.

of the municipality's waiting list system. The respondents were in a state of dismay and alleged that the municipality thereafter withdrew the waiting list and suspended the process due to problems with the waiting list.[20]

On 24 November 2003 the Gauteng Department of Housing (the second appellant) introduced a new allocation programme called the 1996 and 1997 waiting list beneficiaries programme. This programme was introduced by a policy directive issued by the then MEC for Housing in the Gauteng Province.The directive *inter alia* mentioned that '…the province had experienced "various problems [plaguing] the Waiting List at a provincial and municipal level"'. It added that the allocation of housing subsidies to beneficiaries 'has not been totally aligned to the Waiting List and as a consequence a significant number of beneficiaries [who had] applied in 1996 and 1997 [had] not yet received any subsidy assistance'.[21]

On 20 November 2003, the mayoral committee of the municipality adopted a resolution with regard to the housing allocations in Eden Park. The purpose of the resolution was to obtain information to establish a new waiting list. Thus during January 2004 a new waiting list was issued by the municipality. This list mentioned only 268 applicants from Eden Park and other feeder areas. This gave rise to several meetings between community representatives and local councillors relating to the allocation process. The meetings failed to satisfy the respondents who protested and petitioned. On 9 October 2008, after a mass meeting, the respondents decided to occupy the houses (both complete and incomplete) in Eden Park.[22]

The respondents cited several reasons which gave rise to the occupation. These reasons were briefly as follows:

(a) an incoherent and mysterious beneficiary criteria;

(b) appellants' failure to explain their housing policy and attendant beneficiary criteria;

(c) their failure to engage with the respondents by explaining to them the reasons why the houses were not allocated to the community;

(d) certain members of the respondents were approved for the housing allocation but feared that they would not be allocated the houses and would be overlooked yet again;

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[20] *Id* paras 3-4.
[21] *Id* para 5.
[22] *Id* paras 6-7.

(e) other members applied for housing in 1996 and 1997 but had not been allocated houses; and

(f) houses that had been allocated to some members were incorrectly handed over to other people.[23]

3 The various judgments

3.1 South Gauteng High Court

The appellants applied to the High Court (court *a quo*) for the eviction of the respondents from the houses of the development. The founding affidavit to the application for eviction stated that the respondents were unlawful occupiers of 651 houses and the identities of the occupiers were not known because officials, employed by the appellants to ascertain the identities of the occupiers, were threatened with violence when they attempted to do so. The court *a quo* refused the application because it found that the eviction of the occupiers would not be just and equitable. It based this finding on the following considerations: (a) the appellants had not ascertained the identity of the people to be evicted; (b) both the integrity of the waiting list and the attendant allocation process were compromised; (c) the probability existed that these processes were tainted with arbitrariness; and finally (d) the appellants adopted an eviction process that ignored the personal circumstances of the unlawful occupiers.[24]

3.2 Supreme Court of Appeal

The appellants, dissatisfied with the judgment of the court *a quo*, launched an appeal to the Supreme Court of Appeal (SCA). The SCA set out the law applicable to evictions[25] and made reference to a plethora of authorities dealing with the meaning and operation of the term, 'just and equitable', in eviction proceedings.[26] The SCA then turned to deal with the facts of the case. It noted that the respondents were poor people, most of them living below the breadline.

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[23] *Id* para 7.
[24] *Id* paras 8-10.
[25] The SCA mentioned ss 26 and 28(1)(c) of the Constitution, s 2(1) of the Housing Act and PIE (*id* paras 11, 14-15).
[26] *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 3 SA 454 (CC); *City of Johannesburg v Changing Tides 74 (Pty) Ltd* 2012 6 SA 294 (SCA); *Port Elizabeth Municipality v Peoples Dialogue on Land and Shelter* 2000 2 SA 1074 (SE); *Ndlovu v Ngcobo; Bekker v Jika* 2003 1 SA 113 (SCA); Wilson 'Judicial enforcement of the right to protection from arbitrary eviction: Lessons from Mandelaville' (2006) 22 *SAJHR* 535; and Chenwi 'Putting flesh on the skeleton: South African judicial enforcement of the right to adequate housing of those subject to evictions' (2008) 8 *HRLR* 105; *Ekurhuleni* (n17) paras 13, 16, 18-19, 20.

It further noted that their conduct was a deliberate strategy to gain preference in the allocation of houses, which resulted in a land invasion. The SCA remarked that this strategy had to be viewed within the historical and factual context of the case.[27]

The SCA noted that the appellants had conceded that they have a duty to ensure that a coherent housing policy is in place which should be implemented reasonably and appropriately. It further found that there were two official housing policies with regard to the Eden Park housing programme. The first policy was the resolution adopted by the mayoral committee of the municipality with regard to the housing allocations and the second was the new allocation housing programme in the form of a directive. The criteria of these policies were different. The court found that the first appellant failed to explain how it came about that the elderly and those with special needs, who were in possession of form Cs,[28] were not initially captured on the system. There was no explanation regarding which community leaders were involved in the compilation of the waiting lists and what criteria had been used to identify beneficiaries.[29]

The SCA found that the respondents were promised priority in respect of the allocations in Eden Park Extension 5 and the appellants' attempts to deny this by simply suggesting that there was no record of such promise and any arrangements made with regard to the priority of beneficiation had been superseded by the directive issued by the MEC portrayed them as insensitive and uncaring.[30] This portrayal ignored the dignity[31] of the respondents that should be

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[27] *Ekurhuleni* (n 17) paras 22-24.

[28] Form C is a housing waiting list registration receipt which proves that the holder thereof is registered on the waiting list,Tissington *et al* (n 10) 3.

[29] *Ekurhuleni* (n17) paras 24, 26.

[30] In *Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg v City of Johannesburg* 2008 3 SA 208 (CC) (*Olivia Road*) the Constitutional Court held that meaningful engagement has the potential to lead to the resolution of disputes and to better understanding as well as *sympathetic care* if both sides participate in the process (emphasis added, para 15). In *Port Elizabeth Municipality* the Constitutional Court held that meaningful engagement means that the parties should engage with each other in a proactive and honest manner in order to find a solution (n14 para 39).

[31] In *Grootboom* Yacoob J stated the following with reference to the link between dignity and the right to adequate housing '… It is fundamental to an evaluation of reasonableness of state action that account be taken of the inherent dignity of human beings. The Constitution will be worth infinitely less than its paper if the reasonableness of state action concerned with housing is determined without regard to the fundamental constitutional value of human dignity. Section 26, read in the context of the Bill of Rights as a whole, must mean that the respondents have a right to reasonable action by the state in all circumstances and with particular regard to human dignity. In short, I emphasise that human beings are required to be treated as human beings…' (n3, para 83). See also Liebenberg 'The value of human dignity in interpreting socio-economic rights' (2005) 21 *SAJHR* 1-31.

respected. The SCA in dismissing the appeal found that it would not be just and equitable to order the eviction of the respondents.[32]

4 Comment

4.1 Evaluating the impact of the waiting list system in eviction proceedings

It is important to evaluate the impact of the waiting list system in eviction proceedings as it usually forms part of a housing programme (policy) which seeks to discharge the state's housing obligations to provide access to adequate housing in terms of section 26(2) of the Constitution. A coherent waiting list which is properly applied will discharge the state's obligation in section 26(2) of the Constitution whilst an incoherent waiting list will fail to discharge this obligation and might constitute the basis for the refusal of an eviction order sought. For example the court *a quo* held that the integrity of the waiting list and the attendant allocation process was compromised and the probability existed that these processes were tainted with arbitrariness. This was the basis for refusing the eviction order and the SCA regarded it as faultless.[33] In this matter the number of respondent beneficiaries dwindled from 2600 in the year 2000 to 268 in the year 2004 in terms of four waiting lists. The community leaders were not involved in the compilation of these waiting lists and had no idea of the criteria used to identify beneficiaries. The waiting lists were also withdrawn without engaging the community and the reduction of respondent beneficiaries remained a mystery.

Section 2(1)(c)(iv) of the Housing Act provides that government must ensure that housing development is managed in a transparent, accountable and equitable manner which upholds the practice of good governance. This obligation is further cemented by *Grootboom* wherein the Constitutional Court held that housing programmes must be coherent and reasonable both in formation and application.[34] It is submitted that the appellant has breached section 2(1)(c)(iv) of the Housing Act by having implemented different waiting lists in an irrational and inequitable manner. It is apposite to note that section 152(1)(a) of the Constitution provides that one of the objects of local government is 'to provide democratic and accountable government for local communities'. The appellants should take cognisance of this section when compiling waiting lists.

The failure to engage with the community raises the issue of a lack of meaningful engagement. Section 152(1)(e) of the Constitution provides that local government should encourage local communities to be involved in matters of

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[32] *Ekurhuleni* (n17*)* paras 27-29.
[33] *Id* para 26.
[34] *Grootboom* (n 3) para 42.

local government. The irony is that in this instance it was the community who encouraged the appellants to engage with them and not the other way round. Section 2(1)(b) of the Housing Act provides that government must consult meaningfully with individuals and communities affected by housing development. Section 2(1)(l) moreover provides that government must facilitate the participation of all relevant stakeholders (which will include local communities) in housing development. The SCA did not refer to these sections of the Housing Act. However, it is clear that the appellants have breached section 2(1)(b),(l) of the Housing Act.

The requirement of meaningful engagement is well known in case law dealing with evictions. In *Port Elizabeth Municipality* the Constitutional Court held that it would ordinarily not be just and equitable to grant an eviction order in circumstances where proper discussions (meaningful engagement) have not been attempted, save in special circumstances.[35] In *Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg v City of Johannesburg*[36] the Constitutional Court held that meaningful engagement is a two-way process undertaken by both parties in good faith which is transparent and free from secrecy and is aimed at achieving certain objectives.[37] It further held that the court has the duty to take into account whether there has been meaningful engagement or whether reasonable efforts towards meaningful engagement have been made. The lack of engagement will weigh heavily against the grant of an eviction order.[38]

In *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes*[39] Sachs J stated that the use of a top-down approach which merely passes information to communities regarding decisions already taken instead of engaging meaningfully with them was a failure on the part of the authorities.[40] In this instance the appellant unilaterally compiled the waiting lists and withdrew them without engaging with the community. This egregious behaviour accords with the

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[35] *Port Elizabeth Municipality* (n 14 para 43). In *Olivia Road* the Constitutional Court stated that '[i]t follows that, where a municipality is the applicant in eviction proceedings that could result in homelessness, a circumstance that a court must take into account to comply with section 26(3) of the Constitution is whether there has been meaningful engagement' (n 30 para 18). For a discussion of the requirement of meaningful engagement see Van Wyk 'The role of local government in evictions' (2011) 14(3) *PER* 50 at 62-65 and Muller 'Conceptualising "meaningful engagement" as a deliberative democratic partnership' (2011) 22(3) *Stell LR* 742.

[36] *Olivia Road* (n 30).

[37] *Id* paras 14, 20-21.

[38] *Id* para 21.

[39] *Joe Slovo* (n 26).

[40] *Id* para 378. Muller (n 35) argues at 753 that the nature of community participation should be determined according to the ladder of citizenship participation which Arnstein has developed within the American housing context. He further states at 755 that meaningful engagement closely resembles partnership as a form of participation which is on the ladder of citizen participation.

top-down approach to engagement as echoed in *Joe Slovo*. In *Schubart Park Residents' Association v Tshwane Metropolitan Municipality*[41] the Constitutional Court stated that meaningful engagement must occur at every stage of the housing process.[42] Meaningful engagement should therefore also take place when waiting lists and all matters attendant thereto are compiled, because as mentioned in the introduction, a waiting list forms part of the housing process.

5 Conclusion

It is clear from the above discussion, that a coherent waiting list is essential to discharge the state's constitutional obligation to provide adequate housing. For a waiting list to be considered a measure in terms of section 26(2) of the Constitution it has to be coherent and applied reasonably. An important aspect which is derived from this case is that there must be meaningful engagement regarding the compilation of the waiting list and the criteria used to identify beneficiaries. It is submitted that a waiting list which is compiled without the input of the community which it impacts upon cannot be said to be coherent. This unilateral behaviour is contrary to the constitutional encouragement of community participation, the prescripts of the Housing Act and is contrary to meaningful engagement.

An incoherent waiting list which is applied unreasonably will weigh heavily against the appellants when eviction orders are sought. In the discussed decision the respondents proved that they were the true beneficiaries of the housing programme but their beneficiary status changed erratically due to incoherent waiting lists and this was one of the reasons why the eviction order was refused. The appellants should ensure that their waiting lists are coherent and reasonable. This should be done by engaging with the community leaders of the beneficiaries regarding the compilation of the list or the correction thereof. It is submitted that rectification of a waiting list is possible through the medium of meaningful engagement. A proper waiting list will also benefit the appellants as it will assist it when seeking eviction orders against unlawful occupiers. It will further protect the houses to be allocated to the true beneficiaries. The benefits of engaging the affected communities regarding the housing process cannot be over-stated. Only time will tell whether the appellants will meaningfully engage with affected communities when compiling waiting lists.

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[41] 2013 1 BCLR 68 (CC) 26.
[42] *Id* para 51. Muller (n 35) 756.