



Nokotyana v. Ekurhuleni Municipality

(CCT 31/09) [2009] ZACC 33; 2010 (4) BCLR 312 (CC) (19 November 2009)

Country: South Africa

Region: Africa

Year: 2009

Court: Constitutional Court

Health Topics: Health care and health services, Poverty, Water, sanitation and hygiene

Human Rights: Right to a clean environment, Right to health, Right to housing, Right to work

Facts

This was an appeal from an order of the South Gauteng High Court. The Applicants were members of the Harry Gwala Informal Settlement (Settlement). They approached the High Court for an order against the Ekurhuleni Metropolitan Municipality (Municipality) to install communal water taps, temporary sanitation facilities, refuse removal facilitation and high-mast lighting in key areas, pending a decision by the Member of the Executive Council for Local Government and Housing, Gauteng (MEC) on whether the Settlement was to be upgraded to a formal township. The Municipality submitted a proposal for its upgrading to the MEC in August 2006, but three years later a final decision had not yet been taken. The Applicants thus approached the High Court for relief.

Based on the Municipality's agreement to provide taps and refuse removal services to the Settlement, the High Court ordered it to provide those services. However, it dismissed the Applicants' claim for sanitation services and high-mast lighting.

In the Constitutional Court, the Applicants contended that the High Court failed properly to apply several constitutional and statutory provisions, especially the right of access to adequate housing under section 26 of the Constitution and the National Housing Code. They insisted on one ventilated improved pit latrine per household (alternatively two per household) and high-mast lighting, which, according to the Applicants, constituted basic sanitation and electricity.

After the High Court judgment, the Municipality adopted a new policy in which it offered to provide one chemical toilet per ten families and to make efforts to provide high-mast lighting where the infrastructure existed. The MEC, the national Minister of Human Settlements and the Director-General of the national Department of Human Settlements undertook to assist the Municipality with funding to provide one chemical toilet per four households in the Settlement. They emphasised, however, that they could only offer this to the Settlement, as they were not in a position to extend it to the many similarly placed informal settlements.

Decision and Reasoning

The Court held that the Municipality did not have an obligation under the National Housing Code or the Constitution to provide the services sought by the Applicants.

The Applicants relied upon Chapter 12 and 13 of the National Housing Code. Chapter 12 addressed emergency housing situations, whereby existing shelter is destroyed or damaged or there is an immediate threat to the residents' lives, health and safety or a threat of imminent eviction. Chapter 13 dealt with upgraded townships. The provisions of Chapter 13 relied upon by the Applicants related to the obligation of every municipality, as part of its process of integrated development planning, to take reasonable steps to ensure that residents of its jurisdiction had access to adequate housing on a progressive basis; that conditions not conducive to the health and safety of residents were prevented or removed; and that services in respect of water, sanitation, electricity, roads, storm water drainage and transport were provided in a economically efficient manner.

The Court held unanimously that the High Court was correct to find that Chapters 12 and 13 of the National Housing Code were not applicable.

The Applicants also argued that the right to adequate housing guaranteed by section 26 of the Constitution must be interpreted to include basic sanitation and electricity and to include a minimum content. The Court

decided that it was not necessary to make a finding on these submissions. Moreover, the Applicants' direct reliance on several other constitutional provisions was found to be vague, insufficiently specified and inappropriate.

The Constitutional Court did not pronounce on the reasonableness of the Municipality's new policy, as it found that it was inappropriate to consider a case so fundamentally changed on appeal. While acknowledging the temptation to order the Municipality to accept the assistance offered by the provincial and national governments in order to improve the lives of at least the Applicants before the Court, the Court held that it would not be just and equitable to make an order benefitting only those who caused sufficient embarrassment to the authorities by litigation and not the many others in a similar situation.

The delay by the MEC in deciding whether to upgrade the Settlement was found to be the most immediate reason for the dilemma and desperate plight of the residents. The MEC was thus ordered to take a final decision on the application to upgrade the status of the Settlement within 14 months of the date of the order.

The appeal was dismissed.

Decision Excerpts

"The Constitution explicitly recognises social and economic rights with regard to housing, as well as healthcare, food, water and social security. On several occasions this Court has been called on to decide difficult issues in connection with access to health care, housing and water, as well as the provision of electricity. This is understandable. Our history is one of land dispossession, institutionalised discrimination and systemic deprivation. The need for housing and basic services is still enormous and the differences between the wealthy and the poor are vast." Para. 1.

"It was argued . . . that the right of access to adequate housing, recognised in section 26 of the Constitution, must be interpreted to include basic sanitation and electricity. Counsel for the Applicants also urged this Court to find that its previous decisions on section 26 were wrong in as much as the right of access to adequate housing was not given content and to find that the right in fact has a minimum content. It is not necessary to make a finding on these submissions. Chapters 12 and 13 [of the National Housing Code] were promulgated to give effect to the rights conferred by section 26 of the Constitution. They do not purport to establish minimum standards. Their manifest purpose is to regulate the provision of services pending a decision on upgrade, as in this case." Para. 47

"Where the Constitution contains both a specific right, and a more general right, it is appropriate first to invoke the specific right. Section 39 of the Constitution requires courts when interpreting the Bill of Rights to promote the values that underlie an open and democratic society based on human dignity, equality and freedom. It is incontestable that access to housing and basic services is important and relates to human dignity. It remains most appropriate though to rely directly on the right of access to adequate housing, rather than on the more general right to human dignity." Para. 50.

"It is tempting to order the Municipality to accept the assistance offered in order to improve the lives of at least the Applicants before this Court, by describing their situation as exceptional and unique. Unfortunately though, it is not so exceptional or unique . . . Elsewhere in the province and the country there are thousands more in similarly unsatisfactory circumstances. It would not be just and equitable to make an order that would benefit only those who approached a court and caused sufficient embarrassment to provincial and national authorities to motivate them to make a once-off offer of this kind." Para. 50.