CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 61/00

KATAZILE MKANGELI AND OTHERS	1st to 242nd Applicants
versus	
JOSHUA JOHANNES JOUBERT	1st Respondent
VILLAGE FARM ADMINISTRATORS (PTY) LIMITED	2nd Respondent
JUKSKEI CROCODILE CATCHMENT AREA FORUM	3rd Respondent
THE DUTCH REFORMED CHURCH, NOORDRAND	4th Respondent
NICOLAAS LOURENS JANSE VAN RENSBURG	5th Respondent
STANLEY MAHLALELA N.O. AND OTHERS	6th to 13th Respondents
THE MASTER OF THE HIGH COURT	14th Respondent
THE REGISTRAR OF DEEDS	15th Respondent
THE NORTHERN METROPOLITAN LOCAL COUNCIL OF GREATER JOHANNESBURG	16th Respondent
25 OTHER PERSONS, OTHER THAN THE APPLICANTS, RESIDENT ON PORTION 133 OF THE FARM ZANDSPRUIT, 191 REGISTRATION DIVISION I.Q. OF THE GAUTENG PROVINCE	17th Respondent

Decided on : 06 March 2001

JUDGMENT

CHASKALSON P:

CHASKALSON P

[1] This judgment deals with an application for leave to appeal directly to this Court against a decision of the Witwatersrand High Court. The applicants are two hundred and forty two occupants of land registered in the Deeds Registry in the name of the Itsoseng Community Trust. An informal township is being developed on this land contrary to the provisions of a Town Planning Scheme and other relevant legislation. It was alleged that in the circumstances the occupation of the land by the two hundred and forty two applicants and other occupants of the land was unlawful. It was also alleged that all the occupants were using the land in a manner that constituted a nuisance to neighbouring landowners. These allegations were upheld in the High Court by Flemming DJP who delivered a judgment in which he made a series of orders against the occupants and other respondents in that application. The orders are complicated and it is not necessary for the purposes of this judgment to refer to them in any detail. It is sufficient to say that their effect is to require the occupants to abate the nuisance they were causing and to terminate their occupation of the land. The structures in which they are living are to be broken down and if they fail to leave the property they are to be ejected by the sheriff.

[2] The occupants, wishing to appeal to this Court against the order made by the High Court, applied to that court for a certificate in terms of rule 18 of the rules of the Constitutional Court. They also applied for leave to appeal to the Full Bench of the High Court against the order that had been made. Flemming DJP dealt with these applications in a brief judgment in which he furnished a negative certificate and declined to grant leave to appeal against his judgment. He indicated that if leave to appeal had been granted the appropriate court to deal with the appeal would have been the Supreme Court of Appeal and not the High Court.

[3] The applicants have now applied to this Court for leave to appeal directly to it and have disclosed in their application that they have also petitioned the Acting Chief Justice for leave to appeal to the Supreme Court of Appeal. That petition is apparently conditional upon leave to appeal directly to this Court being refused. The applicants say that the matter is urgent.

[4] Their application is opposed by the respondents, who also say that there is urgency in bringing this matter to finality. They contend that the issues raised in the appeal are not constitutional issues and that there are no reasonable prospects that an appeal will succeed. They ask that the matter be brought to an end by refusing the application for leave to appeal.

[5] Before dealing with the merits of the application it is necessary to say something about the procedure that has been adopted. Section 167(6)(a) of the Constitution provides:

> "National legislation or the rules of the Constitutional Court must allow a person, when it is in the interests of justice and with leave of the Constitutional Court—
>
> (a) to bring a matter directly to the Constitutional Court; . . ."

The Constitutional Court Complementary Act[1] and the rules of this Court[2] deal with the circumstances in which direct appeals can be brought to this Court and the procedure to be followed in such matters.

[6] Litigants wishing to take advantage of these provisions face a problem. Unless they also

---

1 Section 16 of Act 13 of 1995.

2 Rule 17 of the rules of the Constitutional Court.

apply for leave to appeal to the Supreme Court of Appeal or to the Full Bench of the High Court, when they apply for a certificate in terms of rule 18, an application for leave to appeal to such courts may be out of time, if leave to appeal directly to the Constitutional Court is refused. To deal with this it has become the practice for litigants to apply for leave to appeal to the Supreme Court of Appeal or to the Full Bench at the same time as they apply for a certificate in terms of rule 18. If the High Court considers that leave to appeal should be granted it may then grant leave subject to the condition that leave is granted only if this Court refuses the application to appeal directly to it.[3]

[3] *Member of the Executive Council for Development Planning and Local Government in the Provincial Government of Gauteng v Democratic Party and Others* 1998 (4) SA 1157 (CC), 1998 (7) BCLR 855 (CC) at paras 16-18; and *President of the RSA and Others v SARFU and Others* 1999 (2) SA 14 (CC), 1999 (2) BCLR 175 (CC) at para 45.

[7] If the High Court refuses leave to appeal in such matters, a litigant who wishes to keep its options open regarding an appeal may have to petition the Chief Justice for leave to appeal, before a decision is given by this Court on the application for leave to appeal directly to it. That is what has happened in this case. It is a practical course to follow. This Court may refuse leave to appeal directly to it, not because the appeal lacks prospects of success, but because it considers the matter to be one which ought properly to be dealt with by the Supreme Court of Appeal before it is called on to consider hearing the matter.[4] Where that is the case, an order refusing leave to appeal directly to this Court does not preclude the litigant from approaching this Court again for leave to appeal after the Supreme Court of Appeal has disposed of the matter either by way of a judgment, or by refusing the petition for leave to appeal. Should that happen, this Court will consider the application on its merits in the light of the decision of the Supreme Court of Appeal. It is against this background that the application for leave to appeal in the present case has to be considered.

[8] Various issues are dealt with in the judgment of the High Court. They include whether the High Court had jurisdiction to hear the application, or whether the claim was one which fell within the jurisdiction of the Land Claims Court; whether the applicants in the High Court

---

4 *De Freitas and Another v Society of Advocates of Natal (Natal Law Society intervening)* 1998 (11) BCLR 1345 (CC) at para 23; and *Amod v Multilateral Motor Vehicle Accidents Fund* 1998 (4) SA 753 (CC), 1998 (10) BCLR 1207 (CC) at para 35.

application had standing to enforce the provisions of the Town Planning Scheme and to seek the eviction of the occupants from property that they did not own; whether a trust can be registered as the lawful owner of land and in any event whether the trust was a valid trust and whether, in the circumstance, the occupants had any right to remain on the land as beneficiaries of the trust; whether the provisions of various statutes dealing with the occupation and use of land were relevant to the application and the claim for eviction, and in particular whether the occupants are protected against an eviction order by the provisions of the Extension of Security of Tenure Act 62 of 1997 (Tenure Act).

[9] In dealing with these issues and whether an order for eviction was appropriate in the circumstances of this case, Flemming DJP gave detailed consideration to the constitutionality of the Tenure Act and concluded that its provisions are inconsistent with the Constitution. In their application for a certificate under rule 18 of the rules of the Constitutional Court, the applicants contend that this finding was made despite the fact that the constitutionality of the Tenure Act had not been raised as an issue on the papers, and that no argument had been addressed to the court on that issue. In the judgment in which he furnished a negative certificate Flemming DJP does not suggest that this averment is incorrect.

[10] Having reached the conclusion that the Tenure Act was unconstitutional, Flemming DJP considered it unnecessary to make a formal declaration of invalidity - this despite the provisions of section 172(1) of the Constitution which requires that a court when deciding a constitutional matter within its jurisdiction "must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency". If the constitutionality of the

legislation was not relevant to his judgment the learned judge ought not to have considered that issue; if it was relevant he ought to have taken steps to have had the Minister responsible for the administration of the Tenure Act joined as a party to the proceedings.[5] He ought then to have heard argument from the parties on that issue, and if he found the Act to be inconsistent with the Constitution, he ought to have made a declaration to that effect as required by section 172(1) of the Constitution.

[11] Section 172(2)(a) of the Constitution provides:

> "The Supreme Court of Appeal, a High Court or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court."

The purpose of this section is

---

5 *Parbhoo v Getz NO* 1997 (4) SA 1095 (CC), 1997 (10) BCLR 1337 (CC) at para 5; *Beinash v Ernst & Young* 1999 (2) SA 116 (CC), 1999 (2) BCLR 125 (CC) at para 27; and *Jooste v Score Supermarket Trading (Pty) Ltd* 1999 (2) SA 1 (CC), 1999 (2) BCLR 139 (CC) at paras 7-8.

> "...to preserve the comity between the judicial branch of government, on the one hand, and the legislative and executive branches of government, on the other, by ensuring that only the highest Court in constitutional matters intrudes into the domains of the principal legislative and executive organs of State. . . . It entrusts to this Court the duty of supervising the exercise of this power and requires it to consider every case in which an order of invalidity has been made, to decide whether or not this has been correctly done."[6]

The section also serves the purpose of ensuring that certainty is obtained as to the constitutionality of Acts of Parliament where that has been challenged. A finding that an Act of Parliament is unconstitutional, which is not accompanied by an order declaring that to be so, defeats the purpose of section 172(2) of the Constitution, and creates the very uncertainty that the Constitution sought to avoid.

[12] The application for leave to appeal directly to this Court focuses on the finding that the Tenure Act is inconsistent with the Constitution. Appeals are brought against orders made by a court and not against comments made in the course of the judgment. The orders made here concern the abatement of the nuisance and the eviction from the land. The issues raised are complex. Section 26 of the Constitution, which is referred to in the judgment of the High Court, may be relevant to the orders dealing with the breaking down of the structures and the eviction from the property; section 39(2) of the Constitution may be relevant to the interpretation of the Tenure Act and other relevant legislation, and if the Tenure Act is relevant, the constitutionality

---

6 *President of the RSA and Others v SARFU and Others* above n 3 at para 29.

of that Act may have to be considered. If these were the only issues in the appeal, this Court might have granted leave to appeal directly to it against the order made by the High Court. There are, however, other issues, such as the claim based on nuisance and the appropriate remedies for it, the standing to enforce provisions of the Town Planning Scheme, the validity of the trust and the ownership of the land. Because of the nature and the variety and complexity of the issues raised in the judgment, this is a case in which an appeal against the decision of the High Court ought not to be brought directly to this Court.

[13] The applicants contend that the manner in which the constitutionality of the Tenure Act is dealt with in the judgment has created confusion. They say that the judgment has received wide publicity and has created uncertainty in the daily lives and relationships of millions of people which can only be resolved by a definitive ruling from this Court on the constitutionality of the Act. That the judgment may have created uncertainty is no doubt true, but that in itself is not necessarily sufficient reason for an appeal from the High Court to be brought directly to this Court.

[14] The finding made by Flemming DJP that the Tenure Act is inconsistent with the Constitution was not the basis for the orders made by him. The finding is moreover of no force and effect. That is clear from the Constitution and there is no need for this Court to make a declaration to that effect or to hear the appeal for the purpose of saying so. Should the constitutionality of the Act become a relevant issue in these or other proceedings it can be brought before this court in accordance with the proper procedures.

[15] It follows that a case has not been made out for a direct appeal to this Court. The following order is accordingly made:

> The application for leave to appeal directly to this Court against the order made in this matter by the High Court is refused.

Ackermann J, Goldstone J, Kriegler J, Madala J, Mokgoro J, Ngcobo J, Sachs J, Yacoob J, Madlanga AJ and Somyalo AJ concur in the judgment of Chaskalson P.