

**IN THE HIGH COURT OF SOUTH AFRICA  
(WITWATERSRAND LOCAL DIVISION)**

**MAIN APPLICATION  
CASE NO: 06/16270**

In the matter between:

<b>EBRAHIM DADA N.O.</b>	First Applicant
<b>YUSAF EBRAHIM OSMAN N.O.</b>	Second Applicant
<b>ESSOP SHAIK N.O.</b>	Third Applicant
<b>SHAUKAT THOKAN N.O.</b>	Fourth Applicant
<b>ABDUL MAJEED DAWOOD N.O.</b>	Fifth Applicant
<b>ISMAIL ESSA PATEL N.O.</b>	Sixth Applicant

and

<b>UNLAWFUL OCCUPIERS OF PORTION 41 (a portion of Portion 15 of the farm ROOIKOP 140 as described in the Deed of Transfer No: T2849/2004)</b>	First Respondent
<b>EKURHULENI METROPOLITAN MUNICIPALITY</b>	Second Respondent

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**JUDGMENT**

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**Introduction**

1. In November 2004, a group of people, described as people living in informal settlements, vacated Portion 40 and moved onto Portion 41 (a portion of Portion 15 of the Farm Rooikop 140) (“the property”) because of a flooding which took place on Portion 40 which is located next to a river and part of what is described as wetlands.
2. These people had resided on Portion 40 since 2001 and the annual summer rains created marsh-like conditions causing three children to drown in the floods in October 2004.
3. The IDM Trust, a religious charitable trust, is the owner of the property. The trust made an abortive urgent application in November 2004, but for reasons which are not relevant to this application, withdrew the application.
4. In July 2006, the trustees, in their representative capacities, made application to this court citing the Unlawful Occupiers of Portion 41 as the First Respondent and the Ekurhuleni Metropolitan Municipality (“the Municipality”) as the Second Respondent, seeking the eviction of the people occupying the property belonging to the trust.
5. Murray Howard Hawthorn (“Hawthorn”) of the firm Webber Wentzel Bowens (“WWB”) representing 76 households in the informal settlement

of the property caused an answering affidavit to be prepared on behalf of the First Respondents. This court is indebted to Hawthorn, WWB Public Interest and The Gender Law Department, which conducts and coordinates the *pro bono publico* work of WWB, for its assistance in this case in representing the 76 households. It appears that currently there are 214 households unlawfully occupying the property.

6. On behalf of the First Respondents, WWB made counter-application in which it seeks the following orders:

- “1. Declaring that the First Respondent in Reconvension is under a constitutional and statutory obligation to have a policy and/or programme in place which:*
  - 1.1 makes short-term provision for the applicants in reconvention residing at Portion 41 of the farm Rooikop 140, Gauteng, who are in a crisis or in a desperate situation;*
  - 1.2 provides relief for the applicants in reconvention residing at Portion 41 of the farm Rooikop 140, Gauteng, who are in a crisis or in a desperation situation;*
  - 1.3 gives adequate priority and resources to the needs of the applicants in reconvention residing at Portion 41 of the farm Rooikop 140, Gauteng, who do not have access to a suitable place where they may lawfully live;*
  
- 2. The Second to Seventh Respondents in reconvention are interdicted from evicting the applicants in reconvention from Portion 41 of the farm Rooikop 140, Gauteng, until such time as suitable alternative accommodation or land is available to them;*

3. *The First Respondent in Reconvension is ordered to comply with its constitutional and statutory obligations as declared in this order;*
4. *The First Respondent in Reconvension is ordered within three months of the date of this order to deliver a report or reports under oath, stating what steps it has taken to comply with its constitutional and statutory obligations as declared in this order, what future steps it will take in that regard, and when such future steps will be taken.*
5. *The applicants in reconvension may within one month of delivery of that report, deliver commentary thereon, under oath;*
6. *The First Respondent in Reconvension may within two weeks of delivery of that commentary, deliver its reply to that commentary under oath.*
7. *The case is postponed to a date to be fixed by the Registrar for consideration and determination of the aforesaid report, commentary and reply.*
8. *Alternative relief;*
9. *That the First Respondent in Reconvension is ordered to pay the costs of the counter application.”*

7. The Municipality opposes the counter-application.

### **The hearing before me on 13 and 14 February 2008**

8. By agreement between the parties, I am required to determine the counter-application. Subject to my findings, the Applicants have to satisfy the requirements of the prevention of Illegal Eviction from an Unlawful Occupation of Land Act (“PIE”) before it can succeed in its claim.
9. In the process of considering the counter-application in motion proceedings, in the exercise of my discretion, I called for oral evidence, and the Municipality presented two witnesses, namely Johan Gertzen

(“Gertzen”), Project: Implementation, and Mrs Lorette Tredoux, Manager: Legal and Administration, and the Hawthorn testified on behalf of the First Respondents.

### **The material facts**

10. Mendukazi Patricia Monakali (“Monakali”) deposed to the answering affidavit on behalf of the Unlawful Occupiers represented by WWB. She resides on the property and is unemployed, relying on piece jobs on some days during the week in the Rooikop area near the property.
11. She is a South African citizen, unmarried and has one child, Thembinkosi Monakali who attends school in Katlehong.
12. She started living on Portion 40 of the Farm Rooikop 140, the property adjacent to the property, i.e. the Applicants’ property, in an informal settlement situated there called Rooikop Informal Settlement, in 2001.
13. She has no home other than her shack on the property, and she accepts that she never obtained the permission of the trust to reside on the property nor have any of the persons comprising the First Respondent obtained such permission.

14. Monakali, by reference to a series of questionnaires, copies whereof has been attached to her affidavit, provides the following information to the court:

14.1. the head of each of the 76 households has an identity book and number indicating that they are South African citizens;

14.2. 47 household heads do not have a spouse or partner, 30 household heads have a spouse or partner;

14.3. children reside in approximately 68 of the households;

14.4. 40 of the households are headed by women;

14.5. those households with children in school are in schools within walking or commuting distance of the property;

14.6. 42 households have no income. Of these five households are headed by pensioners;

14.7. in only seven households is the spouse or partner of the household head employed;

- 14.8. in employed households, the particulars of the income is furnished and for purposes of this judgement it can be accepted that the average income is approximately between R1200 and R1600 per month;
- 14.9. particulars are furnished as to the mode of transport used by those employed to reach their place of work;
- 14.10. in the case of every single household they did not have an alternative home;
- 14.11. on 6 November 2004 the Municipality made available a grader to grade about half the property.

### **The property**

15. The size of the property is 5,4291 hectares. In a with prejudice offer in December 2007, the trust offered the property for sale to the Municipality at a purchase consideration of R250,000.00. The Municipality has offered to lease the property from the trust in an amount of R1,800.00 per

month for a period of 12 months commencing 1 February 2008 for the rental of 5,4921 hectares of the property.

16. The Municipality's offer to settle is dated 12 February 2008. It is based on a market valuation undertaken at the instance of the Municipality dated 25 May 2007 in which the municipal value of the property as at 1 July 2004 is R191,000.00 and as at 28 May 2007 the sum of R180,000.00.
17. The Applicant pays some R700.00 per month for rates and taxes.
18. Ms Clark who appeared on behalf of the applicant reiterated the offer of the trust to sell the property to the Municipality for a purchase consideration of R250,000.00 at the hearing before me.

#### **The Municipality's version**

19. The Municipality's case as formulated in its answering affidavit is to the effect that it is not under any constitutional and or statutory obligation to have a plan and or program in place which has the features contended for in the First Respondents' notice of counter- application.

20. The Municipality has not challenged the factual material put up on behalf of the unlawful occupiers.
21. The Municipality has placed a document comprising some 150 pages styled "Overview of the Sustainable Human Settlements Strategic Framework and Integrated Development Plan" of the Ekurhuleni Metropolitan Municipality Housing Department.
22. This document is a projected framework in terms whereof the Municipality contemplates providing low cost housing and/or the provision of essential services for homeless people and aims to accomplish this task by 2025.
23. The document regrettably does not inform me as to what is immediately being done to address the issue of homeless people. Nor does the deponent in the answering affidavit on behalf of the Municipality shed any light on this issue.
24. This occasioned my request to hear oral evidence from officials of the Municipality.

25. Gertzen's testimony was to the effect that the Municipality depended on a budget made available by the Gauteng Housing Department. He could not inform me as to what is likely to happen to the people living on the property. He expected that the Gauteng Housing Department would commission consultants to determine whether the property could be used to provide low cost housing or receive essential services before any decision could be taken as to the suitability of this property for housing people.
26. Tredoux supported the evidence of Gertzen. An environmental impact study had to be undertaken, prior to a decision being taken to acquire the property. The time period for such a study was estimated to be one year after such a study is commissioned. I must point out that to date no such study has been commissioned. There must also be a further investigation referred to as a "geo-technical" report. This investigation concerns the make-up of the ground itself. I was informed that dolomite poses a risk of sink holes and that this is prevalent in the Ekurhuleni area.
27. The evidence of both these witnesses reveals that not much attention has been directed at the plight of these unlawful occupiers. I was not informed, for instance, as to the Municipality's investigations as to whether the persons occupying the property could be accommodated in an established township, namely Buhle Park located a kilometre away. I

got the distinct impression that nobody from the Municipality undertook a site visit to find practical solutions. They appeared generally to be indifferent as to the urgency of the matter and relied on other legal impediments as an excuse not to find a solution.

28. Tredoux indicated that the people living on the property could be accommodated on Rooikop Station, one of 33 project descriptions as part of the essential services program forming part of the Municipality's framework referred to hereinabove. The difficulty with her evidence is that she could not assist in the following material respects:

- 28.1. How it was contemplated that the residence on the property would be relocated at Rooikop Station, when the document she relied upon indicated that there were 200 people at Rooikop Station. If, on the Municipality's version, there were 214 families on the property (76 households being before me), account has not been taken on the residents on the property when computing the number of families in respect of whom the Municipality prepared an essential services program ("ESP").

- 28.2. There is no explanation whatsoever as to why the property itself (bearing in mind that it is being occupied by unlawful occupiers and who are homeless) did not pertinently feature on the ESP.
- 28.3. Nor could Tredoux indicate as to what services were currently rendered at Rooikop Station or when it is contemplated such services to be installed.
- 28.4. Both she and Gertzen suggested that some of the residents could be moved to Portion 35 of Rondebult. This was sheer speculation because no investigation has been conducted as to this feasibility, nor any serious consideration been given to this prospect prior to this matter. There is not a single supporting document or fact to demonstrate that the Municipality has any action planned relating to the unlawful occupiers of the property.
29. Hawthorn testified that, at a meeting which he attended in May 2007 together with representatives of the Municipality and the Applicant, he was under the clear impression that upgrading of the property could have been undertaken and more importantly that the property could be rezoned to form part of Buhle Park Township and in conformity with the

provisions of Chapter 13 of the Housing Code, the property could be upgraded as an informal settlement. This would minimize disruption and preserve the community.

### **The legal considerations**

30. Mr Hulley, who represented the Municipality, argued that if I were to adopt a clinical approach (which he contended would be appropriate), I should strike off identified paragraphs in the First Respondents' replying affidavit in the counter-application. These are references to provisions of the Housing Code and the Housing Act, which Mr Hulley contended constituted a new cause of action and that his client was prejudiced. I disagree, in matters of this nature I must adopt a holistic approach.
31. In any event, in the order which the First Respondents sought in the counter-application, the very issues which the Municipality complains is new matter were in fact foreshadowed.
32. This case is about the plight of homeless people in our society and addresses fundamental issues of service delivery. It relates to the two different worlds that we as South Africans live in. It is understandable when one has regard to the President's apt description of everyday life, as for many in this country, it is the worst of times and for others (perhaps less in number) the best of times. It revolves around

fundamental rights promised to the citizens of this country in the Bill of Rights of our Constitution.

33. It is not my intention to reiterate a host of utterances by the higher courts of this land to the effect that poor people in particular are entitled to basic provision of services for their needs. Section 26 of the Constitution of the Republic of South Africa, 108 of 1996 (“the Constitution”), which provides that everyone has the right to have access to adequate housing becomes meaningless, unless and until this right is given effect to.
34. In **Government of the RSA and Others v Grootboom and Others** 2001 (1) SA 46, the Constitutional Court held that s 26 guaranteed a right of housing to those who did not have resources to provide for themselves. In its decision, the court recognized that the State has a particular and special obligation to provide housing to those who cannot afford to provide for themselves, as a question of access.
35. For those who cannot afford to pay for adequate housing, the State’s primary obligation lies in unlocking the system, providing access to housing stock and a legislative framework to facilitate self-built houses through planning laws and access to finance. Issues of development and social welfare are raised in respect of those who cannot afford to provide themselves with housing. State policy needs to address both groups. The poor are particularly vulnerable and their needs require special attention. The Constitutional Court in the **Grootboom** case did not, with respect, take the opportunity to monitor and, in the context of our

country, police, the conduct of the State inclusive of municipalities in ensuring that the provision of housing for poor people is a priority and accomplished within a manageable timeframe. In this context, the Minister of Finance announced an excess of R40 billion in the 2006 financial year of monies available and unspent.

36. There is precedent for the implementation process. In **Brown v Board of Education** 347 US 483 1954), the United States Supreme Court concluded that in the field of public education the doctrine of “separate but equal” has no place. Therefore, the court concluded that the plaintiffs and others, similarly situated for whom the actions have been brought are by reason of the segregation complained of deprived of the equal protection of the laws guaranteed by the 14<sup>th</sup> Amendment of the United States Constitution. The matter, however, did not end up there. Because the case was a class action and because of the wide applicability of the decision, and because of the great variety of conditions, the court invited further argument and in particular required the Attorney Generals of the States to present a program to address practical measures as to how the effect of the decision was to be implemented. The cases that followed thereafter in giving effect to the decision of **Brown v Board of Education** required enforcement by bussing, under federal guard, black children to white schools and white children to black schools. Since the decision in the **Grootboom** case, there has not been any court monitoring of the performance of the government which ironically in

2005/2006 budget allocated 5.8% of the budget for defence (not police, but defence) and 1.7% of the budget for housing.

37. I appreciate and understand that the approach I adopt in this matter may well be viewed not only as ordering the State to fulfil its obligations, but also telling it how to do so and that this would be a breach of the rule on separation of powers (see for instance: **President of the RSA v Modderklip Boerdery (Pty) Ltd** 2005 (5) SA 3 (CC) at 27B).
38. The failure on the part of the South African judiciary consciously to promote human rights has been well documented. Professor Dugard has demonstrated that prior to the new found Constitution of our country, judges faced with a choice in the interpretation of statutes, in the review of subordinate legislation and administrative action, and in the application of the common law, did not sufficiently select the rule of construction, presumption, principle or precedent which most advances human rights. This was justified to the theory of legal positivism on the part of the jury that judges interpret the law and do not make the law (see for instance: **Human Rights and the South African Legal Order** (1978) Part 4; **The Judicial Process, Positivism and Civil Liberty** (1971) 88 SALJ 181). In his seminal work on LC Steyn's Impact on South African Law published in the SALJ 1982, vol. 99, page 38, Cameron cautions against a court leaning towards the side of the government or public body when its interest are in dispute before the court. A judge, Cameron

points out, “*may be executive-minded without being bound by the fetters of corrupt pre-decision. Temperamental disposition is another matter, however, and it is suggested that Steyn was distinctly predisposed to countenance executive interest when these were in dispute before him.*”

39. I must emphasise that I understand the imperative that judges must not be seen to be interfering in the work of the legislature or the executive. I cannot, however, adopt an approach reminiscent of the Appellate Division’s approach when enforcing inequities of the Group Areas Act found that Parliament must be held to have authorised the inequality by implication:

*“The Group Areas Act represents a colossal experiment in a long term policy ....” Parliament must have envisaged that compulsory population shifts of persons occupying certain areas would inevitable cause disruption and, within the foreseeable future substantial inequalities (**Minister of the Interior v Lockhat** 1961 (2) SA 587 (A)).”*

40. The facts of this case are simple. The owner of the property has now waited in excess of 3½ years for the law to come to his assistance. The law has failed him. The unlawful occupiers on the Applicants’ property are citizens of this country and residents of the Municipality. Their plight is desperate. They have been waiting since the new democracy in 1994

for the government to come to their assistance. The government, in this case, is represented by its local authority, the Municipality. The evidence of Tredoux was that I should now allow the Municipality an opportunity to deal with the matter. It is common cause that the Municipality has, to date, done nothing about the plight of these desperate people. Tredoux testified that the first step in the process of assisting these people would be the commission of reports by consultants. The environmental impact assessment and geo-technical survey cannot be done in less than a year. After the completion of these reports, there are decisions to be taken by the Municipality. This involves acquiring the property and motivating a budget to provide essential services.

41. Our Constitution provides for a robust role of the judiciary in the legal and political life of the nation. The heart of this role is the institution of “judicial review” which empowers the courts, under the role of the Constitutional Court, to measure governmental conduct against the terms of the Constitution and to invalidate that conduct if it is deemed inconsistent with the Constitution (see for instance: **Bato Star Fishing (Pty) Ltd v The Minister of Environmental Affairs and Tourism and Others** 2004 (4) SA 490).
42. In my view, a court of law must interfere in appropriate cases where an organ of State is consistently failing in its functions and obligations, particularly insofar as the plight of poor people is concerned. Indigent

people cannot look after themselves and when the executive fails them, a court of law must come to their assistance. The Constitution is law, not merely an enshrinement of a set of political ideals. The Constitution is supreme law, and overwrites any conflicting source of law within the legal system. Judges have the same responsibility and authority with regard to the Constitution as they do with regard to other sources of law (quoted from Chief Justice John Marshall's decision in **Marbury v Madison** 5 US 137 (1803)).

43. To give effect to the socio-economic rights aspects of the Bill of Rights, our courts have to adopt a jurisprudence that enables it to interrogate government spending:

*“Constitutional human rights litigation has the potential to play an important role within a broader eradication of poverty strategy but new litigation tools need to be developed which are more appropriate for litigating on economic and social rights, including human rights budgets and indicators. New approaches also have to be adopted including identifying the minimum core of the government's obligations in relation to each right and an appropriate standard of review by the Court. Essential in using the courts to help alleviate poverty is a judiciary with vision and lawyers with compassion.” (See: **Alleviating Poverty Through the Constitutional Court – Geraldine van Bueren**)*

44. Since November 2004 to the present time, the Municipality has not undertaken any investigation as to the desirability of the property being utilised to provide shelter for homeless people. Tredoux testified that the most rudimentary provision is one of essential services, namely clean water, sewage facilities and shelter. This could have been undertaken by

now. Prior to December 2007, no consideration was given to the desirability of expropriating the property. This is no longer an issue because since December 2007, the property is available to be purchased by the Municipality. The purchase consideration of R250,000.00 is, by any standard, a modest sum. Since the issue of the present application, namely, in July of 2006 and the counter application in August 2006, no serious attention has been given by the Municipality to deal with the plight of the homeless people living on the property. Not a single iota of evidence was placed before me that anything of substance or meaning has been done to address this problem.

45. In terms of s 9(1) of the Housing Act, 107 of 1997 (“the Housing Act”), requires every Municipality to take all reasonable steps to ensure inhabitants in its area have access to housing on a progressive basis. This has to be done in a manner which gives priority to the needs of the poor in respect of a housing development. This is clear from the provisions s 9(1)(a) of the Housing Act.
46. The National Housing Code’s Programme for Housing Assistance in Emergency Housing Circumstances (“the emergency housing program”) defines an emergency as a situation where “the affected persons are, owing to circumstances beyond their control, evicted or threatened with imminent eviction from land or unsafe buildings, or situations where pro-active steps ought to be taken to forestall such consequences ...”.

47. This program makes funding available from the provincial departments of housing for emergency housing assistance. It requires municipalities to investigate and assess the emergency housing need in their areas of jurisdiction and to plan pro-actively therefore.
48. I accept that this Municipality has formulated a policy and a plan to deal with homeless people in its area of jurisdiction. I find, however, that insofar as the inhabitants of the Applicants' property are concerned, no emergency plan has been put into effect.
49. I cannot agree with Mr Hulley's contention that the responsibility in this case rest with central government or the provincial government. If I were to postpone the matter and require joinder of these higher levels of government, this would not take the matter any further. I have no doubt that the central government will say to a court that it is the responsibility of provincial government, which in turn will point out that the residents' first call of complaint is the local government, in this case the Municipality. The Housing Act, as indicated hereinabove in s 9(1), makes this the responsibility of the Municipality. This, of course, has to be done within the framework of national and provincial housing legislation and policy. I do not read the judgment of Yacoob J in the **Grootboom** case, where he says that local governments have an important obligation to ensure that services are provided in a sustainable manner to the

communities they govern, to exclude a Municipality from taking responsibility in this case. Mr Hulley argued that his clients' obligation was limited to providing services. In my view, the Municipality has failed to do so. It has not provided essential services in the form of clean water, sanitation and shelter to these desperate people before the court. This should have already been done. In my view, it is the Municipality's responsibility to find a long term resolution for these residents.

50. In the result, I make the following orders:

50.1. The Second Respondent is directed to purchase the property from the Applicants at a purchase consideration of R250,000.00 within 30 (thirty) days from the date of this order.

50.2. The Second Respondent is required to forthwith make provision of essential services to the occupiers of the property.

50.3. There shall be no order as to costs.

**NA CASSIM AJ**

High Court, Johannesburg  
15 February 2008