

CASE REVIEW

Evictions and Tenure Security in South Africa: A Review of *Baron and Others v Claytile (Pty) Ltd and Another (2017)* *Gaopalelwe Lesley Mathiba*

The main societal challenge causing instability in most areas of South Africa, especially in white commercial farms, is that the vast majority of black people continue to live under insecure tenancy on privately owned lands. The fact that the land is registered in their names and that they have title to the land confers on them a form of complete and unreserved power of disposal. This reasoning is informed mainly by the Roman-Dutch Law principle of dominium. In terms of this principle, the owner of the land has the unqualified discretion to evict anyone at any time, without even serving a notice, and to decide unilaterally who should reside on the land, for how long, and under what circumstances. Due to the absolute powers of ownership stemming from the dominium principle, large numbers of illegal evictions have been noted.

When tenants are evicted, they usually have no alternative place to resort and are thus compelled by the landlessness situation to submit themselves to the exploitative and inhumane demands of the land owners. This is so because, in the absence of capitulation on the victims' side, forced eviction is the unavoidable outcome. Upon eviction, these victims have nowhere else to go and suffer terrible hardships stemming from homelessness and destitution.

*It is against this backdrop that this review discusses the judgment of the Constitutional Court handed down on 13 July 2017 in the case of *Baron and Others v Claytile (Pty) Ltd and Another [2017] ZACC 24*. Central to this judgment is a controversial interpretation of section 26 of the Constitution of the Republic of South Africa, 1996, with the controversy relating to what constitutes 'adequate accommodation' in eviction matters and what duty rests on the state to make alternative accommodation available to the person under threat of eviction. Moreover, the judgment has determined whether it is 'just and equitable' to evict applicants from privately owned dwellings in terms of the Extension of Security of Tenure Act 62 of 1997 (ESTA). It is important to note that the availability of alternative accommodation, it was argued, should be a precondition of granting an eviction order. This article looks at the historical context of evictions and the legislative framework governing them. It goes further to discuss the effects of the state's failure to fulfil its duty to provide alternative accommodation.*

Forced evictions before the 1996 Constitution

According to Terreblanche (2002: 6), modern-day South Africa has been shaped by the intersecting histories of land, power and labour. Colonialism created a monopoly of economic power in which white farmers enriched themselves at the expense of natives from the mid-seventeenth century until the late twentieth century. Van der Walt (2005b: 285) points out that under the apartheid regime, a number of racially based laws regulating evictions were formulated and applied in a partisan fashion. Rugege (2004) argues that the apartheid land laws were framed in such a way that the idea behind was to impoverish and disrelish black people.

This is best illustrated by the infamous Natives Land Act of 1913, which contributed immeasurably to black economic downturn by bringing about the impoverishment of black society (Modise & Mtshiselwa 2013: 5). This legislation accomplished its purpose of pushing the vast majority of black South Africans off their aboriginal land titles and into farms owned predominantly by whites, where, under insecure tenancy, they were accommodated in structures that were inadequate. In the aftermath of this punitive history, the government adopted few legislative measures and policies to secure the tenure rights of farm dwellers as part of its national land reform programme (Hall 2013: 1).

It is noteworthy that during the apartheid regime, the remedy available to property owner faced with an unlawful occupant was the common law remedy of *rei vindicatio* ('action for vindication'), as opposed to the current remedy of eviction, a process normally carried out under strict judicial supervision through the courts in order to avert arbitrariness. According to Wilson (2009: 270), *rei vindication*, as it was then interpreted, meant that the property owner had an absolute right to evict all unlawful occupants from his property at any time he so wished. It is also important to note that the latter eviction was undertaken regardless of the victim's housing needs and other personal circumstances which, upon proper consideration, might lead to the decision to evict being otherwise.

In the light of the above discussion on the past lawlessness, this article submits that this historic pattern was not a coincidence and arose very possibly because there was neither the constitutional right to adequate housing nor the duty on the state to provide alternative accommodation to the evicted, which could have served as a counterweight to the then owner's absolute property rights over the unlawfully occupied property (Van der Walt 1990: 32).

The constitutional and legislative framework on evictions

Section 26 of the Constitution affords everyone the right to adequate housing. This right, according to Hall (2013: 1), is the most contested and litigated socio-economic right in South Africa. The situation is the unavoidable outcome of South Africa's deeply unequal housing regime. Hall (2013: 1) goes further to observe that the black majority are denied access to adequate housing opportunities and other basic amenities of life, which has led to many underprivileged black households being exposed to unbearable hardships and perilous living conditions in the 'slums', over and above the constant risk of forced and illegal eviction.

The thrust of the argument in this case review is that section 26 of the Constitution, which affords everyone the right to adequate housing, is in stark conflict with the pervasive realities of forced removals, housing deficits and evictions; hence the right has been frequently invoked in courts during litigation, and hence there is an urgent need to devise proactive, programmatic and coherent responses to cases of evictions.

Analysis of the Baron case

In the *Baron case*, the Constitutional Court had to clarify a matter concerning whether it is just and equitable to evict applicants, who were under insecure tenancy, from a privately owned property in terms of the ESTA, notwithstanding the



The court ignored the possibility of homelessness after granting the eviction order.

non-availability of alternative accommodation. The employer, Claytile (Pty) Ltd, sought an order evicting its former employees from its private units prior to the termination of their employment contracts, and this was in accordance with the provisions of ESTA. Subsequently, an eviction order was granted and later confirmed by the Land Claims Court. However, the applicants refused to vacate the private dwellings of their former employer (Claytile) because, had they done so, it would have resulted in their being homeless. Furthermore, it must also be borne in mind that by then the legal basis of the applicants' occupation, namely the employment relationship with the respondent (Claytile), was terminated. To that end, two main shortcomings have been noted from this judgment.

First, in terms of section 26(2) of the Constitution, the responsible municipality (state), in this case the City of Cape Town, had a duty to provide alternative accommodation to the applicants upon their eviction, based on its available resources. However, the municipality failed to fulfil this constitutionally imposed obligation. For the duration of this impasse, the employer (Claytile) was then implicitly forced to accommodate the applicants (unlawful occupants) on its private dwellings until the municipality fulfilled its obligation, since there was no way they could vacate in the absence of alternative accommodation.

Secondly, section 26(3) of the Constitution is clear that eviction can be effected only through a court order, which can be granted or refused, after the court has taken into consideration relevant

circumstances. Moreover, the eviction sought must not be effected in an arbitrary manner. In the light of this case, one of the relevant circumstances that the court of first instance ignored was the possibility of homelessness after granting the eviction order; this notwithstanding, the court went on to grant an order. This raises the question as to how this was possible, given the fact that legislative protection was in place which strongly prohibits illegal evictions. It is due to this blunder that this article finds repugnant the flawed decision of the Constitutional Court to confirm the validity of an eviction order which was granted without all relevant circumstances being taken into consideration, as required by the Constitution.

In line with the foregoing discussion, two observations may be made. At first, as a result of the municipality's failure to provide alternative accommodation, the property owner's right, in terms of section 25(1) of the Constitution, to not be arbitrarily deprived of his property, was hampered, raising the question of whether such hampering was just. In this regard, one could argue that the burdening of the property owner by the municipality was legally unjustified since the obligation in section 26(3) is not a shared one.

Secondly, it is evident from the facts of the case that the municipality had later made an offer to the applicants of alternative accommodation at Blikkiesdorp. However, the applicants rejected the offer, arguing that it was not suitable and adequate in comparison to the dwellings they were unlawfully occupying at that stage, since the accommodation offered at Blikkiesdorp had no electricity and was far from basic services such as schools and health-care centres. In this regard, the question that ultimately arises is, In terms of which structure and/or criteria is the adequacy of alternative accommodation assessed? Is the benchmark of adequacy not set by the property from which the victims have just been evicted?

Be that as it may, this article holds a 'stubborn' view that the Constitutional Court did not delve deep in providing much-needed clarity on the two questions raised above and on how one can strike an equitable balance between, on the one hand, applicants

who are on the verge of being rendered homeless and, on the other, respondents who are denied the undisturbed enjoyment and use of their property.

Conclusion

The task of interpreting eviction laws and harmonising competing rights often falls exclusively to the courts. However, the courts have been indecisive in their interpretation of the 'relevant circumstances' to be considered before an eviction order can be granted, and have also been unclear on what exactly one should prove, or what key considerations one may argue, to establish whether the granting of an eviction order will be 'just and equitable'. It is only after the judgment in the *Baron* case that the Constitutional Court attempted to shed light on how the latter indecisiveness can be averted, although the justification demonstrates the misdirection of law. Despite the latter incongruities, the *Baron* judgment is important in two respects.

In the first instance, it elaborates at length on the circumstances under which an eviction can be said to be 'just and equitable' in the absence of alternative accommodation, and it goes further to consider what constitutes 'suitable adequate housing' on eviction matters. Secondly, the judgment highlights that the constitutional obligation on the state to provide alternative accommodation to those faced with eviction is not a shared obligation with private citizens but it is meant to be fulfilled exclusively by the state.

To that end, this article is of the view that eviction order should not be granted if the person against whom it is sought will end up being homeless. Moreover, this article further suggests that an eviction order should always be kept at halt, pending the availability of alternative accommodation, unless there is a strict urgency to divert. It is submitted that the latter will not be unjustly depriving the owner of his ownership rights over an unlawfully occupied property since property rights are not absolute and are subject to limitation, given the nature of the right it competes with. The right to adequate housing is inseparable from a number of other rights, such as the right to human dignity, freedom of security

of person and freedom of residence, and hence it should be given effect over ownership rights.

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