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An administrative law perspective on "bad building" evictions in the Johannesburg inner city

City of Johannesburg v Rand Properties (Pty) Ltd 2007 SCA 25 (RSA) (*Rand Properties)*

The recent judgment of the Supreme Court of Appeal in *Rand Properties* provides an opportunity to assess the use of administrative law arguments in advancing the realisation of socio-economic rights. The judgment itself is disappointing in this respect by failing to grapple effectively with the potentially constructive interaction between section 33 of the Constitution and the various socio-economic rights provisions.

On 26 March 2007 the Supreme Court of Appeal (the SCA) delivered judgment in the appeals against the decision of Jajbhay J in *City of Johannesburg v Rand Properties (Pty) Ltd* 2007 (1) SA 78 (W). It upheld the appeal and dismissed the cross-appeal. The background to and facts of this case as well as the High Court judgment have been concisely discussed by Stuart Wilson in (2006) 7(2) *ESR Review* 9 and I will not attempt to traverse the same ground here. In short, the *Rand Properties* matter dealt with eviction notices issued by the City of Johannesburg in terms of section 12(4)(b) of the National Building Regulations and Building Standards Act 103 of 1977 (the NBRA) against a large number of occupiers of dilapidated buildings (so-called "bad buildings") in the inner city. It is these notices that the City sought to enforce in its High Court applications. The occupiers resisted the applications and brought a counter-application, arguing *inter alia* that section 12(4)(b) of the NBRA conflicts with section 26 of the Constitution and is accordingly unconstitutional; that the City failed to honour its housing obligations towards the occupiers in terms of section 26 of the Constitution and that the City's decision to issue the notices should be reviewed and set aside in terms of the Promotion of Administrative Justice Act 3 of 2000 (the PAJA). It is the last-mentioned

administrative law dimension to this matter that interests me in this review. The *Rand Properties* matter (if not the judgment) provides a good illustration of the use of administrative law arguments in the realisation of socio-economic rights.

Procedural fairness

The respondents' central administrative law argument was that the City's failure to afford them a hearing prior to issuing the section 12(4)(b) NBRA notices amounted to procedurally unfair administrative action. The SCA rejected this argument, declaring: "It is clearly desirable that there should be consultation in matters of this nature but this is not such a case." With all due respect, Harms ADP's approach here seems to hark back to the narrow common law view of *audi alteram partem,* which we have left behind with the adoption of procedural fairness in section 33(1) of the Constitution and the strong constitutional emphasis on consultation and participatory democracy. It should no longer be necessary to come up with creative or forced arguments in order to ensure that those looking to government for socio-economic assistance are treated in a fair manner, as was too often the case in common law. Proper consultation in all administrative decision making is now a constitutional duty that can only be departed from under the most circumspect of circumstances. It is certainly much more than a "desirable" aspect of administrative conduct, which deserves much closer consideration than the SCA seems to suggest. The SCA's approach to the matter in common law terms is also evident from the further remark in par 63: "In cases of crisis the *audi* principle can hardly apply." This approach is not in line with the new constitutional administrative law. In respect of both the SCA's treatment of the sources and the substance of administrative law, one is reminded of the stern warning by the Constitutional Court in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and others* 2004 (4) SA 490 (CC) where O'Regan J said: "To the extent … that neither the High Court nor the SCA considered the claims made by the applicant in the context of PAJA, they erred."

The respondents' procedural fairness argument should have been assessed much closer in the context of PAJA than the off-hand references to the Act made by the SCA. In particular, the City's evident non-compliance with the mandatory procedural requirements found in PAJA section 3(2)(b) when issuing the section 12(4)(b) NBRA notices must be closely assessed against the requirements for departures found in PAJA section 3(4). The SCA quotes this latter section without

seriously engaging with its specific requirements. The court notes two reasons for allowing the departure from section 3's mandatory procedures. It firstly states that such departure is acceptable in "cases of crisis", which the current ostensibly is. In this statement the court seems to contradict its earlier remark that the respondents are not in an emergency situation, but in "an ongoing state of affairs" (at par 45). This argument is supposedly one of urgency if one applies the factors listed in PAJA section 3(4)(b) to guide an assessment of the reasonableness and justifiability of departures. However, on the facts of this matter, the City can hardly claim that the issuing of the notices were urgent. More than seven months separated its initial inspection and the issuing of eviction notices in respect of one of the buildings involved. The second justification for the City's non-compliance with PAJA section 3(2)(b), accepted by the SCA, was "the problem in establishing the number, apart from the identity, of the occupiers." The court does not, however, seem to have much difficulty in overcoming this problem itself when it issues an order directing the City to provide temporary settlement to specific occupiers (see par 2.3 of the SCA's order). If, alternatively, the identity and number of the occupiers are real problems, the City should have followed section 4 of PAJA, which specifically provides for procedural fairness in instances where "any group or class of the public" is affected.

One of the main criticisms, from an administrative law perspective, against *Rand Properties* is accordingly the SCA's failure to seriously engage with procedural fairness requirements as structured in PAJA. In particular, the factors listed in section 3(4)(b), aimed at assessing whether a departure from the procedural requirements of section 3 is "reasonable and justifiable in the circumstances", are largely ignored by the court. Those factors are specifically designed to achieve a proportional balance of competing interests in instances such as the present. By failing to balance "the likely effect of the administrative action" (section 3(4)(b)(iii)) against the City's "need to take the … action" (section 3(4)(b)(i)) the SCA failed to protect the procedural rights of the occupiers.

The importance of procedural fairness rights in instances such as *Rand Properties,* involving the realisation of socio-economic rights for the poor, cannot be overstated. It is firstly critical in bringing all the relevant considerations to the attention of the administrator before decisions are taken. Consequently, a much more balanced approach to the matter at hand is encouraged, which in turn must

lead to higher rationality in administrative programs. *Rand Properties* effectively illustrates the importance of this function of procedural fairness. The City's focus seems to have been largely on the buildings rather than the people involved. If it afforded the occupiers an opportunity to respond to proposed eviction notices, the City may have realised that such evictions would result in the occupiers being worse off from a safety point of view. It may have consequently realised that it should put in place realistic alternative housing options for these occupiers before issuing eviction notices, which would certainly have been a much more rational course of action. But by only inspecting the buildings and not listening to the inhabitants, the City seemingly did not grasp the irrationality of its actions.

Procedural fairness can secondly help reinforce the dignity of beneficiaries of state socio-economic programs. Comprehensive socio-economic assistance from the state inevitably runs the risk of creating a culture of dependence. The problem is not so much dependence on the provision of the actual assistance (e.g. food, housing or social assistance), but the perception it may create under recipients and non-recipients of the former as dependent, passive, weak, subjugated "external objects of judgment" (Nedelsky "Reconceiving Autonomy: Sources, Thoughts and Possibilities" (1989) 1 *Yale J.L. & Feminism* 7 at 27), which principally undermines such beneficiaries' dignity. By affording them the opportunity to actively participate in the provision of state assistance, procedural fairness can achieve much in giving such beneficiaries a sense of control, participation and accordingly significance and worth. (For an eloquent account of these arguments see Nedelsky 1989: 27.) Even where a hearing allegedly cannot achieve much by way of substantive outcome (as the SCA seems to suggest in *Rand Properties*), this important function of procedural fairness remains unaffected.

Relevant considerations and reasonableness

It is finally of interest to note some alternative arguments, based on administrative law, that may have assisted in resisting the eviction notices in *Rand Properties* without getting bogged down in the interpretative difficulties surrounding section 26 of the Constitution (which ultimately undermined much of the respondents' claims). These illustrate the potential use of administrative law arguments in such cases.

The first argument, which was in fact also made by the respondents, is based on the duty to take all relevant considerations into account when taking

administrative decisions (PAJA section 6(2)(e)(iii)). When an administrator takes any decision in the context of housing, the state's duties in terms of section 26 of the Constitution are obviously relevant considerations. When the decision furthermore involves the poor, the specific housing obligations of the state as explained in cases such as *Government of the RSA v Grootboom* 2001 (1) SA 46 (CC) become even more relevant. The SCA in fact found in *Rand Properties* that the City failed to honour its constitutional obligations towards those in desperate need as a result of the evictions. It is accordingly difficult to understand how the court could have found that the City did take all relevant considerations into account when deciding to issue the eviction notices.

A second argument, based on reasonableness, focuses on the specific wording of section 12(4)(b) NBRA. That section empowers an administrator to issue eviction notices when it "deems it necessary for the safety of any person … to vacate such building." A reasonable decision, which concludes that it is indeed necessary to vacate the building must take note of the impact of ordering the person to vacate. Can it be said that an order to vacate a building in the interest of the occupier's safety is reasonable if the effect of that order is to place the person in an even less safe position? Can it then be held *necessary* for her safety to vacate the building? Is it not rather necessary for her safety to remain in the building? By focusing on the reasonableness of the assessment of the precondition to ordering eviction (i.e. the safety necessity) one is able to largely avoid the much more difficult section 26 analysis.

Conclusion

In *Rand Properties* there was much scope for administrative law arguments to advance the protection of socio-economic rights. Unfortunately, the SCA did not show much enthusiasm for the respondents' arguments in this regard. The SCA's failure (or unwillingness) to seriously engage with administrative law arguments (in terms of the Constitution and PAJA) in this case undermines the development of a potentially constructive alliance between specific socio-economic rights and administrative justice provisions in the Constitution.

The respondents have, however, already filed notice of their intention to apply to the Constitutional Court for leave to appeal the SCA's judgment. One hopes that

also the administrative law dimension of this matter will receive better treatment in Braamfontein than it did in Bloemfontein.

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