

Research Findings: Burgers Park Community v/s City of Tshwane Metropolitan Municipality

Case Details

- Case Number: 120856/2023
- Court: High Court of South Africa (Gauteng Division, Pretoria)
- Judge: V Ngalwana AJ (Acting Judge)
- Date of Judgment: 04 December 2023
- Date of Hearing: 30 November 2023
- Status: REVISED (Not reportable, not of interest to other judges)

Parties

- Applicants: Thapelo Josiah Mogoai (First Applicant) and The Burgers Park Community (2nd to 25th Applicants) - 26 people total
- Respondent: City of Tshwane Metropolitan Municipality
- Legal Representatives:
 - Applicants: Lawyers for Human Rights, Pretoria (Counsel: Z Mahamba)
 - Respondent: Ncube Inc (Counsel: SG Zwane)

The Case Summary

The case involves 26 members of the Burgers Park Community who were living in makeshift homes (cardboard and plastic structures) on sidewalks near Burgers Park in Pretoria. The municipality removed their structures, and they sought urgent court relief.

Applicants' Claims

1. Restoration to peaceful and undisturbed access to their makeshift homes
2. Return of building materials and movable assets
3. Reconstruction of their "homes"
4. In the alternative: Emergency temporary accommodation within 48 hours
5. Damages of R1,500 each for removal of personal possessions

Key Legal Issues

1. Municipal By-laws Violation: The applicants' occupation of sidewalks violated municipal by-laws
2. Constitutional Right to Housing: Section 26 of the Constitution guarantees the right to access adequate housing
3. State Obligation: The state must take reasonable legislative and other measures to achieve progressive realization of housing rights

(3 of 3) The courts can play a crucial role in holding government accountable

4. Conflict Between Law and Homelessness: The tension between enforcing municipal by-laws and protecting constitutional rights

Judge's Key Findings

The Problem of Lawlessness in South Africa

The judge opened with a scathing critique of South Africa's state of lawlessness:

1. Systemic Corruption:

- National Police Commissioner convicted of corruption
- Legislators accused of living lavishly on unjustifiable salaries
- A judicial panel found the President "may have committed" serious violations of section 96(2)(a) of the Constitution
- Suggestions of presidential involvement in money laundering

2. Language and Euphemism:

- Senior executives who "cook the books" are described as committing "accounting irregularities" rather than crime
- Public Finance Management Act violations are called "irregularities" rather than crimes
- This linguistic obfuscation enables criminals to escape accountability

3. Public Numbness:

- Voters continue returning ruling parties despite corruption
- South Africans have become numb to criminality
- There is endemic lawlessness at the state level

The Case's Broader Implications

The judge noted that the case implicates:

- The Respondent municipality and its enforcement of by-laws
- Provincial and national departments responsible for human settlements
- Provincial and national treasury for budget allocation in housing development
- Home affairs department for immigration affairs handling
- National legislature for laws regulating immigrant influx
- Law enforcement officials for policing and enforcing municipal by-laws
- Courts for orders made in similar cases

The Judgment's Core Reasoning

1. Law Must Apply Equally: Breaking the law is a criminal act regardless of who breaks it - whether a billionaire or a homeless immigrant. The law cannot be applied selectively.

2. Municipal By-laws Are Valid: The judge agreed that the applicants' occupation of sidewalks violated municipal by-laws. Sidewalks are public amenities, and erecting structures on them is prohibited.

3. But the State Must Provide Alternatives: While the municipality can enforce by-laws, it cannot simply remove people without providing alternative accommodation. The Constitution requires the state to take reasonable measures to achieve progressive realization of housing rights.

4. The Contradiction: The judge pointed out the fundamental problem - the applicants were living in violation of the law, but the municipality's only response was removal without providing viable alternatives.

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The Court Order

The judge made the following interim order:

- 1.Immediate Relief: The City of Tshwane is directed to provide alternative accommodation within 48 hours that is fit for human habitation
- 2.Part B Application: The applicants are granted leave to approach the court on the same papers (supplemented) for Part B of the notice of motion within two months (by 6 February 2024)
- 3.Costs: Stand over for determination at Part B hearing
- 4.Condition: If applicants fail to launch Part B proceedings within the stipulated time, the relief granted in paragraph 1 shall lapse

The Judge's Reasoning on Why Not to Strike the Application

The judge refused to strike the application off the roll despite the applicants having already rebuilt their structures, because:

- 1.Striking it off would contribute to the "continuing cycle of lawlessness"
- 2.Courts exist to resolve disputes by application of law, not to avoid disputes by doctrinal refuge
- 3.It would be unjust to allow elected representatives to continue making election promises of "a million houses" they have no intention of keeping
- 4.South African voters must mature to the level of holding elected representatives accountable for their promises
- 5.Courts must step in to uphold and protect the Constitution and human rights

The S v Selebi Precedent

The judgment references S v Selebi 2012 (1) SACR 209 (SCA); 2012 (1) SA 487 (SCA) in footnote 2, which establishes:

Key Principle: Members of cabinet, of which the President is one, may not undertake any paid work other than one for which they have been elected or appointed in public office.

This precedent is cited in the context of the judge's critique of government corruption and the failure of elected officials to comply with constitutional obligations.

Advantages for Hardworking Communities

1. Judicial Enforcement of Constitutional Rights

- The court affirmed that constitutional rights to housing are enforceable in court
- Communities cannot be simply removed without alternative provision
- The state must demonstrate it is taking reasonable measures toward housing

2. Accountability of Government

- The judgment holds municipalities accountable for their policies
- It requires the state to follow through on stated commitments (e.g., identified shelters)
- It prevents the state from using by-law enforcement as a substitute for housing policy

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3. Rule of Law Principle

- The judge emphasized that the law must apply equally to all
- No one is above the law, and no one is beneath it
- This principle protects vulnerable communities from arbitrary state action

4. Interim Relief Mechanism

- The court can grant immediate relief while longer-term solutions are pursued
- The 48-hour accommodation order provides immediate protection
- Part B proceedings allow for comprehensive long-term solutions

5. Exposure of Systemic Problems

- The judgment exposes the hypocrisy of government corruption while criminalizing homelessness
- It highlights the gap between constitutional promises and lived reality
- It calls for voter accountability and judicial enforcement

Broader Context: South Africa's Lawlessness

The judgment's opening critique establishes that:

1. Corruption is endemic at the highest levels of government
2. Language is used to obscure rather than describe criminal conduct
3. The public has become numb to government criminality
4. Yet the same government criminalizes the survival strategies of the poor
5. This creates a two-tier system of justice

The case demonstrates that while cabinet members engage in corruption with impunity, homeless people are criminalized for seeking shelter.

Constitutional Framework

The judgment references:

- Section 26: Right to access adequate housing
- Section 34: Courts exist to resolve disputes by application of law
- Section 96(2)(a) and (b): Presidential conduct and conflict of interest
- Section 34(1) of PECCA: Prevention and Combating of Corrupt Practices Act requirements

The Constitution places an obligation on the state to "take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of [the right of access to adequate housing]."

COMPARATIVE JURISPRUDENCE: BURGERS PARK v GROOTBOOM

The Grootboom Case (2000) - Foundation

The landmark case *Government v Grootboom* (2000) established that:

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1. Progressive Realization Principle: The state must take reasonable measures to progressively realize the right to housing

2. Immediate Obligations: While full housing delivery takes time, the state has immediate obligations to provide basic shelter

3. Vulnerable Groups: Special attention must be paid to those in desperate need

4. Coherent Policy: Housing programs must be coherent and directed toward progressive realization

The Grootboom respondents were evicted from informal settlements and left homeless. The Constitutional Court ordered the state to provide emergency shelter while longer-term housing was developed.

The Burgers Park Case (2023) - Evolution

The Burgers Park judgment applies and extends Grootboom by:

1. Accountability for Promises: Holding government accountable for stated commitments (identified shelters)

2. Interim Relief: Using interim court orders to compel immediate action while longer-term solutions are pursued

3. Systemic Critique: Exposing the hypocrisy of government corruption while criminalizing homelessness

4. Rule of Law: Emphasizing that law must apply equally regardless of status

5. Voter Accountability: Calling for voters to hold elected officials accountable

THE HYPOCRISY EXPOSED: CORRUPTION v HOMELESSNESS

Government Corruption (Unpunished)

- National Police Commissioner convicted of corruption
- Cabinet members living lavishly on unjustifiable salaries
- Presidential involvement in potential money laundering
- Legislators failing to investigate corruption
- Widespread use of euphemistic language to obscure crimes

Homelessness (Criminalized)

- Poor people living in cardboard structures = criminal offense
- Violating municipal by-laws = subject to arrest and prosecution
- Seeking shelter on public land = criminal conduct
- Demanding housing rights = "taking the law into their own hands"

The Judge's Point

The judge explicitly asks: Can the poor be faulted for believing that if common criminals, legislators, the Executive, and law enforcement officers get away with far more serious criminality, that they too will get away with their lawlessness?

This is not merely a legal question—it is a question about the legitimacy and credibility of the entire legal system.

ADVANTAGES FOR HARDWORKING COMMUNITIES

1. Judicial Enforcement of Constitutional Rights

What This Means: Communities can go to court to enforce their constitutional rights to housing, even against powerful government institutions.

How It Helps:

- Provides a legal mechanism for the voiceless to challenge government action
- Establishes that constitutional rights are not merely aspirational but enforceable
- Creates precedent that courts will intervene when government fails its obligations
- Allows communities to bypass political processes that may be unresponsive

Practical Impact: The Burgers Park community secured immediate accommodation within 48 hours through court order, something they could not achieve through political channels.

2. Accountability of Government

What This Means: Government cannot simply enforce laws against the poor while ignoring its own constitutional obligations.

How It Helps:

- Requires municipalities to follow through on stated policies and commitments
- Prevents selective enforcement of by-laws
- Creates consequences for government inaction
- Establishes that government must provide alternatives before removing people

Practical Impact: The court ordered the City of Tshwane to provide the shelters it claimed to have already identified, preventing the municipality from simply removing people without providing alternatives.

3. Rule of Law Principle

What This Means: The law applies equally to all—no one is above it, and no one is beneath it.

How It Helps:

- Prevents arbitrary state action against vulnerable groups
- Establishes that government cannot use by-laws as a substitute for housing policy
- Creates equal protection regardless of economic status
- Prevents the criminalization of survival strategies

Practical Impact: The judge emphasized that breaking the law is criminal regardless of who breaks it—whether a billionaire or a homeless person. This principle protects the poor from selective prosecution.

4. Interim Relief Mechanism

What This Means: Courts can grant immediate relief while longer-term solutions are pursued.

How It Helps:

- Provides immediate protection while cases are being decided
- Prevents irreparable harm while waiting for final judgment
- Allows communities to survive while systemic problems are addressed

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•Creates urgency that political processes often lack

Practical Impact: The 48-hour accommodation order provided immediate shelter, preventing the community from being left homeless while the case proceeded.

5. Exposure of Systemic Problems

What This Means: Court judgments can expose the hypocrisy and systemic failures of government.

How It Helps:

- Creates public record of government failures
- Highlights contradictions between government rhetoric and action
- Educates the public about systemic injustice
- Provides basis for political and social reform

Practical Impact: The judgment's opening critique of government corruption creates a powerful narrative that challenges the legitimacy of criminalizing homelessness.

6. Precedent for Future Cases

What This Means: This case establishes precedent that courts will enforce housing rights.

How It Helps:

- Other communities can cite this case in their own disputes
- Establishes legal principles that bind lower courts
- Creates a body of law protecting housing rights
- Encourages similar litigation by other communities

Practical Impact: The judgment can be cited by other homeless communities and informal settlement dwellers in their own cases.

7. Voter Accountability

What This Means: The judgment calls for voters to hold elected officials accountable for their promises.

How It Helps:

- Empowers voters to demand accountability
- Establishes that election promises are not merely rhetoric
- Creates political consequences for failure to deliver
- Strengthens democratic accountability

Practical Impact: The judge's statement that "South African voters must mature to the level of holding their elected representatives accountable for their promises" creates a moral and political obligation on voters.

THE BROADER CONTEXT: SOUTH AFRICA'S CONSTITUTIONAL PROMISE

What the Constitution Says

Section 26 of the South African Constitution provides:

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"Everyone has the right of access to adequate housing. The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right."

The Gap Between Promise and Reality

The Burgers Park judgment exposes a massive gap between:

- Constitutional Promise: Everyone has the right to adequate housing
- Government Action: Removing people from makeshift shelters without providing alternatives
- Government Corruption: Cabinet members enriching themselves while housing delivery stalls
- Public Numbness: Voters continuing to elect the same parties despite corruption

Why This Matters for Communities

The judgment establishes that:

- 1.The Constitution is not merely aspirational—it is enforceable
- 2.Courts will intervene when government fails its obligations
- 3.The poor have legal remedies available to them
- 4.Government cannot use by-laws to avoid its constitutional obligations
- 5.The rule of law applies equally to all

THE S v SELEBI PRECEDENT: CABINET ACCOUNTABILITY

What the Case Established

S v Selebi (2012) established that members of cabinet, including the President, may not undertake any paid work other than that for which they have been elected or appointed in public office.

How It Relates to Burgers Park

The judge cites this precedent in the context of exposing government corruption:

- Cabinet members are subject to strict conflict-of-interest rules
- Yet these rules are routinely violated
- The President was found to have "may have committed" serious constitutional violations
- The Legislature refused to investigate these violations

The Hypocrisy

While cabinet members are legally prohibited from conflicts of interest and yet engage in corruption with impunity, homeless people are criminalized for seeking shelter. This double standard undermines the legitimacy of the entire legal system.

What This Means for Communities

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If the highest officials can violate constitutional provisions with impunity, why should the poor respect laws that criminalize their survival? The Burgers Park judgment addresses this by insisting that the law must apply equally to all.

PRACTICAL IMPLICATIONS FOR HARDWORKING COMMUNITIES

What Communities Can Do

- 1.Document Everything: Keep records of government promises, policies, and actions
- 2.Seek Legal Help: Organizations like Lawyers for Human Rights can assist with court cases
- 3.Build Community Organizations: Collective action is more powerful than individual action
- 4.Engage with Courts: Use the judicial system to enforce constitutional rights
- 5.Hold Government Accountable: Demand that government follow through on stated policies

What the Courts Will Do

- 1.Enforce Constitutional Rights: Courts will intervene when government fails its obligations
- 2.Grant Interim Relief: Courts can provide immediate protection while cases proceed
- 3.Order Specific Performance: Courts can order government to take specific actions
- 4.Expose Systemic Problems: Judgments can highlight government failures
- 5.Create Precedent: Successful cases create precedent for future cases

What Government Must Do

- 1.Provide Alternatives: Before removing people, government must provide alternative accommodation
- 2.Follow Through on Policies: Government must implement the housing policies it has adopted
- 3.Apply Law Equally: Government cannot selectively enforce by-laws
- 4.Respect Constitutional Rights: Government must take reasonable measures toward housing realization
- 5.Comply with Court Orders: Government must comply with court orders promptly

CONCLUSION: THE POWER OF LAW FOR THE POWERLESS

The Burgers Park judgment demonstrates that despite South Africa's systemic corruption and government failures, the law remains a powerful tool for protecting the rights of vulnerable communities. The judgment establishes that:

- 1.Constitutional rights are enforceable: Communities can go to court and win
- 2.Government is accountable: Courts will hold government to its constitutional obligations
- 3.The rule of law applies equally: No one is above the law, and no one is beneath it
- 4.Interim relief is available: Courts can provide immediate protection
- 5.Systemic problems can be exposed: Judgments can highlight government failures and create political pressure for reform

(3 of 3) The courts can play a crucial role in holding government accountable

For hardworking communities struggling with homelessness and inadequate housing, this judgment offers hope that the legal system, despite its flaws, can be used to enforce their constitutional rights and hold government accountable.