

The Burgers Park Community v. The City of Tshwane Metropolitan Municipality

A Detailed Case Study: When the Law Protects the Homeless and Exposes Government Hypocrisy

Executive Summary

On December 4, 2023, the High Court of South Africa in Pretoria issued a landmark judgment that vindicated the rights of 26 homeless individuals living in makeshift shelters in Burgers Park, Pretoria. More importantly, the judgment delivered by Acting Judge V. Ngalwana served as a scathing indictment of the systemic lawlessness that pervades South African society, particularly the hypocrisy of a government that criminalizes the survival strategies of the poor while tolerating corruption at the highest levels. This case study explores the judgment in detail, explaining its significance for hardworking communities and the future of social justice in South Africa.

Part One: The Facts of the Case

The Applicants and Their Plight

The case involved 26 members of the Burgers Park community, led by Thapelo Josiah Mogoai. These individuals were living in makeshift shelters constructed primarily from cardboard and plastic materials on the sidewalks adjacent to Burgers Park, a public open space in the heart of Pretoria's inner city. The structures, while crude, represented the only shelter these individuals had—a desperate response to homelessness and the complete absence of affordable housing options.

Burgers Park itself is a historically significant public space in Pretoria's inner city. In recent decades, it has become a focal point for homeless communities and informal settlement dwellers, many of whom have no alternative accommodation. The park and its surrounding areas have transformed into a de facto shelter for those pushed to the margins of South African society.

The Municipality's Response

The City of Tshwane Metropolitan Municipality, the respondent in this case, took action to enforce its municipal by-laws. These by-laws prohibit the erection of any shelter, house, shack, or structure on public amenities with the intention to live in it. The municipality removed the applicants' structures, leaving them homeless and their possessions scattered or destroyed.

The applicants' response was to rebuild their shelters in the same location, a decision that reflected their desperation and the complete absence of viable alternatives. They had nowhere else to go.

The Legal Claims

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

The applicants approached the High Court with an urgent application seeking:

1. Restoration of Access: Immediate and peaceful restoration to their makeshift homes
2. Return of Property: Return of their building materials and movable assets
3. Reconstruction: Permission to reconstruct their "homes"
4. Alternative Relief: In the alternative, emergency temporary accommodation within 48 hours
5. Damages: Compensation of R1,500 each for the removal of their personal possessions

The applicants were represented by Lawyers for Human Rights, Pretoria, through counsel Z Mahamba. The municipality was represented by Ncube Inc, through counsel SG Zwane.

Part Two: The Judge's Scathing Critique of South African Lawlessness

Opening Statement: A Cesspool of Lawlessness

The judgment begins with one of the most powerful opening statements in recent South African jurisprudence. Acting Judge Ngalwana declared:

"South Africa has become a veritable cesspool of lawlessness. Evidence of this is legion. People generally seem to do as they please without any fear of consequence, including arrest and successful prosecution."

This is not the language typically found in judicial decisions. It is the language of a judge who has lost patience with the systemic corruption and hypocrisy that characterizes the South African state.

The Evidence of Lawlessness

The judge then provided concrete examples of this lawlessness:

1. Corruption at the Highest Levels

The judge cited the conviction of a former National Police Commissioner (Jackie Selebi) for corruption. Selebi, who had risen to lead the South African Police Service and served as President of Interpol, was convicted of receiving bribes and providing favors in return. This was not a minor official or a low-level functionary—it was the person responsible for enforcing the law across the entire nation.

2. Allegations Against the President

The judge noted that a judicial panel led by a former Chief Justice had found that the President "may have committed" serious violations of the Constitution, including:

- Violation of section 96(2)(a) of the Constitution (relating to the conduct of the President)
 - Violation of section 34(1) of the Prevention and Combating of Corrupt Practices Act (PECCA)
 - Serious misconduct in violating section 96(2)(b) of the Constitution by acting in a way inconsistent with his office
 - Exposure to a conflict between his official responsibilities and his private business
- The panel even suggested that the President may be implicated in money laundering.

3. Legislative Inaction

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

Most damning of all, the judge noted that the Legislature—which is supposed to hold the President accountable—decided that these "prima facie findings do not deserve further investigation." In other words, the branch of government responsible for oversight decided to ignore evidence of potential presidential corruption.

4. The Voter Paradox

The judge observed that despite these revelations, South African voters continue to return the ruling party to power, "like fanatical club football supporters." This suggests that voters have become numb to criminality or have lost faith in the system's ability to deliver change.

The Language of Corruption: Euphemism and Obfuscation

The judge made a particularly insightful observation about how language is used to obscure the truth. Drawing on George Orwell's 1946 essay "Politics and the English Language," the judge noted that when senior company executives "cook the books," the media describes it as "accounting irregularities" rather than crime. When executives violate the Public Finance Management Act with serious consequences for service delivery, lawyers characterize it as "irregularity" rather than the crime that it is.

This linguistic obfuscation serves a crucial function: it allows criminals to escape accountability by hiding the true nature of their conduct beneath a veneer of bureaucratic language. The judge argued that this is a form of insidious corruption that undermines the rule of law.

The Hypocrisy at the Heart of the Case

The judge then drew the connection to the case at hand. The applicants—homeless people living in cardboard structures—are treated as criminals. They are subject to arrest, prosecution, and imprisonment for violating municipal by-laws. Yet the government officials who engage in far more serious crimes—corruption, money laundering, abuse of power—are often left untouched.

The judge posed a rhetorical question that cuts to the heart of the matter: Can the poor be faulted for believing that if common criminals, legislators, the Executive, and law enforcement officers are seen getting away with far more serious criminality, that they too will get away with their lawlessness?

This question exposes the fundamental hypocrisy of the South African legal system: it applies the law selectively, punishing the poor for minor infractions while allowing the powerful to commit serious crimes with impunity.

Part Three: The Legal Framework

The Constitutional Right to Housing

South Africa's Constitution, adopted in 1996, represents one of the most progressive constitutional documents in the world. Section 26 provides:

"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."

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

This is not merely an aspirational statement. It is a binding constitutional obligation on the state. The state cannot simply ignore this obligation; it must take concrete steps to realize the right to housing progressively over time.

The Tension Between By-Laws and Constitutional Rights

The municipality argued that the applicants' occupation of the sidewalk violated municipal by-laws. This is true. The by-laws explicitly prohibit the erection of any shelter, house, shack, or structure on public amenities with the intention to live in it. Violation of these by-laws is a criminal offense, punishable by a fine of up to R10,000 or imprisonment of up to 12 months. However, the judge recognized a fundamental tension: the municipality cannot simply enforce its by-laws without regard to the constitutional rights of the people affected. The state cannot use by-laws as a substitute for housing policy.

The Principle of Progressive Realization

The judge drew on the landmark case of *Government v. Grootboom* (2000), which established the principle of "progressive realization" of socio-economic rights. This principle means that while the state may not be able to provide housing to everyone immediately, it must:

1. Have a coherent, coordinated housing policy
2. Take concrete steps to implement that policy
3. Prioritize the most vulnerable groups
4. Show progress over time

The state cannot simply ignore the problem of homelessness or use punitive measures as a substitute for constructive solutions.

The Court's Reasoning

The judge acknowledged that the applicants had violated municipal by-laws. However, he refused to strike the application off the roll (dismiss it) for several reasons:

First, striking the application would contribute to the "continuing cycle of lawlessness." If the court simply dismissed the case because the applicants had violated the law, it would be endorsing the idea that the state can use the law selectively—enforcing it against the poor while ignoring the constitutional obligations to provide alternatives.

Second, courts exist to resolve disputes by application of law, not to avoid disputes by doctrinal refuge. The Constitution (section 34) makes clear that courts have a duty to resolve disputes. Simply dismissing the case would be an abdication of that duty.

Third, it would be unjust to allow elected representatives to continue making election promises of "a million houses" they have no intention of keeping. The judge argued that South African voters must mature to the level of holding their elected representatives accountable for their promises. The courts have a role to play in enforcing that accountability.

Part Four: The Court's Order

The Interim Order

The judge issued an interim order directing the City of Tshwane to:

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

1. Provide Alternative Accommodation: Within 48 hours of the order, provide alternative accommodation that is "fit for human habitation"
2. Part B Application: Grant the applicants leave to approach the court on the same papers (with supplementary evidence) for Part B of the notice of motion within two months (by February 6, 2024)
3. Costs: Stand over the question of costs for determination at the Part B hearing
4. Condition: If the applicants fail to launch Part B proceedings within the stipulated time, the relief granted shall lapse

The Basis for the Order

The judge noted that the City of Tshwane had stated, through its spokesperson, that it had already identified homeless shelters to accommodate homeless people. The judge held the municipality to this promise. If the municipality had already identified shelters, it should be able to accommodate the applicants within 48 hours.

The judge also noted that the municipality's own policy—the Street Homelessness Policy for the City of Tshwane 2015—includes provisions for "creating, developing and sustaining access to diverse housing options that are affordable, accessible and well-located." The court was simply holding the municipality to its own stated policy.

Part Five: The S v Selebi Precedent and Cabinet Accountability

The Case and Its Significance

The judgment references *S v Selebi* (2012), a landmark case in which Jackie Selebi, the former National Police Commissioner, was convicted of corruption. The case established important principles about the conduct of public officials and the seriousness of corruption. More specifically, the judgment alludes to the principle that members of cabinet, including the President, are prohibited from undertaking any paid work other than that for which they have been elected or appointed in public office. This principle is designed to prevent conflicts of interest and ensure that public officials are not using their positions for private gain.

The Hypocrisy Exposed

By citing the Selebi case, the judge highlighted the glaring hypocrisy at the heart of the South African justice system. While the state vigorously prosecutes homeless people for building shelters on public land, it often fails to hold its own powerful officials accountable for far more serious crimes—corruption, money laundering, abuse of power.

The judge's point is clear: if the highest officials in the land can violate constitutional provisions with impunity, why should the poor respect laws that criminalize their survival? This is not merely a legal question; it is a question about the legitimacy and credibility of the entire legal system.

Part Six: The Advantages for Hardworking Communities

The Burgers Park judgment offers several crucial advantages for hardworking communities in South Africa:

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

1. The Constitution as a Shield for the Powerless

The case proves that the Constitution is not just a piece of paper. It has real, enforceable power to protect the rights of ordinary citizens against the actions of the state. Communities can and should use the courts to enforce their constitutional rights.

What This Means Practically: If a municipality or government department violates your constitutional rights, you can go to court and win. The courts have the power to order the government to comply with the Constitution.

Example from the Case: The applicants were homeless and living in violation of municipal by-laws. Yet the court sided with them because the municipality had failed to comply with its constitutional obligation to take reasonable steps toward realizing the right to housing.

2. Government Accountability

The judgment sends a clear message to municipalities and government departments: you cannot ignore your constitutional duties. You must create and implement coherent plans to address social problems like homelessness, rather than simply resorting to punitive measures.

What This Means Practically: When a government agency claims to have a policy or program, it can be held accountable for implementing it. The court will enforce compliance.

Example from the Case: The City of Tshwane claimed to have identified homeless shelters. The court held it to this promise and ordered it to provide accommodation within 48 hours.

3. The Rule of Law for All

The judge's insistence that the law must apply equally to everyone is a crucial victory for justice. It challenges the idea that the rich and powerful can get away with anything, while the poor are punished for minor infractions.

What This Means Practically: The law cannot be applied selectively. If government officials violate the law, they should be prosecuted just as vigorously as ordinary citizens.

Example from the Case: The judge pointed out that breaking the law is a criminal act regardless of who breaks it—whether a billionaire or a homeless immigrant. The law must apply equally.

4. Immediate, Tangible Relief

The court's order for immediate alternative accommodation shows that the legal system can provide practical, life-saving solutions for people in desperate situations. The 48-hour deadline was not arbitrary; it reflected the urgent need for shelter.

What This Means Practically: If you are facing eviction or removal, you can go to court and potentially obtain an interim order requiring the government to provide alternative accommodation immediately.

Example from the Case: The applicants obtained a court order for accommodation within 48 hours, preventing them from being left homeless on the streets.

5. Exposing the Rot

By publicly calling out the hypocrisy of the state, the judgment helps to expose the systemic corruption and inequality that plague South Africa. This public exposure is a vital first step towards meaningful change.

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

What This Means Practically: Court judgments become part of the public record. They can be used to mobilize public opinion, pressure politicians, and drive social change.

Example from the Case: The judge's opening critique of government corruption and lawlessness will likely be cited in future cases and used by civil society organizations to advocate for reform.

6. Precedent for Future Cases

This case establishes precedent that courts will enforce housing rights and hold government accountable. Other communities can cite this case in their own disputes.

What This Means Practically: If you are facing a similar situation, you can cite the Burgers Park case to strengthen your legal arguments.

Example from the Case: Other homeless communities in South Africa can now argue that the government has a constitutional obligation to provide them with alternative accommodation before removing their shelters.

7. Voter Accountability

The judgment calls for voters to hold elected officials accountable for their promises. This is a powerful statement about the relationship between citizens and their elected representatives.

What This Means Practically: Voters have power. If elected officials fail to deliver on their promises, voters can hold them accountable at the ballot box.

Example from the Case: The judge criticized the fact that South African voters continue to return the ruling party to power despite its failure to deliver on housing promises. He called for voters to "mature to the level of holding their elected representatives accountable."

Part Seven: The Broader Context—South Africa's Constitutional Promise and Reality

The Constitutional Promise

South Africa's 1996 Constitution represents a remarkable achievement. It enshrines a comprehensive bill of rights, including not just civil and political rights but also socio-economic rights such as the right to housing, healthcare, education, and social security. The Constitution declares that:

"The founding values of our society are human dignity, the achievement of equality and the advancement of human rights and freedoms."

This is an extraordinary promise—a commitment to build a society where everyone enjoys dignity, equality, and fundamental rights.

The Reality

Yet as the Burgers Park judgment makes clear, the gap between constitutional promise and lived reality is enormous. While the Constitution guarantees the right to housing, millions of South Africans live in informal settlements and makeshift shelters. While the Constitution guarantees equality, the law is applied selectively—harshly against the poor, leniently against the powerful.

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

The Tale of Two South Africas

The judge's concept of "a tale of two South Africas" captures this contradiction perfectly. There is one South Africa for the powerful—where corruption is tolerated, where conflicts of interest are overlooked, where the law is selectively enforced. And there is another South Africa for the powerless—where survival strategies are criminalized, where the law is enforced with harsh severity, where constitutional rights remain aspirational rather than real.

Why This Matters

The Burgers Park judgment is significant because it refuses to accept this state of affairs. The judge insists that the law must apply equally to all, that the Constitution must be enforced for the benefit of the poor as well as the rich, and that government must be held accountable for its failures.

Part Eight: Lessons and Implications

For Hardworking Communities

The Burgers Park case offers several crucial lessons for hardworking communities struggling with homelessness, inadequate housing, and government indifference:

1. **The Law Can Be Your Ally:** Don't assume that the courts are only for the rich and powerful. The courts can be a powerful tool for protecting your rights and holding government accountable.
2. **Document Everything:** Keep records of government promises, policies, and actions. If government claims to have a housing program or identified shelters, hold it accountable for implementing these commitments.
3. **Seek Legal Help:** Organizations like Lawyers for Human Rights provide free or low-cost legal assistance to vulnerable communities. Don't hesitate to approach them.
4. **Build Community Organizations:** Collective action is more powerful than individual action. Organize with others in your community to demand accountability from government.
5. **Engage with the Courts:** Use the judicial system to enforce your constitutional rights. The courts have shown that they are willing to intervene when government fails its obligations.

For Government and Municipalities

The judgment sends a clear message to government and municipalities:

1. **You Cannot Ignore Your Constitutional Obligations:** The Constitution is not optional. You must take reasonable steps to realize the right to housing.
2. **You Cannot Use By-Laws as a Substitute for Policy:** You cannot simply remove people without providing alternatives. You must have a coherent housing policy and implement it.
3. **You Will Be Held Accountable:** If you make promises or adopt policies, the courts will hold you accountable for implementing them.
4. **The Law Applies Equally:** You cannot selectively enforce the law. The law must apply equally to all.

For Society as a Whole

The judgment has broader implications for South African society:

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

- 1.The Constitution Matters: The Constitution is not just a piece of paper. It has real power to protect rights and hold government accountable.
- 2.Corruption Must Be Addressed: The judge's opening critique of government corruption is a powerful call for systemic reform. South Africa cannot achieve its constitutional promise while corruption is rampant at the highest levels.
- 3.Voters Must Hold Government Accountable: The judge's call for voters to "mature to the level of holding their elected representatives accountable" is a challenge to South African democracy. Voters have power, and they must use it.
- 4.The Rule of Law Must Be Universal: The law cannot apply selectively. If South Africa is to be a constitutional democracy, the rule of law must apply equally to all.

Conclusion: A Beacon of Hope in a Lawless State

The Burgers Park judgment is a powerful reminder that even in a society grappling with systemic corruption and government failures, the law can still be a force for good. The judgment demonstrates that:

- 1.The courts can play a crucial role in holding government accountable and protecting the rights of the most vulnerable
- 2.The Constitution has real power to protect the rights of ordinary citizens
- 3.The rule of law can be enforced even when government officials violate it
- 4.Hardworking communities have legal remedies available to them

For the 26 members of the Burgers Park community, this judgment is a victory. They secured accommodation within 48 hours and the opportunity to pursue a longer-term solution through Part B proceedings. More importantly, they have vindicated their constitutional rights and exposed the hypocrisy of a system that criminalizes their survival while tolerating corruption at the highest levels.

For hardworking communities across South Africa, this judgment is a beacon of hope. It affirms that their rights matter, that the courts will listen to their grievances, and that the fight for a just and equitable society is far from over. The Burgers Park case proves that even the most vulnerable members of society can use the law to protect themselves and hold government accountable.

The judgment is also a stark warning to government and to South African society. The judge's opening critique of lawlessness is a call to action. South Africa cannot continue to tolerate corruption at the highest levels while criminalizing the survival strategies of the poor. The nation must choose: either it will be a constitutional democracy where the rule of law applies equally to all, or it will continue to be a "cesspool of lawlessness" where the powerful are above the law and the powerless are crushed by it.

The Burgers Park judgment suggests that the courts, at least, have chosen the path of justice. The question now is whether the rest of South African society will follow.

References

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

[\[4\] Government of the Republic of South Africa and Others v Grootboom and Others \(CCT11/00\) \[2000\] ZACC 19; 2001 \(1\) SA 46 \(CC\); 2000 \(11\) BCLR 1169 \(CC\) \(4 October 2000\). Constitutional Court of South Africa.](#)

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Date: December 2024

Jurisdiction: South Africa

Case Citation: 120856/2023