IN THE SOUTH GAUTENG HIGH COURT OF SOUTH AFRICA

(JOHANNESBURG)

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~/NO
(2) OF INTERESTTO OTHER JUDGES: YES/NO
(3) REVISED.
24/03/2009
DATE SIGNATURE

CASE NO: 08/17815

In the matter between:

JOHNSON MATOTOBA NOKOTYANA AND OTHERS Applicants

and

THE EKURHULENI METROPOLITAN MUNICIPALITY Respondent

JUDGMENT

EPSTEIN AJ:

[1] The Applicants seek an order directing the Respondent to provide the Harry Gwala Informal Settlement ("**HGS**") with certain basic services pending the decision on whether the HGS should be upgraded in terms of chapter 13 of the National Housing Code.

[2] The Applicants are represented by Johnson Matotoba Nokotyana ("**Nokotyana**") who is a resident of the HGS which is located in Benoni. Nokotyana has been authorised by the other Applicants to bring this application on their behalf. His authority appears from the power of attorney attached to the founding affidavit which in turn has attached to it a list of the Applicants together with their signatures.

[3] The Respondent is the Ekurhuleni Metropolitan Municipality which is a Metropolitan Municipality established in terms of the Local Government Municipal Structures Act 117 of 1998, as amended.

[4] The original occupiers of the HGS occupied the land during the 1980's. Subsequently, Iscor, one of the owners of the land, initiated a process of relocation. Most of the people who occupied the Iscor land moved voluntarily to Chief Albert Luthuli Extension 4 ("**Extension 4**"). The Respondent claims that those who relocated to Extension 4 have access to permanent services but this is disputed by the Applicants who allege that they do not have access to electricity nor are there schools at Extension 4. Most of the people who occupy portions 29 and 68 of the Farm Rietfontein (where the HGS is located), have refused to be relocated but the Applicants contend that they have not refused to be relocated without reason. They state that they have insisted on enforcement of their rights as contemplated in Chapter 13 of the Housing Code, that is to be housed in the HGS and for the Settlement to be upgraded if it is found to be feasible as contemplated in Chapter 13.

[5] The services which the Applicants require the Respondent to provide, as appears from the Notice of Motion, are the following:

1. Communal water taps: for the provision of water in accordance with the basic standards required by Regulation 3 (b) of the Regulations Relating to Compulsory National Standards and Measure to Conserve Water promulgated in Government Gazette Notice No. R. 509 dated June 2001 in terms of the Water Services Act, 108 of 1997;

2. Temporary sanitation facilities;

3. Refuse removal facilitation;

4. High mast lighting in key areas to enhance community safety and access by emergency vehicles.

[6] When argument commenced before me, it became apparent that there was really no dispute in respect of water taps and refuse removal. The Respondent accepts the obligation to provide communal water taps for the provision of water in accordance with the Basic Standards required by Regulation 3 (b) of the Regulations relating to Compulsory National Standards and Measures to conserve water. This provides that the minimum standard for basic water supply services is a minimum quantity of potable water of 25 litres per person per day or 6 kilolitres per household per month and a minimum flow rate of not less than 10 litres per minute within 200 metres of a household. There are 48 taps in the area with a result that no resident is more than 100 metres from a tap.

[7] The Respondent provides a refuse removal service which involves every household being furnished with an 85 litre plastic bin which is emptied and collected once per week subject to accessibility. In cases where it is not possible to access areas for purposes of refuse collection, residents are required to drag the plastic bin to a position where the bins can be accessed. Previously all households had been provided with a bin but the Respondent recognized that it is possible that in cases where people had moved, new residents may have moved into the area and these new residents do not have bins. The Respondent, in its answering affidavit, invited the community committee of the Applicant to provide the Respondent with a list of names and identity numbers so that the Respondent could ensure that all households are provided with a refuse bin. The Applicants disputed that the refuse is collected by the Respondent and stated that the Applicants have resorted to recycling their refuse in vegetable gardens within the informal settlement. Nevertheless, in the light of the Respondent's attitude to the application for the provision of water and refuse services, there was no objection to my granting an order as sought. In the circumstances, at the conclusion of the hearing, I granted the following Order:

1. *Pending the decision whether the Harry Gwala Informal Settlement ("HGS") shall be upgraded in situ, the Respondent is ordered to comply with its constitutional and statutory obligations in terms of section 26 and 27 of the Constitution of the Republic of South Africa, 1996 and chapters 12 and 13 of the National Housing Code read with section 9 (1) of the Housing Act, 1997, that it provide to the HGS, the following basic interim services immediately:*

1.1 Communal water taps for the provision of water in accordance with the basic standards required by Regulation 3 (b) of the Regulations Relating to Compulsory National Standards and Measure to Conserve Water promulgated in Government Gazette Notice No. R. 509 dated June 2001 in terms of the Water Services Act, 108 of 1997.

1.2 Refuse removal facilitation which is to commence from 1 January 2009.

[8] Accordingly, the remaining issue in this case concerns whether the Applicants are entitled to an order for the provision of the following services:

i) Temporary sanitation facilities;

ii) High mast lighting in key areas to enhance community safety and access by emergency vehicles.

[9] The Applicants have approached this Court in terms of section 38 of the Constitution of the Republic of South Africa, 1996, the Applicant alleging that he is acting in his own interest, as well as on behalf of persons who cannot act in their own name and, further, on behalf of a group of persons. The Applicant also states that he is acting in the public interest, all of this as envisaged in section 38 (a), (b), (c) and (d).

[10] The grounds for the relief relied upon are sections 26 and 27 of the Constitution, as well as section 9 (1) of the Housing Act, 107 of 1997. I repeat the various relevant sections:

"Section 26 of the Constitution provides:

26 (1) Everyone has the right to have access to adequate housing.

(2) The State must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.

(3) .....

Section 27 of the Constitution provides:

27 (1) Everyone has the right to have access to –

(a) .....

(b) sufficient food and water; and

(c) .....

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.

(3) .....

Section 9 (1) of the Housing Act provides:

9 (1) Every Municipality must, as part of the Municipality's process of integrated development planning, take all reasonable and necessary steps within the framework of National and Provincial Housing Legislation and Policy to -

(a) ensure that -

(i) the inhabitants of its area of jurisdiction have access to adequate housing on a progressive basis;

(ii) conditions not conducive to health and safety of the inhabitants of its area of jurisdiction are prevented or removed;

(iii) services in respect of water, sanitation, electricity, roads, storm water drainage and transport are provided in a manner which is economically efficient.

(b) set housing delivery goals in respect of its area of jurisdiction;

(c) identify and designate land for housing development'

(d) create and maintain a public environment conducive to housing development which is financially and socially viable;

(e) promote the resolution of conflicts arising in the housing development process;

(f) initiate, plan, coordinate, facilitate, promote and enable appropriate housing development in its area of jurisdiction;

(g) provide bulk engineering services, and revenue generating services insofar as such services are not provided by specialist utility suppliers; and

(h) plan and manage land use and development."

[11] The Respondent has submitted a proposal for the upgrading of the HGS. This application has been submitted to the Gauteng Department of Housing ("**GDH**") in terms of chapter 13 of the Housing Code. A decision on the proposal is still being awaited from the Housing Advisory Committee of the GDH. It is the Applicants case that pending the decision on whether the HGS should be upgraded, the Respondent is in terms of its statutory obligations, sections 26 and 27 of the Constitution, and Chapters 12 and 13 of the Housing Code read with section 9 (1) of the Housing Act, under a legal obligation to provide the HGS with the basic services sought in the Notice of Motion. (In view of the Order I have already made, I need only adjudicate on the temporary sanitation facilities and high mast lighting.)

[12] According to Mr John Hutton ("**Hutton**"), a project manager employed by the Respondent, (and who has deposed to a confirmatory affidavit which is attached to the answering affidavit), the Applicants have access to temporary sanitation facilities in the form of stand related pit latrines. Hutton states that there are no conditions which would render the use of pit latrines hazardous.

[13] No steps have been taken for high mast lighting although this has been referred to the electricity department.

[14] It is the Applicants' case that they live in conditions that pose immediate threats to their lives, health and safety and that they are in need of emergency assistance. It is further the Applicants' case that they meet the eligibility requirement of Chapter 12 and that they fall under Chapter 13 of the Housing Code (paragraph 13.7.1).

[15] The defences raised by the Respondent are the following: -

i) Chapter 12 is not applicable as the Applicants do not fall within the emergency housing requirements of this Chapter.

ii) The provision of services in terms of Chapter 13, with the exception of the provision of access to water, is only applicable where it has been decided to develop an informal settlement *in situ*. It is the Respondent's case that no decision to upgrade the HGS has been made. Accordingly the Respondent, save with the exception relating to the provision of access to water, has no obligation to provide the interim services. The Respondent's defence is that it has no obligation until such time as it has been decided that the land in question is fit for development for residential purposes and the development process for the township is complete.

iii) The installation of engineering services can only be provided once the layout of the township is established to prevent wastage of pipes, cables and other structures.

[16] In order to determine the applicability of Chapters 12 and 13 of the Housing Code, it is necessary to have regard to the contents thereof. Chapter 12 deals with housing assistance in emergency housing circumstances. The following objectives and policies, *inter alia*, are stated, in Chapter 12:

a. *The rules relate to assistance to people who, for reasons beyond their control, find themselves in an emergency housing situation such as the fact that their existing shelter has been destroyed or damaged, their prevailing situation poses an immediate threat to their life, health and safety, or they have been evicted, or faced the threat of imminent eviction.*

b. *The assistance provided consists of funds in the form of grants to Municipalities to give effect to accelerated land development, the provision of basic municipal engineering services and shelter.* (The grants to Municipalities are given by the Provincial Government once the Municipality has applied for project approval via the Provincial Government's Department of Housing to the member of the Executive Council responsible for housing.)

c. *The assistance provided falls short of formal housing as provided for in other Programmes of a Housing Subsidy Scheme contained in the Housing Code, and is thus rendered only in emergency situations of exceptional housing needs.*

d. *The main objective of the Programme is to provide temporary assistance in the form of secure access to land and/or basic municipal engineering*

services and/or shelter in a wide range of emergency situations of exceptional housing need through the allocation of grants to Municipalities instead of housing subsidies to individuals.

e. *Assistance to be provided will only constitute the provision of temporary aid and be of a temporary nature.*

f. *Assistance will be limited to absolute essentials. It will not seek to provide housing or engineering services commensurate with those that might have been previously enjoyed.*

g. *The Programme serves to augment and supplement existing programmes and may not be employed to substitute normal planning and projects with the subsequent so-called "queue jumping" of any priority planning, approved and communicated projects, relating to the provision of housing.*

h. *The Programme applies to emergency situations of exceptional housing need defined in paragraph 12.3.1 of Chapter 12. Such an emergency includes a situation where persons' living conditions that pose immediate threats to life, health and safety and require emergency assistance, or are in a situation of exceptional housing need, which constitutes an emergency that can reasonably be addressed only by resettlement or other appropriate assistance in terms of the Programme.*

i. Funds approved in terms of Chapter 12 may not be used for street lighting and electrical services, except that the provision of high mast lighting could be considered in special circumstances.

[17] The question which then arises is whether the claim for an order that the Respondent provide temporary sanitation facilities and high mast lighting can be made under Chapter 12. In other words, does this constitute assistance to people who find themselves in an emergency housing situation as contemplated by Chapter 12.

[18] I take note of the statement in the replying affidavit that it is self evident that the Applicants live in conditions that pose immediate threats to their lives, health and safety and that they are accordingly in need of emergency assistance. However, the Applicants have been living on the land since the 1980's. A number of the occupiers chose to move to Extension 4, whereas the Applicants chose to stay. Whilst there is a dispute as to whether Extension 4 offers permanent services as alleged by the Respondent, the Applicants state that there is no electricity at Extension 4 and they refer to the fact that people with children in the settlement must send their children to schools either in Daveyton or back to Wattville. (*See Soobramoney v Minister of Health, Kwazulu-Natal 1998 (1) SA 765 (CC) at 774*)

[19] Although there is an allegation of an immediate threat to the lives, health and safety of the occupants of the HGS, there is no evidence of this. The squalid and putrid conditions in which the occupiers live is apparent from the affidavits and the annexures which include photographs. However, Chapter 12 provides for the provision of housing and services in defined emergency situations. Taking into account the provision of

water, refuse removal and the pit latrines, these squalid conditions cannot be categorized as an eventuality envisaged in Chapter 12. The occupiers of the HGS do not find themselves requiring assistance *for reasons beyond their control.* They could have moved to Extension 4. Moreover, their existing shelter has not been destroyed nor damaged. Whilst the Applicants seek assistance pending the decision on the proposal for upgrading, this is not the type of temporary situation envisaged in Chapter 12. The Applicants are not entitled to resources set aside for real emergencies as envisaged in Chapter 12. Utilization of those funds for the present purposes would be detrimental to others who may find themselves in emergency situations envisaged by the Code.

[19] Finally, assistance in terms of Chapter 12 is to be limited to *absolute essentials.* Although the provision of the latrines, poor as it is, does not create a situation which could demand assistance in terms of Chapter 12.

[20] In my view there is merit in the submission made on behalf of the Respondent that treating the situation of the Applicants as an emergency housing situation will inevitably result in the Applicants being preferred over other communities, which is contrary to the principle stated in paragraph 12.2.2 of the Programme.

[21] The Applicants also rely upon Chapter 13. This chapter deals with the rules for the *in situ* upgrading of informal settlements. The Housing Code states that these rules in Chapter 13 relate to the provision of grants to a Municipality to enable it to upgrade informal settlements in its jurisdiction in a structured way and on the basis of a phased development approach.

[22] Chapter 13 contains, inter alia, the following relevant criteria:

i) Grants under the Programme will be made available to Municipalities for the undertaking of projects based on the upgrading of whole settlements on a community basis.

ii) The Programme provides funding for the installation of interim and permanent municipal engineering services. Where interim services are to be provided it must always be undertaken on the basis that such interim services constitute the first phase of the provision of permanent services.

iii) Municipalities will be invited to apply for funding for the upgrading of informal settlements through the submission of Interim Business Plans. The MEC will consider applications based on the criteria detailed in the implementations guidelines.

v) During the phase of the upgrading process, Municipalities will receive funding to undertake, *inter alia*, the installation of interim services to provide basic water and sanitation services to householders within the settlement on an interim basis pending the formalisation of the settlement. The principle must be upheld that any interim services should first and foremost be designed on the basis that it could be utilised/upgraded for the permanent services infrastructure. The provision of interim services should also address lighting in key areas to enhance community safety and access by emergency vehicles.

vi) Having regard to section 9 (1) of the Housing Act, Municipalities are responsible to consider whether a matter merits the submission of an application for assistance under the Programme. If the Municipality considers that it does merit the submission of an application, then the Municipality must, *inter alia*:

a) Initiate, plan and formulate applications for projects relating to the *in situ* upgrading of informal settlements;

b) Request assistance from the Provincial Housing Department on any of the matters concerned if the Municipality lacks the capacity, resources or expertise;

c) Implement projects in accordance with agreements entered into at Provincial Housing Departments;

d) Provide basic Municipal engineering services such as water, sanitation, refuse removal services and other municipal services;

vii) The township establishment must under no circumstances be compromised and the approval of the general plan of the areas, the surveying and pegging of stands, the approval of the services design and standards by the Municipal Council and the actual proclamation of the town must be pursued.

[23] The Applicants submit that pending the decision on whether the Settlement shall be upgraded *in situ*, the Respondent is obliged to provide the basic services in terms of, *inter alia*, Chapter 13. The Respondent's case, on the other hand, is that reliance upon Chapter 13 is misplaced.

[24] The Applicants would only be entitled to rely upon Chapter 13 once it has been decided to develop the HGS (if this is so decided).

[25] The Respondent points out that it is only once the layout of the township has been established by the division of the land into individual stands, as well as the layout of the roads, that the necessary infrastructure for the purposes of the installation of engineering services can be provided. The Respondent submits that if this is done earlier, the cost incurred in providing interim services would be wasted because cables, pipes and other structures would have to be removed and re-laid when the final layout of the stands and the road has been determined.

[26] To determine whether the land is suitable for the development of a township, it is necessary to conduct a feasibility study. Such a feasibility study was undertaken but as a result of shortcomings, the Housing Department of the Gauteng Province, in August 2006, was asked to commission a further feasibility study which will include a geotechnical investigation and an indication of the exact layout of the stands. The first report had provided for only 389 stands which the Respondent regarded as insufficient to house all the existing occupants of the land.

[27] Despite enquiries having been made regarding progress with the further feasibility study, it does not appear that any progress has been made. According to the Respondent, there are 16 feasibility studies which the Respondent has requested and which are outstanding.

[28] If the feasibility study, when it is produced, favours the development of the land for residential purposes, the Respondent states that it will apply to the Department of Housing for the approval of the land as a township in terms of Chapter 13 of the National Housing Code. Should such approval be obtained, the Respondent states that the development of the HGS will be included in the Respondent's integrated development plan according to the priority of the project. Before this can be done, it will be necessary to undertake an environmental impact assessment study which the Respondent states normally takes up to a year to complete.

[29] The deponent to the Respondent's affidavit, Shami Solomon Teboho Kholong ("**Kholong**"), who is the Executive Director : Legal and Administrative Services of the Respondent, states that the HGS is only one of 106 informal settlements which fall within the area of jurisdiction of the Respondent, involving approximately 130,000 informal housing structures. The HGS has approximately 400 structures at present. The implementation of the development plan of the Respondent which is to eradicate the backlog in the provision of water and sanitation services to all communities within its area of jurisdiction by the year 2014, is subject to funding provided for in an approved budget. Kholong states that at present the budget, which provides for the provision of basic engineering services to stands forming part of informal settlements, amounts to R210 million per year. He however states that this is sufficient to cater for

13,000 stands per year. The amount budgeted for had been allocated to the provision of basic engineering services to townships that had already been approved and according to the priority determined by the Respondent. In terms of the provision of the Municipal Finance Management Act, 56 of 2003 (**MFMA**), the Respondent is only entitled to incur expenditure in terms of an approved budget. Kholong submits that providing the sanitation and street lighting services would amount to fruitless and wasteful expenditure contrary to the express provisions of the MFMA. He states that the provision of street lighting requires the laying of cables and the erection of masts on concrete platforms constructed for that purpose. Moreover, the cost of providing street lighting to the HGS will be substantial and in the event of it not being possible to upgrade the settlement *in situ*, the cost in providing the street lighting will be wasted. Kholong states that no provision has been made in the integrated development plan nor in the annual budget for the provision of the sanitation and street lighting services which the Applicants demand.

[30] I have already found that the current situation does not constitute an emergency in terms of Chapter 12. Nevertheless, even in terms of a Chapter 12 emergency, it is provided in paragraph 12.3.4.2 that approved funds may not be used for the provision of street lighting and electrical services and that the provision of high mast lighting could only be considered in special circumstances. Such special circumstances do not exist in the present case.

[31] In argument it was submitted on behalf of the Applicants that the Respondent made various promises to comply with the provision of basic services. It is argued that the Respondent is now estopped from reneging on its verbal and physical actions. The

Applicants argue that they have a legitimate expectation that the basic services would be provided. In support of this the Applicants refer to the principle that good administration requires that public authorities be held to their promises. This principle was ennunciated by Laws LJ, in the Court of Appeal in *R (Abdi and Nadarajah) v Secretary of State for the Home Department [2005] EWCA Civ 1363, para 68.* The facts relied upon by the Applicants relate to interaction between the residents of HGS and the Respondent going back to August 2005 as well as correspondence exchanged on behalf of the residents with the Respondent. It is alleged, *inter alia*, that at a meeting between community representatives and the HGS committee on 23 September 2005, the committee was informed that street lighting would be provided in the Settlement. At a meeting on 13 October 2006 between members of the HGS civic committee and officials of the Respondent, the provision of interim services was discussed. Further meetings were held on 26 March 2007 and on 24 April 2007. Minutes were kept of the latter meeting in which it was recorded that Councilor Sambo stated that:

i) A refuse removal service would be instituted immediately.

ii) No resident of the HGS should be required to walk more than 200 meters to the nearest tap and that a survey would be conducted immediately to check how many more taps should be installed and then install them.

iii) That in July 2007, high mast lighting would be installed in the settlement.

iv) That toilets could be installed only in the event of a decision to be made to upgrade the HGS *in situ*.

[32] Kholong however states that at the meeting on 13 October 2006 there was an undertaking merely to refer the demand regarding the installation of street lights to the Electricity Department of the Respondent.

[33] Insofar as Councilor Sambo is concerned, he has passed away. However, Kholong points out that Councilor Sambo was one of 178 Councilors of the Respondent and that he did not have the authority to bind the Respondent which authority vests only in the Council of the Respondent. Kholong also points out that the funding of street lighting is provided by the National Electricity Regulator who will not approve funding unless a township has been approved. Kholong states that no decision in conformity of what was allegedly stated by Sambo has been taken by the Council. In fact, no such item even appears on its agendas.

[34] The Applicants also rely upon the obligations imposed in terms of the Water Services Act 108 of 1997 and the regulations thereto. With reference to sanitation, the Applicants' counsel in argument referred to the definition of "basic sanitation" in the regulations which provides:

> "2. <u>Basic Sanitation</u> – *the minimum standard for basic sanitation services is – (a) The provision of appropriate health and hygiene education; and (b) a toilet which is safe, reliable, environmentally sound, easy to keep clean, provides privacy*

and protection against the weather, well ventilated, keeps smells to a minimum and prevents the entry and exit of flies and other disease-carrying pests."

[35] The Applicants' counsel referred to an unreported decision in the matter of *Lindiwe Mazibulo & Others v the City of Johannesburg & Others, case no. 06/13865* (a judgment of Tsoka J in the WLD). In that case, the learned judge, correctly with respect, found against the denial of the Minister of Water Affairs and Forestry that there is an obligation to provide free basic water to the poor. The learned judge stated the obligation is to ensure that every person has both physical and economic access to water. Accordingly the Applicants in the present case submit that the Respondent is obliged to comply with its constitutional and statutory obligations to provide basic sanitation. However, in considering the obligations of the Respondent, it is necessary to have regard to section 26 (2) of the Constitution which provides that the obligations are to be performed within available resources. Whilst section 9 (1) of the Housing Act requires steps to be taken by every Municipality to provide adequate housing as part of the Municipalities' process of integrated development planning, such as are reasonable and necessary, steps must be taken within the framework of national and provincial and housing legislation and policy. All this must be done to create and maintain a public environment conducive to housing development which is financially and socially viable (section 9 (1) (d)).

[36] The objects of local Government are set out in section 152 (1) of the Constitution. This includes the object to ensure the provision of services to communities in a sustainable manner and to promote a safe and healthy environment. However, importantly, section

152 (2) provides that a Municipality must strive, within its financial and administrative capacity, to achieve, inter alia, the aforementioned objects.

[37] The Applicants have relied upon a number of authorities to demonstrate the constitutional and statutory obligations imposed on the Respondent. These include *Government of the Republic of South Africa & Others v Grootboom & Others 2001 (1) SA 46 (CC) at para 44; Jafta v Schoeman & Others 2005 (2) SA 140 (CC) at para 28; President of the Republic of South Africa & Another v Modderklip Boerdery (Pty) Ltd & Others 2005 (5) SA 3 (CC) at para 36.* These cases set out important principles which much be applied. However, they do not serve as authority which would entitle me to deviate from the fact that a municipality is obliged to act within the framework and constraints of legislation and the Housing Code. It cannot, for example, simply ignore the Code and regard a situation as an emergency when it is not. Moreover, it cannot use Chapter 13 before it has been decided to develop HGS *in situ*.

[38] In argument, the Applicants' counsel was alive to the fact that the relief sought could amount to an intrusion into the domain of another branch of Government. In support of submissions that the Courts can in certain circumstances so intrude, a number of authorities were referred to. *See SA Association of Personal Injury Lawyers v Heath 2001 (1) SA 883 (CC) paras 18 – 22; Ex Parte Chairperson of the Constitutional Assembly : in Re Certification of the Constitution of RSA 1996 (4) SA 744 (CC) at paras109 -111; Doctors for Life International v Speaker of the National Assembly & Others 2006 (6) SA 416 (CC) para 70; Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & Others 2004 (4) SA 490 (CC).* The Applicants also relied upon the unreported judgment in *Dada & Others v Unlawful Occupiers of Portion 41 Rooikop*

& The Ukurhuleni Metropolitan Municipality, [(WLD) dated 15/02/08]. In this latter case the learned Judge, Cassim AJ, referred to the State's primary obligation toward those who cannot afford to pay for adequate housing "*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*". The learned Judge stated that he appreciated and understood that the approach he was adopting "*may well be viewed not only as ordering the State to fulfill its obligations, but also telling it how to do so and that this would be a breach of the rule on separation of powers*". The learned Judge further stated that "*a Court of law must interfere in appropriate cases when 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*". However, in *City of Johannesburg v Rand Properties (Pty) Ltd & Others 2007 (6) SA 417 SCA, at 432, para 45 E - G* Harms ADP said:

"*A related problem is that the High Court had insufficient regard to the division of power. It is for the democratically elected government of the city to determine what its vision of the inner city is. Courts are not equipped or entitled to second-guess this type of policy decision. The Court also failed to have regard to the constitutional limitation on the right of access to housing. In particular it took no account of the uncontradicted evidence of the city that it did not have the means to provide the respondents with inner city accommodation. I have already referred to the city's housing obligations and plans. There is no suggestion that the city has failed in its general obligations in this regard considering that its duty is to provide housing progressively within its means. One can easily disagree with the allocation of resources by organs of State and one*

may justifiably debate priorities but thus far the Constitutional Court has not sanctioned the re-allocation of public funds by Courts."

[39] Similarly, in the present case, there is no suggestion, (nor could there be substance to such a suggestion), that the Municipality is not carrying out its obligations to take all reasonable and necessary steps within the framework of national and provincial housing legislation and policy to ensure that services are provided in a manner which is economically efficient.

[40] In all the circumstances I conclude that the Applicants are not entitled to the relief sought.

[41] The Applicants sought an order for costs. They have been partly successful in respect of the Order I granted after argument was completed. Whilst it is true that the application was argued essentially in respect of the issues concerning temporary sanitation facilities and high mast lighting, and notwithstanding that the Applicants have been unsuccessful, this is not in my view the type of matter where an adverse costs order should be granted. In my view it is appropriate to order that each party should bear its own costs.

[42] I have already made an order in terms of paragraphs 1, 1.1 and 1.3 of the Notice of Motion (see paragraph [7] above).

[43] In the premises I make the following Order:

1. The application for the relief sought in paragraphs 1.2 and 1.4 of the Notice of Motion is dismissed.

2. No Order is made in respect of costs.

Epstein AJ

24 March 2009