IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO: A 649/2011

In the matter between:

THE SOUTH AFRICAN NATIONAL ROADS AGENCY LIMITED	Appellant

And

EDWARD J SMITH	First Respondent
ERROL M RHODA	Second Respondent
JOAN S POOLE	Third Respondent
VERNON LEEN	Fourth Respondent
A M MANUS	Fifth Respondent
E E MARILLIER	Sixth Respondent
A L AND G U JULIES	Seventh Respondent
B M ADAMS	Eight Respondent
A E APRIL	Ninth Respondent
A M DE WET	Tenth Respondent
M L BAATHIES	Eleventh Respondent
HELEN ISAACS	Twelfth Respondent
CITY OF CAPE TOWN	Thirteenth Respondent

JUDGMENT: 09 October 2012

DAVIS J

Introduction

[1] This is a cross-appeal against an order of costs granted by the court *a quo* on 9 September 2011. Briefly, the appellant had applied in terms of the prevention of their legal eviction from an Unlawful Occupation of Land Act 19 of 1998 (PIE) to evict first to twelfth respondent from their homes in the suburb of Helderzicht Somerset West. It appears from the papers that the appellant is the

owner of the residential dwellings which it had rented to the respondents on a fixed term basis, which lease it claims to have now terminated, pursuant to the applicable contracts of lease.

[2] It is common cause that the reason for the termination of leases was not, as a result of any breach by the respondents, but rather because each residential dwelling is apparently located in close proximity to the road reserve for the proposed N1/N2 Winelands Toll Highway Project in the vicinity of Somerset West.

[3] The thirteenth respondent ('the City') was not initially a party to these proceedings which were instituted on 25 February 2009. On 23 July 2009, the court *a quo* directed that the respondents bring an application to join the City as a co-respondent before 28 July 2009. On 24 July 2009 first respondent made application to join the City as a respondent in terms of case number P3/09. This application was enrolled for hearing on 14 August 2009, in terms of which first respondent sought that second respondent be joined and that no costs should be ordered if the application was unopposed and that costs should be ordered only in the event of opposition. Furthermore, no costs was sought against the City's response in the main application.

[4] In the joinder application, the affidavit of the respondents' attorney Mr Tappenden provides the basis for the application as follows:

"3. *The Honourable Magistrate in the above Court on 23 July 2009 ruled that the application cannot proceed whilst the municipality was not joined as a party to the action to comply with the requirements of Act 19 of 1998 and in particular section 4.7 thereof...*

4. *The Honourable Magistrate also indicated that the municipality should be instrumental in arranging for the facilitation process which had commenced between applicant, first respondent and the Helderzicht Community represented by the N2/T2 Crisis Committee be resumed."*

[5] On 13 August 2009, the joinder application was granted and the City was joined as a party to the dispute and ordered to file a report with the court on or before Thursday 3 September 2009, such report to relate specifically to the personal circumstances of these individual respondents. The main application in turn was postponed.

[6] After hearing the application, the court *a quo* on 9 September 2011 dismissed the application for eviction. It then made the following order in respect of costs:

"*In respect of costs, the court is going to rule as follows: the applicant will be held responsible for his own costs, applicant and City in respect of the respondents' costs will be held responsible as follows: the applicant and City will be jointly responsible for the 12 respondents' costs from the date*

that the City was joined. The applicant is responsible for the 12 respondents costs from the date that proceedings started, on a party to party scale, including senior counsel costs on the scale accepted by the Cape Bar Council, the attorney's costs to be approved on a scale commensurate with an attorney with 35 years' experience, travelling and photocopying and telephone call costs on the scale permitted by the non-litigator's scale of the Cape Bar, Cape of Good Hope Law Society"

[7] It is against this order that the City has cross-appealed to this Court, pursuant to an appeal by the appellant against the dismissal of its application. The latter dispute has been dealt with separately and therefore there is no need to canvass any of the details thereof in this judgment.

The City's argument

[8] Mr Edmunds, who appeared on behalf of the City, submitted that the initial application to join the City had made it clear that, in the event that the City did not oppose the application for joinder, a costs order would not be sought. Furthermore, the City had, subsequent to being joined, cooperated fully in all the relevant proceedings. Notwithstanding an argument from Mr Arendse, who appeared on behalf of the respondents, there is no evidence, on the record, to suggest that the City opposed being joined to the proceedings.

[9] Mr Arendse submitted that when the court *a quo* ordered that the dispute be referred to mediation, this had been opposed, not only by the appellant but also by the City. There is, as Mr Edmunds submitted, no support on the record for this submission. It appears that respondents brought an application that the City appoint a mediator to resolve the dispute between respondents and appellant. This application was successful but, when ordered by the court *a quo,* the order judgment no mention made of any such opposition.

[10] The City submitted further that, contrary to the submissions of the respondents, it had acted reasonably in the circumstances of this case. In this connection, Mr Edmunds relied on a judgment of Binns-Ward J in **Omar NO v Omar and others** [2010] ZAWCHC 91 at para 19 where the learned judge held as follows:

> *"[19] The respondent's counsel criticise that reports submitted by the municipality as having failed to engage sufficiently with the individual circumstances of each of the respondents and as having shown insufficient commitment to determining the availability of alternative accommodation for the respondents. In my view this criticisms is unfounded. I do not consider that the provisions of the PIE Act place a responsibility on municipalities to involve themselves in the detail of the possible consequences of every eviction case. The criterion of reasonableness, which is defined with regard to the characteristics of the case judged in the context of the local authority's practical ability to ameliorate the probable effects of an eviction, governs the extent of the*

municipality's obligation under s 26(2) of the Constitution. Similar consideration will determine the extent to which the courts will look to a municipality for detailed input. This much is recognised in the two-judged bench judgment of this court in ***Drakenstein Municipality v Hendricks and others*** *2010 (3) SA 248 (WCC). (It was also the criterion which decided me against insisting on a report from the municipality in* ***Absa bank Ltd v Murray and Another*** *2004 (2) S 15 (C) (2004 (1) BCLR 10), despite being of the view (which I still hold) that a report by the municipality should be filed in all s 4 PIE applications.) I need only say that I am in full agreement with the reasoning set out in para.s [15] – [17] and [26] – [32] of the* ***Drakenstein Municipality*** *judgment."*

[11] Pursuant to the present dispute, the City filed a report in which it states that it does not have the means to make provision for housing for the respondents, other than in accordance with its existing programmes and policies. It states further that it had no basis by which it might be able to distinguish between the needs of respondents and those of other extremely vulnerable members of society who are on the waiting list for housing.

[12] Mr Arendse attacked the report of the City as not being sufficiently specific with regard to the needs and circumstances of the individual respondents. While the report does not specifically examine the needs of the respondents, it set out the difficulties that the City encounters with regard to homelessness and the

paucity of its resources in resolving these problems. It has become trite law since the decision in **Government of the Republic of South Africa and others v Grootboom** 2000 (11) BCLR 1169 at para 82 that an authority such as the City cannot be expected to make provision for housing beyond the limits of its available resources. That is precisely the basis of the reasoning adopted by the City in its report.

[13] A further indication that the City sought to cooperate with the Court mandated process is to be found in the reports of the mediators who were enjoined to conduct a mediation process. Nowhere in the report of the mediators is there any indication of any absence of meaningful engagement by the City or criticism of any aspect of the City's conduct, which in the mediators view, would have were prevented them from fulfilling their terms of reference in providing the court with a comprehensive report.

[14] To the extent that the high watermark of respondents' case in respect of costs turns on the allegation that the report was 'formulaic', being that it represented a standard response filed in similar matters with not sufficient reference to the individual respondents, there are at least three responses which counter this allegation.

[15] In the first place, in **Ives v Rajah** 2012 (2) SA 167 (WCC) Rogers AJ held that the fact that the City's report was standard in the sense that it was very similar to others filed in similar cases could not necessarily considered to be a fault of the City. Secondly, as noted, the report clearly sets out the difficulties which confront the City in a case such as the present: while the respondents are manifestly a vulnerable community in need of assistance, there is a significant constituency within the Cape Town area who are equally in need of assistance from the City. Within a context of scarce resources, it would be undesirable, without more, to prefer these respondents above others in equal need. Finally, consideration needs to be given between achieving the correct balance between the clear needs of the respondents and the ability of the State to function without having excessively onerous obligations placed upon it which would undermine its ability to discharge its substantive constitutional obligations. Expressed differently, the social democratic nature of the Constitution seeks to respect and protect the rights of all under our Constitution whilst not using those rights in a manner so as to impose so excessive an obligation upon the State, which in turn, would result in the State and its agencies being unable to discharge its substantive obligations. I take the approach adopted by Binns-Ward J in **Omar**, *supra* at para 19 to be congruent with this outline of the correct constitutional balance.

[16] Mr Edmunds also referred to another aspect of the proceedings concerning the question of due process. When the City's legal representative requested the court to excuse her from the hearing of evidence in relation to the

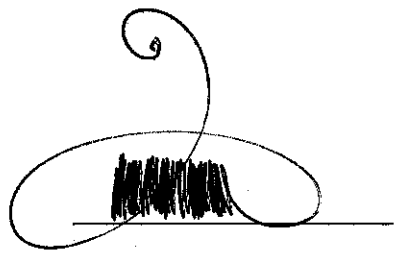
main application, on the basis that the City had decide to abide the court's judgment, she specifically stated that this was 'unless you want me here'. Notwithstanding this request, the court excused the City's representative. Accordingly, the City's legal representatives did not attend argument on the occasion on which the judgment was handed down, given that it abided the decision of the court.

[17] There was no suggestion during any of these proceedings that the court *a quo* contemplated that an adverse costs order should be made against the City. For this reason, there was no opportunity given to the City to make the kind of submissions, which Mr Edmunds has now placed before this court with regard to the reasons as to why no costs order should be made against the City. In my view, the City behaved in a fashion which is congruent with its constitutional obligations. There was no basis, which can be sourced in the record, by which the court *a quo* was justified in making an adverse costs order against the City.

[17] For these reasons, the cross appeal succeeds. The order of the court *a quo* that the City shall be jointly responsible for the costs of the twelve respondents from the date that the City was joined is set aside. There is no order as to costs incurred in the cross appeal.

DAVIS J

I agree



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