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

Case number: 6165/2012

In the matter between:

CITY OF CAPE TOWN Applicant

And

SOUTH AFRICAN NATIONAL ROADS AGENCY LTD First Respondent
MINISTER OF TRANSPORT Second Respondent
MINISTER OF WATER & ENVIRONMENTAL AFFAIRS Third Respondent
AND SEVEN OTHERS Fourth to Tenth Respondents

JUDGMENT (Costs)
Delivered 4 December 2015

BINNS-WARD J *et* BOQWANA J:

[1] As adumbrated in the principal judgment, we heard argument on the costs issues after the publication of our decision of the substantive issues in the main application. The matters that require determination in this regard concern not only the costs in the main application, but also the costs reserved for later determination in various preliminary and interlocutory proceedings. We heard argument on all these matters on 27 November 2015 from counsel for the City and counsel for Sanral. Questions as to costs between the City and the second and third respondents have been settled by agreement.

[2] The City contends that it has been substantially successful and should therefore be entitled to payment of its costs by Sanral. Sanral argued on the other hand that, as both parties are organs of state and their expenses were therefore funded

from 'the common pot', so to speak, it would be appropriate for each party to bear its own costs. It cited *Minister of Police v Premier of the Western Cape* 2014 (1) SA 1 (CC), at para 72, and *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 (6) SA 182 (CC), at para 94, in support of that contention. The City's counsel countered that the litigation had in fact not been funded out of a common pot. They pointed out that the City was to a large extent funded by the rates levied on its property-owning residents,[1] while Sanral's activities were funded in the manner provided for in terms of the SANRAL Act. The City's counsel also reminded us that costs orders had already been made against Sanral in earlier stages of the current litigation - not only by this court, but also by the Supreme Court of Appeal.

[3] The award of costs is, of course, a matter within the discretion of the court seized of the matter. While such an order might be appropriate in given cases, we are not persuaded that there is, or indeed should be, a general rule that in all matters in which the contesting litigants are organs of state each party should be directed to pay its own costs. As the City's counsel have illustrated, it does not necessarily follow that in every case the litigation in such matters should be regarded as having been financed from a common fund. There is in any event also the consideration of individual accountability for spending by organs of state in the context of the division of government revenue between different departments and other organs of state. The Division of Revenue Acts and the Public Finance Management Act demonstrate that organs of state receive and are individually accountable for earmarked and separately identifiable parts of the monies that comprise the public purse. There is something to be said for the idea that if the budgetary shoe pinches as a result of litigation between organs of state, the pinch should be felt at the point that affects the organ that has litigated unsuccessfully or ill-advisedly. The abovementioned judgments to which Sanral's counsel referred us both involved matters of broad constitutional principle, the determination of which was of general governmental interest and benefit. We do not consider that the current litigation fell into that category, notwithstanding that the public interest in an improved administration of the SANRAL Act was a material

[1] We have not overlooked that local government's entitlement in terms of s 227 of the Constitution to an equitable share of the national revenue.

factor in our decision to condone the City's delay in taking the impugned decisions under that statute on judicial review.

[4] In contending that it had been substantially successful, the City argued that the case had essentially been about the legality of the decision to toll the affected sections of the N1 and N2 national roads. They submitted that they had prevailed in their challenge against that decision. While there is some validity in that argument, we consider that it oversimplifies what was actually entailed in the litigation.

[5] The City directed its attack not only at the tolling decision, but also at the environmental authorisation for the undertaking of certain activities listed in terms of the ECA. The activities in question were necessary if the upgrading of the roads that the City itself considered to be desirable were to be undertaken, quite irrespective of how the improvements were to be funded. In this respect the City unnecessarily and unsuccessfully litigated on a question that was essentially discrete from that upon which it achieved success. Similar observations might be made about its unsuccessful applications for interdictal relief.

[6] In our judgment, it would be fair in the circumstances to direct that Sanral should pay part, but not all, of the City's costs in the main application.

[7] Anticipating that that might be our approach, the City submitted an analysis of the 7473 page record, which suggested that the matters on which it had been unsuccessful accounted for only 9,3% of the pages involved. We have had neither the time, nor the inclination to check the analysis. Mr *Budlender* SC, for the City, in any event reasonably conceded that a page count would not necessarily be the only or indeed appropriate way to deal with a division of the costs. The amount of time spent in argument on the various aspects of the case might be another. The apparent relative importance of the issues concerned in the different heads of relief yet another. And our assessment of the relevance and quality of input should surely play a role in the determination of how to make a division. It seems to us that the determining criterion should be our robust sense of what would be fair in the context of having lived through and adjudicated the proceedings.

[8] In our judgment the result of the case merits an award in respect of costs that would acknowledge the City's success in respect of the matter centrally at issue in the proceedings, but also mark the effect of Sanral's successful opposition to the attack

on the environmental authorisation decisions and the interdicts sought by the City. In that regard we have attached most weight to our sense of the time that these matters took up in argument and the fact that they constituted quite discrete aspects to the overall case.

[9] Subject to the qualification recorded in the next paragraph, we have concluded that it would be fair for Sanral to held liable for 70% of the City's costs in the principal proceedings, including the costs of three counsel. The exceptional magnitude of the matter justified the employment of three counsel in respect of most aspects of the matter.

[10] The following experts, not in the employ of the City, gave opinion evidence in support of the challenge to the decisions to declare the roads as toll roads: Barbour (in respect of his report dated May 2014 – his earlier report, dated March 2012, bore essentially on the environmental authorisation), Floor, Naude, Holland, Rossouw, Snell and Grant Thornton (G.A. Penrose and I. Hashim). Sanral will be directed to pay the qualifying fees of those witnesses.

[11] The costs of the first interim interdict application launched by the City on 7 October 2011 under case no. 20705/2011 were postponed *sine die* by agreement for later determination. Case no 20705/2011 was not before us and therefore, as Sanral's counsel rightly contended, the costs in that matter are not for us to decide. It would be hoped that the parties would be able to come to an agreement in this regard to avoid the necessity for the costs in that matter to be separately argued before a Bench specially allocated to determine them. Certainly, that would be the sensible course.

[12] The costs of the second interim interdict application heard in May 2013 were stood over for determination in the principal proceedings. The interdict that was granted related to the matter in respect of which the City achieved success in the principal proceedings. The costs of the second interim interdict application will therefore be awarded to the City, including the costs of three counsel. (The costs attendant on the interlocutory matters argued at the same time concerning the amendment of the City's notice of motion and certain matters of disclosure have already been determined in the judgment delivered on 21 May 2013.)

[13] The costs of the application to introduce supplementary affidavits heard on 4 August 2015 will follow the result. Sanral will be ordered to pay the City costs in the

application. We consider that the employment of not more than two counsel to have been justified in those proceedings. It is not expedient to separate the costs of the City's contingent counter-application and we shall direct that they be treated as part of the costs incurred in Sanral's application to introduce the supplementary affidavits.

[14] It was not necessary for the court to hear and determine City's interlocutory applications in terms of rule 27 and 30A instituted on 16 January and its application in terms of rule 6(5)(e) instituted on 4 March 2015 because the matters concerned were eventually settled by agreement. We consider that the institution of those proceedings to have been reasonable and the order to be made will direct that the costs incurred by the City in connection with such applications shall be paid by Sanral.

[15] We consider that the costs incurred in connection with the various directions hearings before the successive judicial case managers in the review proceedings (Hlophe JP, Traverso DJP and Binns-Ward J, respectively) should be costs in the review.

[16] The following order will issue:

1. Save as specially provided in terms of paragraphs 2, 4 and 5 of this order, or previously ordered in terms of the judgment on the interlocutory applications delivered on 21 May 2013, the first respondent shall be liable to pay 70 per cent of the applicant's costs of suit, which costs shall include the costs of three counsel.

2. The costs incurred by the applicant in respect of the qualifying fees of the following witnesses, as taxed or agreed, shall be paid in full by the first respondent.

    a. A. H. Barbour (in respect of his report dated May 2014);

    b. B.C. Floor;

    c. J.P. Naude;

    d. M.K. Holland;

    e. J.J. Rossouw;

    f. M.J. Snell and

    g. Grant Thornton (G.A. Penrose and I. Hashim).

3. The costs of the interim interdict application instituted by the applicant on 28 March 2013, which were stood over for later determination in terms of the judgment delivered on 21 May 2013, are awarded to the applicant. The costs so awarded shall include the costs of three counsel.

4. The costs of the application to introduce additional affidavits instituted by the first respondent on 17 July 2015, which was decided on 4 August 2015, with costs stood over for later determination, are awarded to the applicant. The costs so awarded shall include the costs incurred in respect of the applicant's contingent counter-application and the costs of two counsel.

5. The costs incurred by the applicant in respect of the interlocutory applications in terms of rules 27 and 30A and rule 6(5)(e) instituted by the applicant on 16 January 2015 and 4 March 2015, respectively, shall be paid by the first respondent.

6. The costs incurred by the applicant in respect of the various directions hearings, including the costs of the attendance of counsel, shall be paid by the first respondent as costs in the cause on the basis provided in terms of paragraph 1 of this order.

A.G. BINNS-WARD
Judge of the High Court

N.P. BOQWANA
Judge of the High Court