Walkers

BOX 462

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case no: 8681/2017

In the matter between:

ERIC LOLO	First Applicant
BERENICE FRANSMAN	Second Applicant
and	
DRAKENSTEIN MUNICIPALITY	First Respondent
THE MEMBER OF THE EXECUTIVE COUNCIL FOR HUMAN SETTLEMENTS, WESTERN CAPE	Second Respondent
THE MINISTER OF HUMAN SETTLEMENTS	Third Respondent
GREENWILLOWS PROPERTIES 2 (PTY) LTD	Fourth Respondent

FIRST RESPONDENT'S APPLICATION FOR LEAVE TO APPEAL

PLEASE TAKE NOTICE THAT the First Respondent ('the Municipality') hereby applies for leave to appeal to the Supreme Court of Appeal, alternatively to a Full Bench of the Western Cape Division of the High Court, against the whole of the judgment and Orders 1 to 10 ("the judgement") delivered by Mr Acting Justice Martin ('the Court') on 28 July 2022.

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PLEASE TAKE NOTICE FURTHER that the grounds upon which leave to appeal is sought are the following:

a) Fundamental misdirection as to onus

1. The Court erred in that, under the heading "onus" in paragraph 70, it quoted *Mazibuko*, but then misinterpreted and / or modified this accepted test, saying "it is clear that unless the Municipality can show that the claim is frivolous, it bears the full onus of proof, nothing less."

2. The above is a fundamental misdirection. The Municipality does not have an onus, or a "full onus", to demonstrate that the Applicants' claim is "frivolous".

3. The above misdirection irredeemably colours every finding which the Court made in the judgement. On this basis alone, leave to appeal should be granted.

b) Breach of constitutional and statutory obligations in relation to emergency housing

4. The Court erred in finding that the Municipality is in breach of its constitutional and statutory obligations by failing to take reasonable measures to provide people living within its area of jurisdiction with emergency housing for the following reasons.

i. Emergency housing policy not referenced in founding papers

4.1. The applicants failed to attach or make any reference in their founding affidavit to the Municipality's Emergency Housing Policy, despite their challenge to the constitutionality of this very housing policy.

4.2. Consequently, the Court's findings in relation to the constitutionality of this policy were made in breach of Constitutional Court authority that holding

parties to pleadings is an integral part of the principle of legal certainty, an element of the rule of law, and necessary so that every party facing a constitutional challenge may know the case they are expected to meet.

ii. Availability of land for emergency housing and the issue of self-funding

1) Self-funding

4.3. The Court failed to have regard to the evidence of the Municipality of the programmes it has undertaken to formulate reasonable and constitutionally compliant housing policies, and deliver on its emergency housing obligations. In particular the Court in the judgement failed to have due regard to:

4.3.1. The fact that the Municipality's emergency housing policy does provide for self-funding for "emergency housing provision in order to supplement provincial funding" (record page 350).

4.3.2. The fact that the Municipality provided details of its business plan and project pipelines as well as annual reports for the financial years 2013 to 2016, which indicated, for instance, that in the 2015/2016 financial year 37 families were relocated from the banks of the Palmiet River, and a further 24 families that were evicted in the Wellington area will also relocated;

4.3.3. Though the Municipality had, accordance with its constitutional obligations, proactively made provision at the Vlakkeland development for the development of 500 emergency housing opportunities, with a subsidy for each unit of R 58,000, amounting to a total of R 29,000,000, the decision of the

Provincial Department that it "would not support construction of a TRA at the site" effectively scuppered this plan;

4.3.4. The problem of land availability, and the fact that in the absence of land availability, provincial funding for "pipeline" projects is automatically removed by virtue of the Division of Revenue Act;

4.3.5. The Court heard in that, though the fact that the Municipality self-funded several emergency housing relocations including:

4.3.5.1. Niuewenhoop - relocation of 22 families entailing expenditure from own resources of R1,440,000;

4.3.5.2. New Beginnings - relocation of 40 families, entailing expenditure from own resources of about R 1,350,000); and

4.3.5.3. Dietman Street - relocation of 23 families (110 persons) entailing expenditure from own resources of R 1,175,000,

is mentioned in the judgement without comment or criticism in paragraph 45, in paragraph 138 the opinion is expressed that the plans the Municipality "did formulate [were] scuppered by its failure to self-fund", and again in paragraph 143, the judgement makes the incorrect statement that "the facts establish that the Municipality did not act reasonably when it failed to self-fund its emergency housing programme even to the extent of its abilities" (emphasis added).

iii. Vlakkeland

4.4. In relation to Vlakkeland, the Court erred in stating in paragraph 143 that the failure of the Municipality's

> "efforts to develop the Vlakkeland site as a result of a Provincial Government veto is possibly ample evidence of the unreasonableness [sic, of] the Municipality [sic, in] relying primarily on funding from the Provincial or National government, while making a minimal contribution from its own coffers. The Constitutional Court's finding in Blue Moonlight that the local government has a duty to finance its own emergency housing scheme effectively means that a lack of funds cannot constitute a valid excuse for local government failing to provide emergency housing." (Emphasis added).

4.5. The above analysis cannot be correct both in law and on the facts. As to the law, with respect, the judgement's characterisation of *Blue Moonlight* is incorrect. This held at paragraph 67 that:

> "local government must first consider whether it is able to address an emergency housing situation out of its own means. The right to apply to the province for funds does not preclude this. The City has a duty to plan and budget proactively for situations like that of the Occupiers. This brings the issue of available resources to the fore." (Emphasis added).

4.6. Thus, on the law, the Court misrepresented *Blue Moonlight*. What the Constitutional Court held is that local government is required to (a) consider whether it is able to address its emergency housing obligations from its own means; (b) must self-fund its emergency housing

schemes to the extent that it is able to do so; and (c) if it is not able to fully address its emergency housing obligations from its own means, it has the right to apply to the Province for funds for its emergency housing scheme.

4.7. The facts are that the Municipality did self-fund and did proactively investigate and plan various properties as emergency accommodation areas. However, on the facts, paragraph 143 of the judgement views the "failure of the [Municipality's] efforts to develop the Vlakkeland site" as an example of "the unreasonableness of the Municipality in relying primarily on funding from provincial national government". The judgement thus holds that the Municipality, by accessing its own funds, could and should have continued to develop the 500 emergency housing opportunities on the Vlakkeland site, over the veto of the provincial government.

4.8. With respect, though the judgement's characterisation of the actions of the provincial government as a "veto" is accurate, its suggestion that this could have been overridden by the Municipality using its own funds to go ahead with the 500 emergency housing sites on Vlakkeland, whilst the provincial government implemented a different plan, amounts to the Court directing the Municipality to ignore settled principles relating to co-operative government, and a failure to respect polycentric decisions and policy implementation in breach of the separation of powers.

iv. Alternatives to Vlakkeland

5. The Court erred in failing to take into account the Municipality's attempts, after the 500 emergency housing opportunities Vlakkeland were in effect scuppered by the Provincial Department, to set about finding alternative sites. Extensive details are

provided in the answering affidavit as to the Municipality's investigations of Bio Delta Farm, erf 584 Paarl, and finally Schoongezicht, as potential sites for emergency housing, and the commissioning of a vacant land study and subsequent workshop as part of the Human Settlement Future Planning Process with provincial government officials.

1) Erf 584

5.1. In relation to erf 584, the Court erred in stating in paragraph 143 that:

> "the Municipality's selection of a site that falls within the hundred-year floodplain exclusion zone cannot be regarded as reasonable. The Municipality does not explain how it came to make such a bad selection… the court cannot simply excuse an experienced municipality for choosing so inappropriately".

5.2. This criticism ignores the fact that the Municipality's deliberations in relation to erf 584 were set out in the answering affidavit in fulfilment of Municipality's obligations to explain the reasonableness of its policy implementation. This land was identified as a possible alternative, along with other vacant sites, at the Future Human Settlement Planning workshop held with provincial government officials on 11 May 2017. However, the Municipality's engineers later rejected this proposal for safety reasons. This is an example of the Municipality proactively seeking alternative solutions. It should not have been criticised by the Court in the way that it was.

2) Schoongezicht

5.3. No mention is made in the judgement to Schoongezicht, the final outcome of the Municipality's search for alternatives after Vlakkeland. The Municipality proactively arranged for this new site, where the necessary environmental approvals were already in place, to be repurposed for emergency housing.

5.4. After consulting engineers were appointed and construction began, backyard dwellers from adjacent neighbourhoods stopped construction and threatened to invade the site, objecting to the Municipality's plans to utilise the site for emergency accommodation.

5.5. The Municipality then brokered a solution whereby 67 backyarders were accommodated, whilst the remainder of the 344 sites were allocated to emergency housing.

v. General

5.6. The Court thus erred in having regard only to an outdated historical set of facts, while ignoring the evidence put up by the Municipality of its ongoing and evolving efforts to meet its obligations as set out in the answering affidavit.

5.7. In so doing the Court impermissibly failed to pay due regard to settled legal principles in relation to the concept of progressive realisation of socio-economic rights.

5.8. The Court thus also erred in finding that the evidence put up by the Municipality *"does not displace its admissions in both Housing Reports"*. In particular, the housing reports referred to by the Court date back to 2013 and 2016

respectively, whereas the Municipality provided comprehensive, detailed information about its then current financial position and the strides it had made in relation to housing generally, and emergency housing in particular.

c) The applicants' personal circumstances and standing

5.9. The Constitutional Court has accepted that it is preferable for courts not to deal with a "generalised claim in relation to anticipated future occurrences" (*Occupiers of 51 Olivia Road, Berea Township*).

5.10. The court erred in not taking cognisance of the fact that the First Applicant, who qualifies for assistance in terms of the quota in section 5.2.2 of the Housing Selection Policy, never registered for the benefit on the Municipality's database, despite numerous invitations. Thus, not only is the Applicants' interpretation of section 5.2.2 incorrect, but the Applicants cannot claim to have any concrete experience of "exclusion" in terms of this provision upon which the Court could base the judgement.

5.11. The Court further erred in failing to find that the application was inextricably linked to the pending eviction proceedings in the Magistrates Court, and in failing to have regard to the implications of the offers of emergency accommodation made to and rejected by the applicants.

5.12. In particular, the Court erred in relying on the evidence of the *amicus curiae*, which evidence did not relate to the applicants' circumstances or reasons for rejecting the Municipality's offers of emergency accommodation, as the basis for its finding that the applicants' were justified in refusing the offers of emergency accommodation.

5.13. The Court failed to engage with the evidence put up by the Municipality which demonstrates that the applicants resisted all efforts to accommodate them, were not *bona fide* in seeking relief in this application; were merely trying to avoid the hearing of the eviction proceedings; and subordinating their rights to alternative accommodation to other agendas.

5.14. The Court erred by failing to find that the applicants have not made out a case to demonstrate that the Municipality's resource allocation in respect of housing in general, and emergency housing in particular, was not reasonable.

5.15. In this regard, the Court erred in failing to pay due regard to the Municipality's detailed evidence as to:

5.15.1. How it has approached its obligations to address emergency housing issues both from its own resources and with the assistance of other spheres of government.

5.15.2. The applicant's incorrect analysis of the municipal budget against which the applicants sought to measure the sufficiency of the Municipality's allocation for emergency housing; and the suggestion that the Municipality should have called "an expert on municipal budgeting" to discharge its onus to show that the case against it was "frivolous", was onerous in the extreme.

d) Funding sources

6. The Court erred in finding that the Municipality has a policy or practice of relying primarily on grants and other funding received from the Provincial Government in order to provide emergency housing; does not make reasonable provision from its

own financial resources for emergency housing; and that the Municipality may not rely on funds received from the Provincial Government, or other external sources, for emergency housing in that:

6.1. The finding that the Municipality is not entitled to rely on funds received from the Provincial Government or other external sources fails to take into account that the Municipality's budget as a whole consists of (1) funds generated by the Municipality, and (2) funds received from the National government in accordance with the Division of Revenue Act, which funds are allocated to allow the Municipality to perform its functions.

6.2. This finding would thus require the Municipality to solely fund emergency housing from the income received from rates and fees for the services that it provides, with the perverse result that the Municipality would have less funding available for emergency housing than it currently has.

6.3. The Court erred in accepting the applicants' contention that the Municipality only allocated R 1 million to emergency housing as this contention proceeds from a misunderstanding of the Municipality's budget, and the practical extent to which funds are allocated for emergency housing.

6.4. The Court erred in granting a declaration of constitutional invalidity based on its interpretation of the appropriateness of the Municipality's self-funding of certain aspects of its emergency housing obligations, viewed in isolation from the Municipality's entire emergency housing programme.

6.5. There is no basis in law and no constitutional mandate for the Court's conclusion that Municipalities are compelled to primarily fund their emergency

housing obligations from their own resources, to the exclusion of funding received in terms of the Division of Revenue Act.

6.6. In reaching this conclusion the Court further failed to have due regard to the binding authority of the Constitutional Court set out in paragraph 4.6 above, as well as the fact that the emergency housing policy mandated self funding, as set out in paragraph 4.3.1 above.

e) Section 5.2.2 of the Municipality's Housing Selection Policy

vi. Incorrect interpretation

7. The Court erred in finding that Section 5.2.2 of the Municipality's housing selection policy, is unconstitutional and invalid, to the extent that it precludes farm residents who have been registered on the Municipality housing database for a substantial period of time from benefitting from the 20% quota set aside for farm workers and farm residents in future municipal housing projects and ordering the Municipality to reformulate Section 5.2.2 in that:

7.1. The Court failed to have regard to the text and context of Section 5.2.2 of the Housing Selection Policy. In particular, the section clearly means that a quota of 20% of opportunities will be set aside for farmworkers and farm residents provided they reside or have in the past resided on farms, and who have not been registered on the housing database. The effect of this is not to exclude but to include such categories of people on the database.

7.2. The Court erred in failing to have due regard to the Municipality's evidence that the quota was put in place in consequence of a recognition that persons who qualify for emergency housing as defined in the Housing Code are not the only

ones who find themselves in desperate need and that the express purpose and effect of the quota is to ensure that rural applicants for housing opportunities are not disadvantaged by the fact that they live far from urban based housing projects, and that they tend to take longer to register on housing demand lists.

7.3. The Court erred in failing to have due regard to the Municipality's evidence the policy is flexible enough to accommodate all rural dwellers who, despite being registered on the Municipality's database, are nonetheless disadvantaged in obtaining equal access to the Municipality's housing programmes.

7.4. The Court erred in failing to have due regard to the Municipality's evidence that it had taken a policy decision to prioritise the provision of housing for a certain, particularly disadvantaged group of rural dwellers.

7.5. The Court erred in finding that the Municipality had not explained the rationale that informed Section 5.2.2. The Municipality explained in detail why its policy is reasonable, what it had done to formulate its policy, its investigations and research, the alternatives considered, the reasons why it opted for the policy selected, and whether the policy had been reconsidered in light of the obligation to progressively realise the right concerned (record pages 182 – 188).

7.6. Indeed, the policy is far more generous than that of other municipalities (in fact more than double its nearest competitor), a fact uncontradicted by the applicant. Thus, Langeberg as a 5% allocation for rural applicants, George 5%, Agulhas 10%, and Breede Valley has no rural quota at all.

7.7. Despite the suspension of the declaration of invalidity of section 5.2.2 in subparagraph 6 of the order, subparagraph 7 directs the Municipality to "remove and reformulate section 5.22 of its Housing Selection Policy so as to render it constitutionally compliant by 27 February 2023". Not only is this contradictory, but if implemented will have the effect that the benefits conferred by this policy will be removed until 27 February 2023, with consequential effects on prospective applicants for this benefit. This cannot be correct.

vii. Non-joinder of Minister of Rural Development and Land Reform

8. This constituted a significant nonjoinder. The Minister of Human Settlements (cited as third respondent) is not the national department charged with ESTA evictees. The Minister of Rural Development and Land Reform is (and funded this litigation). Indeed, the policy challenged in these proceedings was mandated at a national level in terms of the Provincial Policy Framework on Selection of Housing Beneficiaries under the auspices of this ministry.

f) Supervisory order

9. The Court erred in granting the supervisory orders in Orders 8 and 9 in that:

9.1. The applicants failed to make out a case on the facts for a finding of any rights violation that would justify a supervisory order which trenches on the separation of powers.

9.2. The Court erred in failing to have due regard to settled legal principles that supervisory orders are only granted when the circumstances clearly demand a remedy with such broad and far reaching implications.

9.3. The applicants failed to put up any, alternatively any adequate, evidence of systemic failures on the part of the Municipality, or inadequate compliance with its constitutional duties. On the contrary, the evidence put up by the Municipality demonstrates the opposite.

9.4. The Court erred in granting a supervisory order in that it failed to make a finding as to the precise respects in which Municipality's conduct purportedly falls short of its constitutional obligations.

9.5. The supervisory orders granted provide no clarity to the Municipality or subsequent Judges dealing with reports filed in terms of the supervisory orders, in that the parameters of the alleged rights violations are not delineated by the Court, nor are the nature of the steps to be taken by the Municipality.

9.6. The supervisory orders granted contain no indication as to the criteria upon which they may be regarded having been satisfactorily completed, and endure for an indefinite duration.

g) Other compelling reasons in terms of section 17 (1) (a) (ii) of the Superior Courts Act, 2010

10. In addition to the above, there are obviously further compelling reasons that leave to appeal should be granted. Not only is there the potential that the benefits conferred by section 5.2.2 of the Housing Selection Policy will be removed as a result of the order, but the policy implementation ramifications for the Municipality and those residing within its jurisdiction arising from the order are manifest.

DATED AT CAPE TOWN ON THIS 19 **DAY OF AUGUST 2022**

(sgd

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