IN THE CONSTITUTIONAL COURT

(REPUBLIC OF SOUTH AFRICA)

Case number: CCT 69/2011

In the matter between:

THE OCCUPIERS OF PORTIONS 124 AND 150 OF THE FARM ZANDFONTEIN 317 JR Applicants

and

BROOKWAY PROPERTY 30 (PTY) LTD First Respondent

THE CITY OF TSHWANE Second Respondent

SECOND RESPONDENT'S HEADS OF ARGUMENT

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1. The Applicants made an application for leave to appeal against an order issued by the North Gauteng High Court, pertaining to the eviction of the Applicants from land owned by the First Respondent. The order appears in Volume 16, on page 1521 and further, and the judgment appears in the same Volume on page 1526 and further.

2. The Applicants sought leave to appeal from the High Court and the Supreme Court of Appeal. In both instances, leave was refused.

3. Although the order issued by the High Court affects the Second

Respondent, it did not seek leave to appeal against the order.

4. The Second Respondent does not oppose the Applicants' application for leave to appeal (paragraph 32 of its answering affidavit, Volume 16, page 1625). The Second Respondent's involvement in the present matter is mainly by virtue of the directions issued by this Honourable Court on 15 August 2011 and 29 August 2011 (a second reason for the Second Respondent's participation is to oppose orders for compensation and costs sought against it).

5. In terms of paragraph 1 of the first directions, the Second Respondent was required to provide an explanation under oath as to the steps which it has taken to comply with the order of the High Court, requiring it to make alternative land available to the Applicants. In terms of paragraph 5 of the second directions, the Second Respondent *inter alia* was required to file heads of argument.

6. It is submitted that the Second Respondent, in its answering affidavit (Volume 16, page 1612 and further), provides a proper explanation of its failure to strictly comply with the order of the High Court within the time period stipulated therein. It is also submitted that the responsible officials of the Second Respondent

did not act in contempt of court.

7. The explanation boils down to the following:

7.1. even before the application for eviction was made in the High Court, the Second Respondent and the land owner (First Respondent) were engaged in negotiations that the Second Respondent would acquire the First Respondent's land so that the Applicants could be settled there permanently;

7.2. these negotiations commenced at the instance of the First Respondent;

7.3. soon after the order was made, the negotiations were resumed on the instance of the First Respondent;

7.4. the Applicants were kept abreast of the negotiations, *inter alia*, with a public meeting.

8. It is submitted that all the parties affected by the order of the High Court accepted and consented that the Second Respondent would not immediately adhere to the order, but that an endeavour would first be made to settle the matter to the satisfaction of

everyone involved. The First Respondent, being the land owner in whose favour the order operated most strongly, in fact consented to suspension of the court order in writing (paragraph 9 of the Second Respondent's answering affidavit, Volume 16, page 1614).

9. As far as the Applicants are concerned, the Second Respondent kept them abreast of developments and accepted that they would also find suspension of the court order in order. This assumption is proved to be correct in view of the heads of argument filed on their behalf. See the second sub-paragraph of paragraph 108 of the Applicant's heads of argument.

10. Certain new events took place after the Second Respondent's answering affidavit was filed and these will be addressed in a supplementary affidavit which is envisaged to be filed soon. The Honourable Court is respectfully requested to accept the affidavit because it deals with important issues which only arose, or came to light, after filing of the Second Respondent's answering affidavit. These issues concern provisional liquidation of the First Respondent, the breakdown of the negotiations and alternative measures undertaken by the Second Respondent.

11. As far as the Applicants' heads of argument are concerned, same

are in general accepted by the Second Respondent. The only issue is the statements in paragraph 107, that the Second Respondent "*has the habit of burying its head in the sand*" and that it "*failed to appeal an order which it knew it was not going to comply with*". These allegations, as well as the reference to other cases, are uncalled for and irrelevant with regard to the facts of this particular matter. Meaningful engagement with the Applicants, and later negotiations to procure the First Respondent's land for them, can hardly be described as burying a head in sand.

12. The reason why the Second Respondent did not seek leave to appeal against the High Court's order is properly explained in its answering affidavit. In view of the negotiations, the Second Respondent did not deem it appropriate to spend public money on further litigation and this attitude cannot be faulted. As far as the Applicants are concerned, the important point is that the Second Respondent never opposed their applications for leave to appeal.

13. Because the Second Respondent never sought leave to appeal against the order of the High Court, it is accepted that it has no standing to obtain leave in this Court. However, for the sake of completeness and because the Second Respondent was required by this Honourable Court to file an affidavit and heads of

argument, it is submitted that an order against the Second Respondent alone to provide alternative land to the Applicants, was not appropriate. The other two levels of Government, Provincial and National, also had to be involved. They had to be joined as parties and orders had to be made against them.

14. It is submitted that it would be unfair to require from Local Authorities in areas were urbanisation rapidly takes place, to carry the financial burden of providing housing to homeless people alone. Homeless and jobless people tend to move to the larger cities, like Cape Town, Johannesburg and Pretoria, to seek shelter and employment opportunities. It would be unfair if a jurisprudence is developed in terms of which the tax payers in these cities must carry the costs of urbanisation alone. Housing and employment are issues in the national interest and the funding to address these issues should be provided by all the tax payers in the whole country and not only those citizens who find themselves in cities where rapid urbanisation takes place.

15. The fact that the Second Respondent does not oppose the leave to appeal sought by the Applicants, does not mean that it consents to all the orders presently sought by the Applicants. In particular, the Second Respondent does not consent to prayers 6.6 and 6.7 (Volume 16, page 1497), in terms of which orders are

sought that the Second Respondent must pay compensation to the First Respondent and that the Second Respondent must pay the costs of the present application.

16. It is submitted that there simply is no case being made out for this relief. As far as the costs are concerned, there is no reason whatsoever why the Second Respondent should be burdened with the costs for the application for leave to appeal. The Second Respondent never opposed the granting of such leave and never sought the order made by the High Court. On the contrary, the Second Respondent, throughout the proceedings, supported and assisted the Applicants:

16.1. during the proceedings in the High Court, the Second Respondent supported the Applicants' view that the Extension of Security of Tenure Act, 1997 was applicable to at least some of the occupiers;

16.2. the Second Respondent also took the view that urgent proceedings were not appropriate to deal with the matter in the High Court and that Section 5 of the Prevention of Illegal Eviction From and Unlawful Occupation of Land Act, 1998 was not complied with;

16.3. on the instance of the Second Respondent, engagement took place between it and the Applicants, which resulted in a memorandum of understanding which was submitted to the High Court but rejected by no fault of the Second Respondent.

17. The party who throughout opposed the Applicants' application for leave to appeal and who rejected the memorandum of understanding between the Applicants and the Second Respondent, is the First Respondent. It is submitted that the normal rule should apply, namely that costs should follow the result. Applied to the present facts, it would mean that the First Respondent, who opposed the leave to appeal, should be ordered to pay the costs of all other parties, including that of the Second Respondent. The Second Respondent is not before this Honourable Court by its own volition.

18. As far as the compensation to the land owner is concerned, the land owner itself was continuously engaged in negotiations with the Second Respondent and thereby consented to the presence of the Applicants on its land for the time being. There is no basis for an order for compensation in its favour and, in any event, the Applicants do not have *locus standi in iudicio* to seek such an order.

19. It is further submitted that a Local Authority, like the Second Respondent, is not constitutionally liable to provide housing and consequently also not liable for damages if housing is not provided. Neither the Constitution of the RSA, 1996 nor the Housing Act, 1997 places an obligation on a municipality to provide alternative accommodation from its own resources under the circumstances presented *in casu*.

20. Section 2 of the Housing Act deals with general principles applicable to housing development and section 2(1)(h)(ii) reads as follows:

> "National, provincial and local spheres of government must – in the administration of any matter relating to housing development – observe and adhere to the principles of co-operative government and intergovernmental relations referred to in section 41(1) of the Constitution".

21. Section 41(1)(f) of the Constitution reads as follows:

> "All spheres of government and all organs of state within each sphere must … not assume any power or function except those conferred on them in terms of the Constitution".

22. In terms of section 125(2)(b) of the Constitution, read with Annexures 4 and 5 thereto, the sphere of Government which is responsible for housing, is the Provincial Government.

23. In terms of Section 156(1) of the Constitution a municipality has executive authority in respect of, and has the right to administer, the local government matters listed in Part B of Schedule 4 and Part B of Schedule 5 to the Constitution (as well as any other matter assigned to it by National or Provincial Legislation).

24. Housing is not referred to in Part B of Schedule 4 or Part B of Schedule 5.

25. Therefore, a municipality is not empowered to exercise executive authority in respect of housing and it is precluded to assume responsibility in the sphere of authority assigned to provincial government.

26. Section 9 of the Housing Act also does not place a responsibility on a municipality to provide housing. The section merely places general duties on municipalities to be involved in planning and facilitating the provision of housing.

27. In terms of Volume 4 of the National Housing Code ("the Code"), a municipality has duties with regard to emergency housing. In terms of paragraph 2.3.1 (e) of the Code, an emergency exists when "the MEC, on application by a Municipality and/or the PD, agrees that persons affected owing to situations beyond their control ... are evicted or threatened with imminent eviction from land...".

28. In terms of paragraph 2.1 of the Code "the main objective of this program 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 needs through the allocation of grants to municipalities in order to achieve the following policy objectives..."

29. It is accordingly submitted that a Municipality cannot act on its own with regard to emergency housing with its own financial resources. It is dependent on the allocation of grants made available by the Provincial Government. This is emphasised in paragraph 2.2 of the Code:

"Grants to Municipalities: Funding under the program will be made available to Municipalities as grants to enable them to

respond rapidly to emergencies by means of the provision of land, Municipal engineering services and shelter."

30. The duty on a municipality is not to provide housing or shelter from its own resources, the extent of its duty is to make an application to the provincial government that a certain situation, like the plight of the present applicants if they are evicted, constitutes an emergency. Thereafter the municipality will be dependent on grants provided by the provincial government.

31. Accordingly a municipality should not be ordered to pay compensation to a landlord as a result of unlawful occupation.

32. It is submitted that there is nothing in the leading case of *Government of the RSA a.o. v Grootboom a.o.* 2001 (1) SA 46 (CC) which is contradictory to the above submissions and which would justify an order against the second respondent to provide alternative accommodation to the applicants from its own resources or an order to pay compensation to the first respondents. In fact, neither the final orders nor the interim orders (*Grootboom a.o. v Government of the RSA a.o.* [2000] ZACC 14) operated specifically against the municipality in question.

33. The Second Respondent will abide any orders made by the Honourable Court, but it respectfully requests that the prayers for compensation and costs be dismissed.

DATED at PRETORIA on this 14th day of OCTOBER 2011.

J BOTHA
Counsel for Second Respondent