THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

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City of Cape Town v Commando and Others (1303/2021) [2023] ZASCA 7 (6 February 2023)

Today, the Supreme Court of Appeal (SCA) upheld an appeal, with no order as to costs, brought by the appellant, the City of Cape Town (the City), against the judgment of the Western Cape Division of the High Court, Cape Town (the high court) in respect of the constitutional duty of a municipality to provide temporary emergency housing.

The central issue in the appeal was whether that constitutional obligation extended to making temporary emergency accommodation available at a specific location. The high court made an order, inter alia, compelling the City to provide the first to twenty-sixth respondents (the occupiers) and their dependents residing with them with temporary emergency accommodation or 'transitional housing' in Woodstock, Salt River or the Inner-City Precinct.

The high court's order was preceded by protracted litigation between the occupiers and the twenty-seventh respondent, Woodstock Hub (Pty) Ltd (Woodstock Hub). On 30 June 2014, Woodstock Hub gave notice to the occupiers to vacate the premises it had bought from Messrs Reza Syms and Erefaan Syms (the Syms brothers), situated at erf 10626, Bromwell Street, Salt River, Cape Town (the property). The occupiers had rented units in the property from the Syms brothers. In July 2015, Woodstock Hub launched eviction applications in the high court against the occupiers. On 17 March 2016, an eviction order was granted in the high court by agreement between Woodstock Hub and the occupiers. In terms of this order, the occupiers agreed to vacate the property on 31 July 2016. The occupiers unsuccessfully sought to vary the terms of this order. On 15 August 2016, Woodstock Hub and the occupiers concluded a deed of settlement, which was made an order of court, in terms of which the occupiers would vacate the property on 9 September 2016.

While the City was cited in the proceedings between Woodstock Hub and the occupiers, no order was sought against it to provide the occupiers with temporary accommodation, should this have been necessary. In September 2016, the occupiers' attorneys initiated discussions with the City concerning the imminent risk of homelessness faced by the occupiers. These discussions did not result in an outcome acceptable to the occupiers. Consequently, in September 2016, they launched an application which is the subject of this appeal. In essence, the relief sought was for the occupiers to be provided accommodation at a location as near as possible to the property in which they resided.

In December 2017, the occupiers applied to amend their notice of motion, whereby the relief sought changed markedly. It introduced a direct constitutional challenge against the City's housing programme and its implementation, on the basis that it failed to provide for temporary emergency housing in the

inner city and the surrounds. In addition, it sought a declarator that the City was under a constitutional duty to provide temporary emergency accommodation to the occupiers in a specified area of either, Woodstock, Salt River and Inner-City Precinct, and that it should be directed to do so. The high court allowed the amendment, which amended notice of motion was 'effected' on 13 September 2018.

In respect of the issue of constitutionality, the SCA found the following. Firstly, the high court had not identified the extent of invalidity for the City to rectify in its order. For this reason alone, the SCA found that its order of unconstitutionality could not stand.

In addition, the SCA found that the high court's order did not accord with the relief sought by the occupiers. The SCA found that it was not substantiated by the papers which served before the court or by the court's reasoning. This was because the occupiers had challenged the housing programme in terms of the City's Integrated Human Settlements: Five-Year Plan for the period of July 2012 to June 2017 (the Five-Year Plan). In this regard, the SCA found that apart from the fact that that document had expired, no affidavit was filed as the foundation for the new notice of motion, nor any legal basis set out in support of this constitutional attack anywhere in the papers. Neither were the impugned portions of the Five-Year Plan identified, nor the relevant constitutional or statutory provisions infringed. As to the content of the impugned Five-Year Plan, the SCA found that there was no inconsistency between it and the City's alleged new approach. Even if there were, the City was entitled to adapt its housing programme.

Further, the SCA found that the legislative measures and programmes taken by the government giving effect to s 26 of the Constitution did not impose a duty on it to provide temporary emergency accommodation at a specific locality. Nor have the line of cases since *Government of the Republic of South Africa and Others v Grootboom and Others* [2000] ZACC 19; 2001 (1) SA 46 (CC); 2000 (11) BCLR 1169 (CC). In fact, the opposite was suggested; for example, in *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others (Centre on Housing Rights and Evictions and Another, Amici Curiae)* [2009] ZACC 16; 2010 (3) SA 454 (CC); 2009 (9) BCLR 847 (CC).

In regard to the reasonableness of the City's emergency housing programme, the SCA found that the City demonstrated unequivocally that its policy provided for an emergency housing programme, and the fact that no provision was made for such emergency housing needs in the inner city, did not render the choices made by the City irrational or unreasonable.

In regard to the alleged differentiation of treatment of the occupiers by the City, the SCA found that there was no evidence that any evictees in a position similar to the occupiers were accommodated in the transitional housing sites within the inner city.

The SCA found further that the high court's order put the City in an invidious position, by making an order without knowing, or being in a position to know, if land would be found specifically in the inner city and surrounds. An effect of the high court's order was to re-direct the City's resources, which choices were not for the courts to make. In light of all the reasons above, the SCA held that the high court's order had to be set aside.

Lastly, the SCA found that it still had to make a just and equitable order, so as not to render the occupiers homeless. In regard to the appropriate relief, the SCA found that the City bore a duty to provide the occupiers with suitable temporary emergency accommodation, and it was appropriate that an order be made that such accommodation be at a location as near as possible to the area where the property was situated. To this end, it was essential that the City be provided with reasonable time to find the

temporary emergency accommodation. It followed that the date of eviction stipulated in the eviction orders had to be extended to a reasonable date after the City was to provide accommodation.

Notably, the SCA remarked on the imperative for the City to realise that it had the responsibility of ensuring that the occupiers were treated with dignity and care when choosing an appropriate location. In doing so, the City had to take into account the occupier's places of employment and children's schooling, hospitals, transportation and other important amenities that their relocation required. In this regard, the vulnerabilities of the occupiers had to be considered.

As to costs, the SCA held that the *Biowatch* principle applied. Accordingly, no costs order was made in the appeal, and the high court's costs order was set aside.

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