THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 894/2016

In the matter between:

ASLA CONSTRUCTION (PTY) LIMITED **APPELLANT**

and

BUFFALO CITY METROPOLITAN MUNICIPALITY **RESPONDENT**

THE SOUTH AFRICAN CIVICS ORGANISATION **AMICUS CURIAE**

Neutral citation: *Asla Construction (Pty) Ltd v Buffalo City Metropolitan Municipality (*894/2016) [2017] ZASCA 23 (24 March 2017)

Coram: Ponnan, Cachalia, Swain and Dambuza JJA and Gorven AJA

Heard: 23 February 2017

Delivered: 24 March 2017

Summary: Promotion of Administrative Justice Act 3 of 2000 : ss 6, 7 and 9 : application in terms of s 9 for extension of statutory period in terms of s 7 : substantive application required : no explanation for entire duration of delay : failure to properly consider prejudice to appellant and members of public affected by decision : impugned decision validated by unreasonable delay : unlawfulness of decision not proved by admissible evidence.

ORDER

On appeal from: Eastern Cape Division of the High Court, Grahamstown (Revelas J) sitting as court of first instance.

The following order is made:

(a) The appeal succeeds with costs, such costs to include the costs of two counsel.

(b) The order of the court a quo is set aside and replaced with the following order:

In case number 5246/2015;

'The defendant is ordered to pay the plaintiff's costs, such costs to include the costs of two counsel where employed.'

In case number 5668/2015

'The application is dismissed with costs, such costs to include the costs of two counsel where employed.'

JUDGMENT

Swain JA (Ponnan, Cachalia and Dambuza JJA and Gorven AJA concurring)

[1] This appeal must be considered against the background of a desperate need for adequate housing by the residents of Duncan Village, which falls within the jurisdiction of the Buffalo City Metropolitan Municipality (the respondent). The dispute between the parties arose from the award of a contract by the respondent to Asla Construction (Pty) Ltd (the appellant), with the object of addressing this need. The desperation of the residents is highlighted by the fact that the South African Civics

Association was admitted as an amicus curiae to set out the views and represent the interests of the community of Duncan Village, in the resolution of this dispute.

[2] The first step in the proceedings was taken when the appellant sought provisional sentence against the respondent before the Eastern Cape Division of the High Court (Grahamstown), based upon payment certificates issued in terms of two contracts, namely number 1319/2013 - the 'Turnkey' contract, concluded between the parties on 30 May 2014, and number 1122/2010 – the 'Reeston' contract, concluded between the parties on 14 January 2015. The respondent opposed the relief sought on the basis that the payment certificates relied upon were predicated upon a valid appointment of the engineers who issued these certificates, which in turn depended upon the validity of the contract. It was alleged that the conclusion of the Turnkey contract was unlawful but because the claim of the appellant was not based upon this contract, but rather the Reeston contract, it was not necessary to challenge its validity. It was further alleged that the Reeston contract was unlawful and void, ab initio, because of a failure by the respondent in awarding this contract to comply with s 217 of the Constitution, as well as the procurement legislation and policies which were binding on the respondent. Section 217 provides that in contracting for goods or services an organ of state must do so in a manner that is fair, equitable, transparent, cost competitive and cost effective. The respondent accordingly, by way of a counter application, sought an order reviewing and setting aside the award of the Reeston contract to the respondent and declaring that any payment certificates issued in terms of this contract were void ab initio.

[3] The court a quo (Revelas J), upheld the contentions of the respondent. The learned judge accordingly declared the Reeston contract invalid, set it aside and declared the payment certificates issued in terms of the contract void ab initio. The appellant's action for provisional sentence was accordingly dismissed with costs. Leave to appeal to this Court was thereafter granted by the court a quo.

[4] Central to the dispute before the court a quo was the appellant's contention that the respondent had failed to bring the application for the review and setting aside

of the Reeston contract, without unreasonable delay and within 180 days of its award. Section 7 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) provides as follows:

'(1) Any proceedings for judicial review in terms of section 6(1) must be instituted without unreasonable delay and not later than 180 days after the date –

(a) subject to subsection (2)*(c)*, on which any proceedings instituted in terms of internal remedies as contemplated in subsection (2)*(a)* have been concluded; or

(b) where no such remedies exist, on which the person concerned was informed of the administrative action, became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons.'

[5] In addition, the appellant contended that the respondent had failed to adequately explain the delay, which in all the circumstances, so it was contended, was unreasonable. Section 9 provides as follows:

'(1) The period of –

(a) . . .

(b) 90 days or 180 days referred to in sections 5 and 7 may be extended for a fixed period, by agreement between the parties or, failing such agreement, by a court or tribunal on application by the person or administrator concerned.

(2) The court or tribunal may grant an application in terms of subsection (1) where the interests of justice so require.'

[6] The respondent however failed to incorporate as part of the application to review the Reeston contract, an application for the extension of the 180 day period in terms of s 9 of PAJA. The relevance of PAJA was raised by the appellant in its opposing affidavit alleging that the respondent had failed to comply with the provisions of s 7 of PAJA. In reply, the respondent averred that the application had indeed been brought within the period of 180 days stipulated in s 7 of PAJA, because the respondent (as represented by its council) only became aware of the unlawful administrative action in awarding the Reeston contract on 28 October 2015. In the alternative, it was averred that the interests of justice justified an extension of the

period of 180 days contained in s 7 of PAJA.

[7] The contention of the respondent that the time period only commenced running once it became aware of the unlawful administrative action, is untenable. The issue of whether knowledge of the reviewable irregularities in the decision sought to be reviewed was required before this period commenced running, was decided by this Court in *Aurecon South Africa (Pty) Ltd v Cape Town City* [2015] ZASCA 209; 2016 (2) SA 199 (SCA) para 16, in the following terms:

'The decision challenged by the City and the reasons therefore were its own and were always within its knowledge. Section 7(1) unambiguously refers to the date on which the reasons for administrative action became known or ought reasonably to have become known to the party seeking its judicial review. The plain wording of these provisions simply does not support the meaning ascribed to them by the court a quo, ie that the application must be launched within 180 days after the party seeking review became aware that the administrative action in issue was tainted by irregularity. That interpretation would automatically entitle every aggrieved applicant to an unqualified right to institute judicial review only upon gaining knowledge that a decision (and its underlying reasons), of which he or she had been aware all along, was tainted by irregularity, whenever that might be. This result is untenable as it disregards the potential prejudice to the respondent (the appellant here) and the public interest in the finality of administrative decisions and the exercise of administrative functions.'[1]

[8] The respondent therefore required an extension of the period fixed by PAJA within which to bring the application for review. Section 9 contemplates a substantive application to the relevant court or tribunal, by the person or administrator concerned. That application ought to have been made by the respondent when it first approached the court for relief. It did not do so. Once the appellant had raised the issue of compliance with PAJA, the respondent was obliged to launch an application in terms of this section for an extension of the fixed period. This application could thereafter have been consolidated with the review application. The correct procedure would have ensured that the relevant facts were placed before the court a quo, to enable it

[1] Approved in *City of Cape Town v Aurecon South Africa (Pty) Ltd* (CCT 21/16) [2017] ZACC 5 (28 February 2017) paras 40-44.

to exercise its discretion properly.

[9] The court a quo held that the decisive factor in exercising its discretion whether to grant an extension, was its finding that the procurement in respect of the Reeston contract was not 'legal and regular'. This was based upon a finding that the award of this contract did not comply with the requirements of s 217 of the Constitution. Accordingly, so held the court a quo, the award of the contract was consequently invalid and fell to be set aside. Because of the serious breach of the section, and the other statutory instruments that regulated procurement in the context of local government, the court a quo decided that it was in the interests of justice that the respondent be granted the requisite extension in terms of s 9 of PAJA, to review and set aside the award of the contract. It added that 'Accordingly, the invalidity of the decision to award the Reeston contract to the respondent cannot be validated'.

[10] This conclusion was erroneous. It was the product of a number of misdirections committed by the court a quo.

(a) It impermissibly decided the merits of the review application before considering and determining the application for condonation. In doing so, it effectively precluded any finding that the application for condonation should be refused on its merits, with the result that any unlawful award of the Reeston contract would be 'validated' by the delay.

(b) It regarded the serious nature of the breach of s 217 of the Constitution, as a complete bar to the 'validation' of the award of the Reeston contract to the appellant, which could have followed as a result of the delay in bringing the application for condonation.

(c) It failed to consider whether the respondent had furnished a full and adequate explanation for the entire duration of the delay.

(d) It failed to properly consider the extent to which the appellant had proceeded with the performance of the contract, and the resulting prejudice to the appellant in setting the contract aside at that stage.

(e) It failed to properly consider the nature and extent of the prejudice to be suffered

by the inhabitants of Duncan Village and the broader public interest, in setting the contract aside at that stage.

[11] The manner in which the discretion to extend the statutory time period should be exercised, was described in *Camps Bay Ratepayers' and Residents' Association & another v Harrison & another* [2010] ZASCA 3; 2010 (2) All SA 519 (SCA) para 54, in the following terms:

'And the question whether the interests of justice require the grant of such extension depends on the facts and circumstances of each case: the party seeking it must furnish a full and reasonable explanation for the delay which covers the entire duration thereof and relevant factors include the nature of the relief sought, the extent and cause of the delay, its effect on the administration of justice and other litigants, the importance of the issue to be raised in the intended proceedings *and the prospects of success*.' [My emphasis.]

[12] Although a consideration of the prospects of success of the application for review requires an examination of its merits, this does not encompass their determination. In *Beweging vir Christelik-Volkseie Onderwys v Minister of Education* [2012] ZASCA 45; 2012 (2) All SA 462 (SCA) paras 42-44, the proposition that a court is required to decide the merits before considering whether the application for review was brought out of time or after undue delay and, if so, whether or not to condone the defect, was rejected. Thereafter, in *Opposition to Urban Tolling Alliance v South African National Roads Agency Ltd* [2013] ZASCA 148; 2013 (4) All SA 639 (SCA) paras 22, 26 and 43, it was decided that a court was compelled to deal with the delay rule before examining the merits of the review application, because in the absence of an extension the court had no authority to entertain the review application. The court there concluded that because an extension of the 180 day period was not justified, it followed that it was not authorised to enter into the merits of the review application. However, in *South African National Roads Agency Limited v Cape Town City* [2016] ZASCA 122; 2016 (4) All SA 332 (SCA); 2017 (1) SA 468 para 81, a submission based upon this decision, namely that the question of delay had to be dealt with before the merits of the review could be entertained, was answered as follows:

‘It is true that . . . this court considered it important to settle the court's jurisdiction to entertain the merits of the matter by first having regard to the question of delay. However, it cannot be read to signal a clinical excision of the merits of the impugned decision, which must be a critical factor when a court embarks on a consideration of all the circumstances of a case in order to determine whether the interests of justice dictates that the delay should be condoned. It would have to include a consideration of whether the non-compliance with statutory prescripts was egregious.’

[13] A full and proper determination of the merits of the review application was accordingly dependent upon a finding that the respondent's failure had to be condoned. As stated in *Opposition to Urban Tolling Alliance* supra, para 26;

‘Absent such extension the court has no authority to entertain the review application at all. Whether or not the decision was unlawful no longer matters. The decision has been "validated" by the delay . . . ’

It was thus impermissible for the court a quo to have entered into and decided the merits of the review application without having first decided the merits of the condonation application.

[14] In deciding that the ‘serious breach of section 217 of the Constitution’ was dispositive of the application for condonation, the court a quo failed to have regard to what was said in *Opposition to Urban Tolling Alliance* supra, para 36. A submission that the 180 day time bar should be extended because it was a requirement of the rule of law that the exercise of all public power should be lawful and the decision-maker had failed to act legally, was rejected in the following terms:

‘As I see it, however, the argument is misconceived. While it is true that the principle of legality is constitutionally entrenched, the constitutional enjoinder to fair administrative action, as it has been expressed through PAJA, expressly recognises that even unlawful administrative action may be rendered unassailable by delay.’

[15] This erroneous approach resulted in a failure by the court a quo to properly consider whether the respondent had furnished ‘a full and reasonable explanation for the delay which covers the entire duration thereof’ (*Harrison* supra para 50). The only explanation provided by the respondent for the delay, namely that it only became

aware of the alleged irregularities relating to the award of the Reeston contract, when a forensic report was presented to it on 28 October 2015, was no explanation at all.

[16] There was a delay of fifteen months between the award of the contract to the appellant and the institution of the review proceedings by the respondent. The Reeston contract was awarded to the appellant on the 7 August 2014 followed by its conclusion on the 18 December 2014. Thereafter the respondent instructed the appellant to proceed with the implementation of the contract on the 23 January 2015 and made payment of the appellant's first claim in the amount of R2 221 587.37, on the 20 May 2015. On the 4 August 2015 a senior official of the respondent Mr Vincent Pillay reported the alleged irregularities in the conclusion of the contracts with the appellant, to the Executive Mayor, who reported to the Council of the respondent on the 25 August 2015. The council resolved that these issues should be investigated by an independent investigator and Ms York was appointed. Her report became available on the 21 October 2015 and served before the Council of the respondent on the 28 October 2015. The Council resolved that legal advice be obtained as to the validity of the appellant's claims. The application for a review of the award of the Reeston contract was thereafter launched during November 2015.

[17] A glaring omission by the respondent is that no affidavit was obtained from Mr Pillay. He would have been able to explain why the contract was awarded to the appellant, why the contract was signed and why the appellant was thereafter instructed to proceed with the work. In addition he would have been able to explain why the first payment was made, how he discovered that the award of the contract was irregular and why it took twelve months from the time the contract was awarded, to discover this. An important aspect that he could have explained, were the steps that should have been taken by the respondent to avoid what it maintains was an unlawful award of the contract. The respondent quite clearly failed to furnish a full and reasonable explanation for the delay, which covered its entire duration.

[18] The rationale for the rule that an application for the review of an administrative decision should be launched without undue delay, is predicated upon a desire to

avoid prejudice to those who may be affected by the impugned decision. As was said in *Gqwetha v Transkei Development Corporation Ltd & others* 2006 (2) SA 603 (SCA) paras 22-24, the rule is based upon two principles namely, that 'the failure to bring a review within a reasonable time may cause prejudice to the respondent . . . and . . . there is a public interest element in the finality of administrative decisions and the exercise of administrative functions . . . Underlying that latter aspect of the rationale is the inherent potential for prejudice, both to the efficient functioning of the public body and to those who rely upon its decisions, if the validity of its decisions remains uncertain. It is for that reason in particular that proof of actual prejudice to the respondent is not a precondition for refusing to entertain review proceedings by reason of undue delay, although the extent to which prejudice has been shown is a relevant consideration that might even be decisive where the delay has been relatively slight . . . Whether there has been undue delay entails a factual enquiry upon which a value judgment is called for in the light of all the relevant circumstances including any explanation that is offered for the delay . . . A material fact to be taken into account in making that value judgment – bearing in mind the rationale for the rule – is the nature of the challenged decision. Not all decisions have the same potential for prejudice to result from their being set aside.'

A consideration of the consequences of setting a decision aside and any resultant prejudice, was said to be an important consideration (paras 33-34);

' . . . [D]elay cannot be evaluated in a vacuum but only relative to the challenged decision, and particularly with the potential for prejudice in mind . . .' .

In the exercise of the discretion to condone an unreasonable delay, the prospect of the challenged decision being set aside is not:

'a material consideration in the absence of an evaluation of what the consequences of setting the decision aside are likely to be . . .' .

[19] The prejudice to be suffered by the appellant in setting aside the award of the contract, was dealt with by the court a quo in the following terms; 'It cannot be disputed that the respondent incurred substantial expenses by carrying out the applicants instruction to proceed with the execution of the Reeston contract'. It also found that '[i]t is not clear how much construction work has been done so far in terms of the contract. The contract price was just over R74 million and so far about

R7 million has been claimed for work done. It has to be accepted that the Reeston contract is not near completion'. In this finding it erred because the appellant filed an affidavit shortly before the hearing of the matter, which showed by reference to engineers' certificates annexed to the affidavit, that work in the total amount of R30 863 832.70, had been completed by the appellant. The court a quo accordingly failed to properly consider the extent of the appellant's prejudice, which was far greater than the assumption it had made in the face of evidence to the contrary.

[20] Although reference is made in the judgment to the 'convenient, practical and laudable' considerations behind the award of the contract to the appellant, no consideration was afforded to the prejudice to be suffered by the inhabitants of Duncan village, as a result of the inevitable delay in providing them with adequate housing, which would flow from a declaration of invalidity. The appellant set out how the interests of the community of Duncan Village would suffer immeasurable prejudice if the award of the contract was set aside. The appellant had employed workers from the local community who supported between 250 to 300 families, offering desperately needed job opportunities to the community. The South African Civics Organisation in its capacity as the amicus curiae for the inhabitants of Duncan Village, submits that the community of Duncan Village and surrounds, including Reeston, will suffer extensively if the respondent's challenge to the validity of the award of the Reeston contract is upheld. It is alleged that the respondent did not consult the community before launching the review application. Setting the Reeston contract aside will result in untold misery and hardship to the community, who have been waiting for housing for years.

[21] There is further evidence which is relevant in assessing the prejudice to the appellant. The court a quo in granting leave to appeal recorded that shortly before the application for leave to appeal was argued, the appellant filed an affidavit which disclosed that since the launch of the review application, the appellant had continued to perform the contract, with the ostensible permission of the respondent. The respondent did not object to the affidavit being handed in, but submitted that the application for leave to appeal had to be considered on the evidence available when

the matter was argued. The court a quo however decided that in the circumstances of the case, such an approach would be imprudent and unfair. The new evidence contradicted the courts earlier finding that the contract was not near completion and revealed that it now was. The court a quo acknowledged that this erroneous finding had influenced its decision to grant the respondent an extension under s 9 of PAJA. For this reason and others it granted leave to appeal to this Court. In *Moseme Road Construction CC & others v King Civil Engineering Contractors (Pty) Ltd & another* [2010] ZASCA 13; 2010 (4) SA 359 (SCA) para 17, in response to an argument by the appellant that the contract was now near completion and that because of the intervening facts, the order of the court below should be set aside, the following was stated:

'There is a conceptual problem with the submission. The issue on appeal is whether the order granted by the court below was correct at the time it issued. Supervening events cannot affect the answer, although they might conceivably affect enforceability on the ground of supervening impossibility.'

[22] In the affidavit in question, the appellant indicated that in the event of leave to appeal being granted, it would apply for the admission of the evidence by this Court. Counsel for the appellant relying upon the decision in *Rail Commuters Action Group v Transnet Limited t/a Metrorail* 2005 (2) SA 359 (CC) paras 42 – 43 submitted that the evidence that the contract had been practically completed by the appellant in the interim, to the value of R 65 641 776.15 as at the 27 July 2016, should be admitted as evidence on appeal. In *Transnet* the following was stated:

'The Court should exercise the powers conferred by s 22 "sparingly" and further evidence on appeal (which does not fall within the terms of Rule 31) should only be admitted in exceptional circumstances. Such evidence must be weighty, material and to be believed. In addition, whether there is a reasonable explanation for its late filing is an important factor. The existence of a substantial dispute of fact in relation to it will militate against its being admitted.'[2]

By reference to the decision in *Colman v Dunbar* 1933 AD 141 at 161-3, relevant

[2] The repealed provisions of s 22*(a)* of the Supreme Court Act 59 of 1959 are now provided for in s 19*(b)* of the Superior Courts Act 10 of 2013.

criteria in determining whether evidence on appeal should be admitted were said to be:

'. . . the need for finality, the undesirability of permitting a litigant who has been remiss in bringing forth evidence to produce it late in the day, and the need to avoid prejudice.'

[23] The evidence is not disputed, is weighty and material to a determination of the issues in this appeal. By its very nature it could not have been produced at an earlier stage in the proceedings. To exclude its admission would be prejudicial to the appellant and run counter to the interests of justice as it establishes that the contract has been practically completed, with the ostensible permission of the respondent. In addition the court a quo acknowledged that its decision at the time had been based, upon incorrect facts. The evidence is accordingly admitted.

[24] The delay by the respondents in launching the application for a review exceeded 180 days and was therefore 'unreasonable per se' (*Opposition to Urban Tolling Alliance* supra para 26). Even after this period an enquiry into the reasonableness of the conduct of the respondent was necessary, in order to determine whether the interests of justice dictate an extension of the time period (*Opposition to Urban Tolling Alliance* supra para 26). When regard is had to the abject failure by the respondent to furnish a full and adequate explanation for the entire duration of the unreasonable delay, together with the severe prejudice to the appellant and the inhabitants of Duncan Village, caused by reviewing and setting aside the Reeston contract, it is quite clear that the court a quo erred in granting an extension of the time period in terms of s 9 of PAJA. The application for the review and setting aside of the award of the Reeston contract to the appellant, together with the order declaring the payment certificates issued in terms of this contract void ab initio, should have been refused. The award of the Reeston contract was accordingly 'validated', insofar as this may have been necessary, by the undue delay of the respondent. The payment certificates relied upon are accordingly valid.

[25] Strictly speaking an enquiry as to whether the court a quo was correct in concluding that there had been a serious breach of s 217 of the Constitution in the

award of the Reeston contract to the appellant, is rendered unnecessary by this conclusion. I will nevertheless do so as the court a quo based its finding on evidence that was largely inadmissible. The contention of the respondent that the requirements of s 217 of the Constitution were not complied with, was based entirely on the evidence of Ms York. The evidence was however in most parts inadmissible. The report she compiled which formed the basis for her affidavit was based on documents provided to her by the respondent, as well as interviews with persons in the respondents employ. Documents relied upon in formulating her views were not annexed to her affidavit and not all of the documents referred to were placed before the court a quo. No confirmatory affidavits by the persons she interviewed were annexed to her affidavit. As a result her evidence in these respects constituted inadmissible hearsay evidence. In addition she purported to interpret and express her opinion on the contents of certain documents, which was the sole preserve of the court a quo. This constituted irrelevant and inadmissible opinion evidence. The remaining evidence of Ms York, which was admissible and upon which the court a quo was entitled to rely, did not prove that the award of the Reeston contract contravened the provisions of s 217 of the Constitution.

[26] In the result it is unnecessary to consider an alternative argument advanced by the appellant. This was that the requirements of s 217 of the Constitution were complied with when the appellant was appointed as the turnkey implementing agent in terms of the Turnkey contract, to address the housing needs of Duncan village. The award of the Reeston contract was a consequence of this appointment and was encompassed by the provisions of the Turnkey contract. Accordingly, the requirements of s 217 of the Constitution did not have to be complied with in the award of the Reeston contract. It is likewise unnecessary to consider the answer of the respondent to this argument. This was that the Turnkey contract was inchoate, because it was subject to a condition precedent that a funding agreement be concluded between the appellant and the Provincial Department of Human Settlements. No funding agreement had been concluded, with the result that the condition was not fulfilled and the contract did not come into being.

[27] I turn to consider the appellant's appeal against the court a quo's dismissal of the appellant's claim for provisional sentence. Before the court a quo, the respondent's sole ground of opposition to the provisional sentence claim of the appellant was that the payment certificates prepared by the engineer and relied upon by the appellant, were dependent upon his valid appointment in terms of a valid underlying contract (the Reeston contract). This defence was upheld by the court a quo and provisional sentence refused, but the conclusion reached in this appeal renders the defence unsustainable. On appeal however a new defence was advanced by the respondent. The respondent argues that not all of the payment certificates relied upon by the appellant, support the claim for payment. Payment certificates numbers 1, 2 and 3 attached to the summons, were issued in terms of the Reeston contract, whereas payment certificate number 4 was issued in terms of the Turnkey contract. It is common cause that the Turnkey contract did not form the basis for the work performed by the appellant. Payment certificate number 4 was accordingly invalid as the engineer issuing it did not have authority to do so, not having been appointed under the Turnkey contract. Counsel were however agreed that the appellant would have been entitled to provisional sentence in respect of payment certificates 1, 2 and 3, but not in respect of payment certificate 4. The enquiry was rendered moot because we were informed by both counsel that the respondent had in the interim made a without prejudice payment to the appellant in respect of the Reeston contract, in an amount in excess of R40 million. This payment was based upon the extent to which the respondent calculated that it had been unduly enriched by the appellant's performance. It was agreed between counsel that it would no longer be permissible to grant provisional sentence against the respondent, as the payment excussed these earlier claims. Counsel for the respondent however conceded that the appellant would be entitled to the costs of the application for provisional sentence.

[28] The appellant in its heads of argument, sought an order for costs against the respondent on the attorney and client scale, based upon the allegation that the respondent had not provided an honest explanation for its delay in bringing the application for review. In addition the application for the review and setting aside of

the Reeston contract was not in the best interests of either of the parties, or the community, which is in desperate need of the housing to be provided by the performance of the contract by the appellant. Counsel for the appellant did not however advance this contention in argument. In my view a consideration of all of the evidence does not justify the grant of a punitive costs order.

[29] In the result the following order is made:

(a) The appeal succeeds with costs, such costs to include the costs of two counsel.

(b) The order of the court a quo is set aside and replaced with the following order:

In case number 5246/2015;

‘The defendant is ordered to pay the plaintiff's costs, such costs to include the costs of two counsel where employed.’

In case number 5668/2015

‘The application is dismissed with costs, such costs to include the costs of two counsel where employed.’

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K G B Swain

Judge of Appeal

Appearances:

For the Appellant:	G M Budlender SC (with M Schreuder) Instructed by: Vos Maree Inc c/o Wheeldon Rushmere & Cole, Grahamstown Symington & De Kok, Bloemfontein
For the Respondent:	R G Buchanan SC Instructed by: Neville Borman & Botha, Grahamstown Bock & Van Es, Bloemfontein