CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 37/11
[2011] ZACC 33

In the matter between:

CITY OF JOHANNESBURG METROPOLITAN MUNICIPALITY Applicant

and

BLUE MOONLIGHT PROPERTIES 39 (PTY) LTD First Respondent

OCCUPIERS OF SARATOGA AVENUE Second Respondent

and

LAWYERS FOR HUMAN RIGHTS Amicus Curiae

Heard on : 11 August 2011

Decided on : 1 December 2011

JUDGMENT

VAN DER WESTHUIZEN J (Moseneke DCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Mogoeng J, Nkabinde J, Skweyiya J and Yacoob J concurring):

Introduction

[1] This matter concerns the fate of 86 people (Occupiers), who are poor and unlawfully occupy a property called "Saratoga Avenue" in Berea in the City of Johannesburg (property). The property comprises old and dilapidated commercial premises with office space, a factory building and garages. The case deals with the

rights of the owner of the property, Blue Moonlight Properties 39 (Pty) Ltd (Blue Moonlight) and with the obligation of the City of Johannesburg Metropolitan Municipality (City) to provide housing for the Occupiers if they are evicted. Ultimately we must decide whether the eviction of the Occupiers is just and equitable.

[2] Seventeen years into our democracy, a dignified existence for all in South Africa has not yet been achieved. The quest for a roof over one's head often lies at the heart of our constitutional, legal, political and economic discourse on how to bring about social justice within a stable constitutional democracy. In view of prevailing socio-economic conditions, this is understandable. An estimated 423 249 households in Johannesburg alone are, for example, without adequate housing.[1] Approximately 1,8 million households in the country were living in informal housing by 2001.[2] The present number may be higher.

[3] The practical questions to be answered in this case are whether the Occupiers must be evicted to allow the owner to fully exercise its rights regarding its property and, if so, whether their eviction must be linked to an order that the City provide them with accommodation. The City's position is that it is neither obliged nor able to provide accommodation in these circumstances. The owner wishes to exercise its right to develop its property and wants no part in the dispute about the City's responsibilities or the plight of the Occupiers. And the Occupiers do not want to end

[1] A household consists of approximately three people. See the City's Housing Report (referred to at [5] and [13] below) at para 6.

[2] Statistics South Africa (Stats SA) *Census 2001: Primary tables South Africa* Report No 03-02-04 (2001) at 78.

up homeless on the street. All parties rely on the Constitution, statutory law giving effect to the Constitution and judgments of this Court.

[4] The City applies for leave to appeal against a judgment of the Supreme Court of Appeal.[3] That Court dismissed an appeal against a judgment of the South Gauteng High Court, Johannesburg[4] (High Court). Blue Moonlight and the Occupiers are the respondents. The Occupiers also apply for leave to cross-appeal, should leave to appeal be granted to the City. Lawyers for Human Rights, a South African non-profit organisation that provides free legal services, was admitted as a friend of the Court (amicus curiae).

[5] This judgment first provides some background on the factual and litigation history of this matter. Thereafter an overview of the applicable constitutional, legal and policy framework is given. Then an analysis based on the findings of the Supreme Court of Appeal and the submissions of the parties to this Court follows. The interpretation of Chapter 12 of the National Housing Code[5] (Chapter 12) and the constitutionality of the City's housing policy as set out in its 2010 Housing Report (Housing Report) are at the heart of the matter.[6] The question of the resources available to the City has also been raised. This case does not deal directly with a programme, or measures, to realise progressively the right of access to adequate

[3] *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* 2011 (4) SA 337 (SCA).

[4] *Blue Moonlight Properties 39 (Pty) Ltd v The Occupiers of Saratoga Avenue and Another*, Case No 11442/2006, South Gauteng High Court, Johannesburg, 4 February 2010, unreported.

[5] National housing programme: housing assistance in emergency circumstances (April 2004 Final Version).

[6] The National Housing Code and the Housing Report are briefly explained in [27]-[28] below.

housing.[7] But the City's obligations with regard to this right and the implications of the constitutional protection against arbitrary deprivation of property[8] are of overall import to the questions of eviction and provision of temporary accommodation for emergency reasons. Finally, a conclusion is reached and a remedy fashioned.

Factual and litigation background

[6] The Occupiers comprise 81 adults and five children.[9] One child is a person with disability, two adults are pensioners and a number of the households are headed by women. The average income per household is R940 per month. Many of the Occupiers send a portion of their income to family members in other parts of the country. Most of them do not have formal employment and make their living in the informal sector in the central business district. The location of the building is crucial to the Occupiers' income. The majority of them say that they would not be able to afford the transport costs necessitated by living elsewhere. The Occupiers, relying on expert evidence, also state that if they were to be evicted, they would have to sleep on the street as they would not be able to find affordable accommodation.

[7] All the Occupiers have resided at the property for more than six months; several of them have lived there for many years. One had resided there since 1976, but passed

[7] Section 26 of the Constitution recognises the right of access to adequate housing and is quoted in [18] below.

[8] See section 25(1) of the Constitution, dealt with in [17] and [34]-[37] below.

[9] The Occupiers' details are set out in a document entitled "Survey of Occupiers of 7 Saratoga Avenue, Johannesburg" (Survey) filed in the High Court on 30 April 2008. An affidavit filed by the Occupiers at the commencement of the proceedings initially gave a different number of people. However, the Survey was conducted pursuant to an order of the High Court dated 6 February 2008 that required the City to conduct a survey and record in writing the particulars of the Occupiers. When the City failed to complete this task, it was undertaken by the Occupiers' attorneys and the Survey was filed by consent.

away during these proceedings; another has resided at the property since 1990. It is common cause that their occupation is unlawful. It was once lawful though. They lived on the property with the permission of a company which operated from the property until 1999; they then paid rent to a caretaker who ostensibly acted on behalf of the owner until 2000; and they subsequently paid rent to two different property letting firms until 2004.

[8] In 2004 Blue Moonlight purchased the property with the hope of redeveloping it. The Occupiers allege that they paid rent to an individual and into two bank accounts until the end of 2005, but Blue Moonlight contends that it never received payments.

[9] The condition of the property has deteriorated over the years. In 2000 and 2002 – while their occupation was presumably still lawful – the Occupiers laid two complaints with the Housing Tribunal, but nothing came of them. In 2005 the City issued two notices warning Blue Moonlight to remedy the fire safety and the health and sanitation conditions on the property. It is not disputed that the current conditions are abysmal.

[10] On 28 June 2005 Blue Moonlight posted a notice to vacate the property by 31 July 2005. This notice also purported to cancel any lease that may have existed. Another notice, to the same effect, was posted on 6 January 2006 with a deadline of 5 February 2006.

[11] On 25 May 2006 Blue Moonlight commenced eviction proceedings in the High Court under the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act[10] (PIE). The Occupiers opposed the eviction on the basis that they would be rendered homeless. They applied to join the City to the proceedings by reason of its constitutional and statutory duties in relation to housing. The City did not oppose and was joined by an order of the High Court dated 23 October 2007.

[12] On 4 February 2010 the High Court ordered eviction by 31 March 2010. The City was ordered to pay Blue Moonlight an amount equivalent to fair and reasonable monthly rental from 1 July 2009 until the eviction date. The Court found the City's housing policy unconstitutional to the extent that it discriminates against people in desperate need of housing who are subject to eviction from land by private landowners. The City was ordered to remedy this defect and to report under oath to the Court by 12 March 2010 the steps taken to do so. The City was further ordered to provide the Occupiers with temporary accommodation, or to pay R850 per month to each Occupier or household head until the outcome of the structural interdict was finally determined.

[13] Before the Supreme Court of Appeal the City successfully applied for the admission of new evidence in the form of the updated Housing Report, because of the time lapsed since the High Court proceedings. On 30 March 2011 the Supreme Court

[10] 19 of 1998.

of Appeal set aside the High Court's structural interdict. The compensation order awarded in favour of Blue Moonlight was also set aside.[11] The Supreme Court of Appeal upheld the eviction order and ordered the Occupiers to vacate the premises by 1 June 2011. It declared the City's housing policy unconstitutional to the extent that it excluded the Occupiers from consideration for temporary housing. It also required the City to provide the Occupiers with "temporary emergency accommodation".

[14] In this Court the City applies for leave to appeal against those parts of the Supreme Court of Appeal's order that declared its housing policy unconstitutional and ordered it to provide accommodation to the Occupiers. The Occupiers oppose the City's application for leave to appeal. They also apply for conditional leave to cross-appeal, seeking that any order of eviction be linked to the provision of suitable alternative accommodation by the City and that a structural interdict be granted against the City to ensure that it takes appropriate steps to remedy its housing policy. Blue Moonlight filed a notice to abide, but made submissions to this Court relating to its rights in relation to the property.

Leave to appeal

[15] The applications for leave to appeal and to cross-appeal raise constitutional issues relating to the interpretation of PIE, the constitutionality of the City's policy

[11] Above n 3 at paras 69-71. The Supreme Court of Appeal found this case to be factually distinguishable from *Modderfontein Squatters, Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, amici curiae); President of the Republic of South Africa and Others v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, amici curiae)* 2004 (6) SA 40 (SCA) (*Modderfontein*), where the eviction order had been already granted but ignored by the unlawful occupiers, the state had failed to assist the landowner to execute the eviction order, and the private landowner was the innocent victim of a land invasion rather than the purchaser of occupied land.

and the roles of the various spheres of government in proceedings regarding evictions and housing. The appeal and cross-appeal bear reasonable prospects of success. It is in the interests of justice to grant leave to appeal and to cross-appeal.

Constitutional and legal framework

[16] The issues to be determined require a consideration of rights enshrined in our Constitution, which may compete in circumstances where homelessness is a likely result of eviction, as well as constitutional allocation of powers and functions to municipalities and the other spheres of government. Policy has been formulated and statutes enacted to create a scheme for the protection and realisation of these rights. It is necessary to set out briefly the constitutional, legislative and policy framework, as a basis for the analysis that follows, with reference to the jurisprudence of this Court and other courts.

[17] Section 25(1) of the Constitution, on which Blue Moonlight relies, states: "No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property."

[18] The right to have access to adequate housing is protected in section 26:

> "(1) Everyone has the right to have access to adequate housing.
> (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.

> (3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions."[12]

[19] The Occupiers anchor their case in section 26. However, they also engage the right to equality – protected in section 9 of the Constitution – and specifically section 9(1), which provides that "[e]veryone is equal before the law and has the right to equal protection and benefit of the law." Blue Moonlight also relies on this provision, as well as on the right of access to courts in section 34.[13]

[20] As to the state's responsibility to legislate, Part A of Schedule 4 of the Constitution lists housing as one of the functional areas of concurrent national and provincial legislative competence.

[21] The municipality's role in relation to housing must be determined by reference to the Constitution and various enactments.

[22] Chapter 7 of the Constitution sets out the functions and powers of local government. Section 152 states the objects of local government and requires

[12] On section 26, see for example *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) (*Grootboom*); *Port Elizabeth Municipality v Various Occupiers* [2004] ZACC 7; 2005 (1) SA 217 (CC); 2004 (12) BCLR 1268 (CC) (*PE Municipality*); *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others* [2004] ZACC 25; 2005 (2) SA 140 (CC); 2005 (1) BCLR 78 (CC); *Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg v City of Johannesburg and Others* [2008] ZACC 1; 2008 (3) SA 208 (CC); 2008 (5) BCLR 475 (CC) (*Olivia Road*); *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* [2009] ZACC 16; 2010 (3) SA 454 (CC); 2009 (9) BCLR 847 (CC); *Joseph and Others v City of Johannesburg and Others* [2009] ZACC 30; 2010 (4) SA 55 (CC); 2010 (3) BCLR 212 (CC); and *Gundwana v Steko Development CC and Others* [2011] ZACC 14; 2011 (3) SA 608 (CC); 2011 (8) BCLR 792 (CC).

[13] Section 34 states: "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

municipalities to strive to achieve these objects.[14] Section 153(a) provides that a municipality must "structure and manage its administration and budgeting and planning processes to give priority to the basic needs of the community, and to promote the social and economic development of the community". Section 156 authorises municipalities to carry out their functions.[15]

[23] These provisions must be read with Chapter 3 of the Constitution. It enshrines the principle of co-operative government.[16]

[14] Section 152 provides:

> "(1) The objects of local government are—
>
> (a) to provide democratic and accountable government for local communities;
>
> (b) to ensure the provision of services to communities in a sustainable manner;
>
> (c) to promote social and economic development;
>
> (d) to promote a safe and healthy environment; and
>
> (e) to encourage the involvement of communities and community organisations in the matters of local government.
>
> (2) A municipality must strive, within its financial and administrative capacity, to achieve the objects set out in subsection (1)."

[15] The relevant subsections provide:

> "(1) A municipality has executive authority in respect of, and has the right to administer—
>
> (a) the local government matters listed in Part B of Schedule 4 and Part B of Schedule 5; and
>
> (b) any other matter assigned to it by national or provincial legislation.
>
> . . .
>
> (5) A municipality has the right to exercise any power concerning a matter reasonably necessary for, or incidental to, the effective performance of its functions."

[16] Section 40 provides:

> "(1) In the Republic, government is constituted as national, provincial and local spheres of government which are distinctive, interdependent and interrelated.
>
> (2) All spheres of government must observe and adhere to the principles in this Chapter and must conduct their activities within the parameters that the Chapter provides."

[24] The principal instruments enacted to give effect to the constitutional obligations of the various organs of state in relation to housing are the Housing Act[17] and the National Housing Code. The Housing Act expressly gives effect to the Constitution. Its long title states that it aims "[t]o provide for the facilitation of a sustainable housing development process" and "to define the functions of national, provincial and local governments in respect of housing development". The preamble recognises that the Act gives effect to section 26 of the Constitution and specifically mentions the right to have access to adequate housing.[18] Section 9 obliges municipalities, as part of the process of integrated development planning, to take all reasonable and necessary steps within the framework of national and provincial housing legislation and policy to ensure, amongst other things, that the inhabitants of their respective areas have access to adequate housing.[19]

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[17] 107 of 1997.

[18] The preamble states that "in terms of section 26 of the Constitution . . . everyone has the right to have access to adequate housing, and the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right" and recognises that "housing, as adequate shelter, fulfils a basic human need" and that "housing is a vital part of integrated developmental planning".

[19] Section 9 of the Housing Act provides in part:

> "(1) Every municipality must, as part of the municipality's process of integrated development planning, take all reasonable and necessary steps within the framework of national and provincial housing legislation and policy to—
>
> (a) ensure that—
>
> (i) the inhabitants of its area of jurisdiction have access to adequate housing on a progressive basis;
>
> . . .
>
> (b) set housing delivery goals in respect of its area of jurisdiction;
>
> (c) identify and designate land for housing development;
>
> (d) create and maintain a public environment conducive to housing development which is financially and socially viable;
>
> (e) promote the resolution of conflicts arising in the housing development process;
>
> (f) initiate, plan, co-ordinate, facilitate, promote and enable appropriate housing development in its area of jurisdiction".

[25] These functions must be considered with reference to the functions and responsibilities of municipalities set out in the Local Government: Municipal Systems Act[20] (Municipal Systems Act). Section 1 defines "basic municipal services" as "a municipal service that is necessary to ensure an acceptable and reasonable quality of life and, if not provided, would endanger public health or safety or the environment". Section 4 provides for the rights and duties of municipal councils.[21] According to

[20] 32 of 2000.

[21] Section 4 provides:

> "(1) The council of a municipality has the right to—
>
> (a) govern on its own initiative the local government affairs of the local community;
>
> (b) exercise the municipality's executive and legislative authority, and to do so without improper interference; and
>
> (c) finance the affairs of the municipality by—
>
> (i) charging fees for services; and
>
> (ii) imposing surcharges on fees, rates on property and, to the extent authorised by national legislation, other taxes, levies and duties.
>
> (2) The council of a municipality, within the municipality's financial and administrative capacity and having regard to practical considerations, has the duty to—
>
> (a) exercise the municipality's executive and legislative authority and use the resources of the municipality in the best interests of the local community;
>
> (b) provide, without favour or prejudice, democratic and accountable government;
>
> . . .
>
> (e) consult the local community about—
>
> (i) the level, quality, range and impact of municipal services provided by the municipality, either directly or through another service provider; and
>
> (ii) the available options for service delivery;
>
> (f) give members of the local community equitable access to the municipal services to which they are entitled;
>
> (g) promote and undertake development in the municipality;
>
> . . .
>
> (j) contribute, together with other organs of state, to the progressive realisation of the fundamental rights contained in sections 24, 25, 26, 27 and 29 of the Constitution.

section 8(2) "[a] municipality has the right to do anything reasonably necessary for, or incidental to, the effective performance of its functions and the exercise of its powers." Section 11(3) provides for the exercise of legislative and executive authority by municipalities through a number of means.[22]

[26] Finally, section 23(1) places an obligation on municipalities to "undertake developmentally-oriented planning" in order to ensure that they achieve the objects of local government in section 152 of the Constitution, give effect to their developmental duties in section 153 of the Constitution, and "together with other organs of state contribute to the progressive realisation of the fundamental rights contained in sections . . . 25 [and] 26 . . . of the Constitution." Section 73(1) places a general duty on municipalities to give effect to the provisions of the Constitution and to "give priority to the basic needs of the local community; promote the development of the local community; and ensure that all members of the local community have access to at least the minimum level of basic services."

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(3) A municipality must in the exercise of its executive and legislative authority respect the rights of citizens and those of other persons protected by the Bill of Rights."

[22] These include:

"(a) developing and adopting policies, plans, strategies and programmes, including setting targets for delivery;

(b) promoting and undertaking development;

. . .

(e) implementing applicable national and provincial legislation and its by-laws;

. . .

(h) preparing, approving and implementing its budgets;

. . .

(n) doing anything else within its legislative and executive competence."

[27] The National Housing Code was enacted under section 4 of the Housing Act. It contains the national housing policy and sets out the principles, guidelines and standards that apply to the various programmes effected by the state in relation to housing. Chapter 12 of the Code was introduced after the decision of this Court in *Grootboom*.[23] It is entitled "Housing assistance in emergency housing circumstances" and provides for assistance to people who find themselves in a housing emergency for reasons beyond their control.[24]

[28] Chapter 12 is incorporated into the City's housing policy set out in the Housing Report filed in the Supreme Court of Appeal. The Housing Report sets out the City's overall goals and describes four housing programmes: permanent accommodation; housing under the Reconstruction and Development Programme; temporary accommodation (which is also referred to by the City as "temporary accommodation as decant"); and emergency accommodation. The emergency accommodation programme is intended to provide for crises as envisioned by Chapter 12.[25]

[29] Evictions from land are dealt with under PIE. Section 4, concerning eviction of unlawful occupiers by an owner or a person in charge of land, provides that courts may only grant an order for eviction if it is just and equitable to do so, after considering all the relevant circumstances. Where an unlawful occupier has occupied the land for more than six months, those circumstances include the availability of

[23] See Chapter 12 at section 12.1 and *Grootboom* above n 12.

[24] See below n 50 for the definition of emergency housing circumstances.

[25] Housing Report at para 28.

alternative land where the occupier may be relocated.[26] A just and equitable date for eviction must be determined.

Eviction and PIE

[30] It is common cause that Blue Moonlight is the owner, that the Occupiers' occupation is unlawful and that they have occupied the property for more than six months. The High Court and the Supreme of Appeal held that Blue Moonlight had complied with the requirements of PIE and was entitled to an eviction. The crucial question before this Court is therefore whether it is just and equitable to evict the Occupiers, considering all the circumstances, including the availability of other land, as well as the date on which the eviction must take place.

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[26] Section 4 provides:

> "(1) Notwithstanding anything to the contrary contained in any law or the common law, the provisions of this section apply to proceedings by an owner or person in charge of land for the eviction of an unlawful occupier.
>
> . . .
>
> (6) If an unlawful occupier has occupied the land in question for less than six months at the time when the proceedings are initiated, a court may grant an order for eviction if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances, including the rights and needs of the elderly, children, disabled persons and households headed by women.
>
> (7) If an unlawful occupier has occupied the land in question for more than six months at the time when the proceedings are initiated, a court may grant an order for eviction if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances, including, except where the land is sold in a sale of execution pursuant to a mortgage, whether land has been made available or can reasonably be made available by a municipality or other organ of state or another land owner for the relocation of the unlawful occupier, and including the rights and needs of the elderly, children, disabled persons and households headed by women.
>
> (8) If the court is satisfied that all the requirements of this section have been complied with and that no valid defence has been raised by the unlawful occupier, it must grant an order for the eviction of the unlawful occupier, and determine—
>
> (a) a just and equitable date on which the unlawful occupier must vacate the land under the circumstances; and
>
> (b) the date on which an eviction order may be carried out if the unlawful occupier has not vacated the land on the date contemplated in paragraph (a)."

[31] Before this Court, Blue Moonlight submits that an eviction may be delayed on equitable grounds, but that an indefinite delay would amount to an arbitrary deprivation of property in violation of section 25(1) of the Constitution. The provisions of PIE are not designed to allow for the expropriation of land.[27] A private owner has no obligation to provide free housing.

[32] The Occupiers submit that it would not be just and equitable to grant an eviction order, if the order would result in homelessness.[28] The City notes that the eviction is sought at the instance of the property owner, not at its own instance. It also notes that Blue Moonlight is entitled to eviction if PIE is complied with, but emphasises that the City cannot be held responsible for providing accommodation to all people who are evicted by private landowners.

[33] In determining whether the eviction of the Occupiers will be just and equitable, it is necessary to address—

(a) the rights of the owner in a constitutional and PIE era;

(b) the obligations of the City to provide accommodation;

(c) the sufficiency of the City's resources;

(d) the constitutionality of the City's emergency housing policy; and

[27] See *Ndlovu v Ngcobo; Bekker and Another v Jika* 2003 (1) SA 113 (SCA) at 17-8.

[28] Citing *PE Municipality* above n 12 at para 28; *Modderfontein* above n 11 at para 26; and *Occupiers, Shulana Court, 11 Hendon Road, Yeoville, Johannesburg v Steele* 2010 (9) BCLR 911 (SCA) at para 16.

(e) an appropriate order to facilitate justice and equity in the light of the conclusions on the earlier issues.

[34] The South African constitutional order recognises the social and historical context of property and related rights.[29] The protection against arbitrary deprivation of property in section 25 of the Constitution is balanced by the right of access to adequate housing in section 26(1) and the right not to be evicted arbitrarily from one's home in section 26(3).[30] This Court noted in *FNB*:

> "The purpose of section 25 has to be seen both as protecting existing private property rights as well as serving the public interest, mainly in the sphere of land reform but not limited thereto, and also as striking a proportionate balance between these two functions."[31] (Footnote omitted.)

[35] Historical context is relevant to one's understanding of the constitutional protection against arbitrary deprivation of property and to access to adequate housing.[32] Apartheid legislation undermined both the right of access to adequate housing and the right to property. Section 25 prohibits arbitrary deprivation of

[29] This is in accordance with the post-World War II trend in Germany and elsewhere. For example, Article 14 of the German Basic Law provides that "[p]roperty and the right of inheritance shall be guaranteed" but also that "[p]roperty entails obligations" and "[i]ts use should also serve the public interest." See for example the *Co-Determination Decision* BVerfGE 50, 290 (1979) and the *Investment Aid Case* BVerfGE 4, 7 (1954).

[30] See for example Wilson "Breaking the tie: evictions from private land, homelessness and a new normality" (2009) 126(2) *SALJ* 270.

[31] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* [2002] ZACC 5; 2002 (4) SA 768 (CC); 2002 (7) BCLR 702 (CC) (*FNB*) at para 50, relying on Van der Walt *The Constitutional Property Clause* (Juta & Co Ltd, Kenwyn 1997) at 15-6.

[32] For a more detailed summary of the historical context that preceded section 26 of the Constitution and PIE see *PE Municipality* above n 12 at paras 8-10.

property,[33] but also addresses the need to redress the grossly unequal social conditions.[34] Section 26 highlights the transformative vision of the Constitution.[35]

[36] PIE was adopted with the manifest objective of overcoming past abuses like the displacement and relocation of people. It acknowledges their quest for homes, while recognising that no one may be deprived arbitrarily of property. The preamble quotes sections 25(1) and 26(3) of the Constitution.[36] In *PE Municipality* it was stated that the court is required "to balance out and reconcile the opposed claims in as just a manner as possible, taking account of all of the interests involved and the specific factors relevant in each particular case."[37]

[37] Unlawful occupation results in a deprivation of property under section 25(1). Deprivation might however pass constitutional muster by virtue of being mandated by law of general application and if not arbitrary.[38] Therefore PIE allows for eviction of unlawful occupiers only when it is just and equitable.

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[33] Section 25(1).

[34] Section 25(4)-(9).

[35] *PE Municipality* above n 12 at para 17.

[36] The preamble of PIE provides in relevant part:

> "WHEREAS no one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property;
>
> AND WHEREAS no one may be evicted from their home, or have their home demolished without an order of court made after considering all the relevant circumstances".

[37] *PE Municipality* above n 12 at para 23.

[38] See *Harksen v Lane NO and Others* [1997] ZACC 12; 1998 (1) SA 300 (CC); 1997 (11) BCLR 1489 (CC) (*Harksen*) where the distinction was drawn between deprivations (under section 25(1)) and expropriations (as per the rest of section 25). Although the precise relationship between the two was not stated, this Court made observations about their differing attributes. Goldstone J articulated that "[t]he word 'expropriate' is generally used in our law to describe the process whereby a public authority takes property (usually immovable) for a public purpose and usually against payment of compensation" (at para 32). In that case the impugned law did not amount to a compulsory acquisition or expropriation because the property was not appropriated by the state,

[38] This Court has also recognised the concept of ubuntu as underlying the Constitution and PIE and that it is relevant to their interpretation. In *PE Municipality* it was stated:

> "Thus, PIE expressly requires the court to infuse elements of grace and compassion into the formal structures of the law. It is called upon to balance competing interests in a principled way and to promote the constitutional vision of a caring society based on good neighbourliness and shared concern. The Constitution and PIE confirm that we are not islands unto ourselves. The spirit of *ubuntu*, part of the deep cultural heritage of the majority of the population, suffuses the whole constitutional order. It combines individual rights with a communitarian philosophy. It is a unifying motif of the Bill of Rights, which is nothing if not a structured, institutionalised and operational declaration in our evolving new society of the need for human interdependence, respect and concern."[39] (Footnote omitted.)

[39] A court must consider an open list of factors in the determination of what is just and equitable.[40] The relevant factors to be taken into account in this case are the following. The Occupiers have been in occupation for more than six months. Some of them have occupied the property for a long time. The occupation was once lawful. Blue Moonlight was aware of the Occupiers when it bought the property. Eviction of the Occupiers will render them homeless. There is no competing risk of homelessness on the part of Blue Moonlight, as there might be in circumstances where eviction is sought to enable a family to move into a home.

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nor was the applicant deprived thereof permanently (at para 36). For an analytical framework for section 25, see *FNB* above n 31.

[39] *PE Municipality* above n 12 at para 37.

[40] See subsections 4(6) and 4(7) of PIE above n 26.

[40] It could reasonably be expected that when land is purchased for commercial purposes the owner, who is aware of the presence of occupiers over a long time, must consider the possibility of having to endure the occupation for some time. Of course a property owner cannot be expected to provide free housing for the homeless on its property for an indefinite period. But in certain circumstances an owner may have to be somewhat patient, and accept that the right to occupation may be temporarily restricted, as Blue Moonlight's situation in this case has already illustrated. An owner's right to use and enjoy property at common law can be limited in the process of the justice and equity enquiry mandated by PIE.

[41] In order to conclude whether eviction by a particular date would in the circumstances of this case be just and equitable, it is mandatory to consider "whether land has been made available or can reasonably be made available".[41] The City's obligations are material to this determination.

The City's obligations; non-joinder of the other spheres of government

[42] The duty regarding housing in section 26 of the Constitution falls on all three spheres of government – local, provincial and national – which are obliged to co-operate.[42] In *Grootboom* this Court made it clear that "a co-ordinated State housing program must be a comprehensive one determined by all three spheres of government

[41] Section 4(7) of PIE above n 26.

[42] See section 40(1) of the Constitution above n 16.

in consultation with each other . . . Each sphere of government must accept responsibility for the implementation of particular parts of the program".[43]

[43] In this case, the national and provincial spheres of government are not before this Court.[44] An application by the City to join the provincial government as a party in the proceedings was refused by the High Court. The Supreme Court of Appeal noted that the City was "aggrieved" about this but found that, although generally speaking the provincial government has an important role to play, its joinder was not necessary in these proceedings because only the City's obligations were at issue and the province did not have any direct and substantial interest in any order that may have been made.[45]

[44] Generally, a party must be joined in proceedings if it has a direct and substantial interest in any order the court might make, or when an order cannot be effected without prejudicing it.[46] The Rules of this Court require the joinder of an organ of state responsible for executive, administrative or legislative conduct that is

[43] *Grootboom* above n 12 at para 40.

[44] On the eve of the hearing the Minister for Human Settlements filed an affidavit with this Court. Neither the Minister nor his department is party to these proceedings. The Minister did not ask to be joined. The affidavit was filed very late without any explanation or request for condonation. Its admission was opposed by the Occupiers. There is no basis for the affidavit's admission.

[45] Above n 3 at para 68.

[46] See for example *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A) at 659 and *Selborne Furniture Store (Pty) Ltd v Steyn NO* 1970 (4) SA 422 (A) at 423A-B.

being constitutionally challenged.[47] This Court has also joined other spheres and organs of state in cases where they were not responsible for the conduct.[48]

[45] In view of the intertwined responsibilities of the national, provincial and local spheres of government with regard to housing, it would generally be preferable for all of them to be involved in complex legal proceedings regarding eviction and access to adequate housing. Indeed, joinder might often be essential and a failure to join fatal. Whether it is necessary to join a sphere in legal proceedings will however depend on the circumstances and nature of the dispute in every specific case. In this matter the absence of the provincial government is not fatal. The obligations and conduct of the City have to be considered. The joinder of the City as the main point of contact with the community is essential.

[46] The constitutional and legal framework set out in [16] to [29] above demonstrates that local government has an important role to play in the provision of housing.[49] The City does not deny that it has a role to play in this regard. It submits,

[47] Rule 5 of the Rules of the Constitutional Court.

[48] For example, in *Nokotyana and Others v Ekurhuleni Metropolitan Municipality and Others* [2009] ZACC 33; 2010 (4) BCLR 312 (CC), dealing with the need for people in an informal settlement for lighting and toilets, the Court joined the provincial Member of the Executive Council for Local Government and Housing. Because the delay by the province to take a decision on an application to upgrade the status of the settlement under the National Housing Code was unjustified and unacceptable, it was ordered to make a decision within a stipulated time. The Court also ordered the province to pay the costs of the applicants, as its conduct had contributed to their dilemma. See paras 36, 55 and 62.

[49] The primary duties placed on national and provincial governments do not absolve local governments. The Constitution places a duty on local governments to ensure that services are provided in a sustainable manner to the communities they govern: see section 152(1)(b), read with sections 152(2) and 153(a) of the Constitution, discussed at [22] above. A municipality must be attentive to housing problems in the community, plan, budget appropriately and co-ordinate and engage with other spheres of government to ensure that the needs of its community are met. Its duty is not simply to implement the state's housing programme at a local level. It must plan and carry some of the costs, as is shown below. See section 9 of the Housing Act and sections 4, 8(2),

however, that its role is a secondary and limited one, especially in view of Chapter 12 of the Housing Code.

Chapter 12 of the Housing Code

[47] Chapter 12 provides for assistance to people who find themselves in need of emergency housing for reasons beyond their control. Included in the definition of an emergency is the situation where people are "evicted or threatened with imminent eviction from land or from unsafe buildings, or situations where pro-active steps ought to be taken to forestall such consequences".[50] It is undisputed that the Occupiers will be rendered homeless by eviction unless the City provides them with accommodation. It was accepted by counsel on behalf of the City that their situation constitutes an emergency.

11(3) and 23(1) of the Municipal Systems Act, discussed at [24]-[26] above. See also the discussion of Chapter 12 below.

[50] Chapter 12 defines "Emergencies" at section 12.3.1 as the following:

> "An Emergency exists when the MEC, on application by a municipality and or the provincial housing department, deems that persons affected,
>
> a. Owing to situations beyond their control:
>
> • have become homeless as a result of a declared state of disaster . . .
>
> . . .
>
> • are evicted or threatened with imminent eviction from land or from unsafe buildings, or situations where pro-active steps ought to be taken to forestall such consequences;
>
> • whose homes are demolished or threatened with imminent demolition, or situations where proactive steps ought to be taken to forestall such consequences; or
>
> . . .
>
> • live in conditions that pose immediate threats to life, health and safety and require emergency assistance.
>
> b. Are in a situation of exceptional housing need, which constitutes an Emergency that can reasonably be addressed only by resettlement or other appropriate assistance, in terms of this Programme."

[48] Much of the City's oral argument in this Court dealt with whether, on a proper interpretation of Chapter 12, it is entitled or obliged to fund emergency accommodation. The City contends that it is neither entitled nor obliged to do so. It submits that when its application to the provincial government for assistance was refused, the City exhausted its constitutional mandate.

[49] The City states that the National Housing Code was adopted pursuant to *Grootboom*, which suggests that the responsibility to fund emergency housing does not lie with local government. Based on *Grootboom*, the City argues that local governments have an important obligation to ensure that services are provided to the communities they govern, that "funding" language was used only in connection with national government and that local governments are allocated certain implementation responsibilities only in terms of legislation.[51]

[50] The City argues[52] that the functional area of housing appears in Schedule 4A of the Constitution. Schedules 4B and 5B do not confer on local government any function that can be seen to place the onus on it to be the organ primarily responsible for the fulfilment of the right of access to adequate housing. Local government is not primarily responsible for the achievement of this right. The Housing Act requires local governments to act only as a point of delivery. They are entirely dependent on the national and provincial governments and confined to acting within the parameters

[51] See *Grootboom* above n 12 at paras 39-40 and 47.

[52] The City relies on De Visser "A Perspective on local government's role in realising the right to housing and the answer of the *Grootboom* judgment" (2003) 7(2) *Law, Democracy & Development* 201.

set in national and provincial policies. *Grootboom* does not place the primary responsibility to fulfil the right of access to adequate housing on local government, but rather requires local government to respect, protect and promote this right. As to emergency housing, *Grootboom* requires national government to devolve funds and make provision for those desperately in need of shelter.

[51] According to the Occupiers, the City is entitled and obliged to use its own resources to fund emergency housing under Chapter 12. Application to the province for funds is a measure of last resort to be taken when the City lacks the resources to address the situation. The Occupiers are supported by the amicus, submitting that the City can fund housing under Chapter 12 because of its duties to prioritise "basic needs" under section 153(a) of the Constitution and sections 1, 4(2) and 73(1) of the Municipal Systems Act.[53] It further submits that co-operative government failed in this case, but the obligations on provincial and national government under principles of co-operative governance and equitable allocation of revenue do not exonerate local government from predicting and planning for basic services, including under Chapter 12. The amicus argues that Chapter 12 draws a rational distinction between well-resourced municipalities – which are required to provide emergency housing with their own means if able – and under-resourced municipalities, which cannot meet emergency housing needs from their own resources and are entitled to provincial funding.

[53] See [22], [25] and [26] above.

[52] The City disagrees and submits that merely because one municipality has more resources than another does not permit it to deploy those resources, because municipalities' role in the sphere of housing is secondary and cannot usurp the primary obligations of the provincial and national spheres of government.[54]

[53] Chapter 12 must be interpreted in light of the relevant constitutional and statutory framework of which it is a part.[55] For example, section 9 of the Housing Act requires municipalities to take all reasonable and necessary steps to ensure access to adequate housing. Sections 4(1) and 8(2) of the Municipal Systems Act empower municipalities with a degree of general, financial and institutional autonomy to carry out their functions, and section 4(2) places the duty on them to provide for the democratic governance and efficient provision of services to their communities.[56] Section 4(2)(j) requires them to "contribute, together with other organs to state, to the progressive realisation of the fundamental rights contained in sections 24, 25, 26, 27 and 29 of the Constitution." It would hardly be possible for the City to carry out its constitutional and legislative obligations without being entitled or obliged to fund itself in the sphere of emergency housing.

[54] The City's interpretation of Chapter 12 is premised on its view that local government is not primarily responsible for the achievement of the right of access to adequate housing. Its reliance on *Grootboom* is misplaced though. While Yacoob J

[54] In support of its submission, counsel for the City referred to Chapter 12 at 254, 259, 277, 278, 280 and 286, especially during oral argument.

[55] See [16]-[29] above.

[56] See section 4 and section 8(2), set out in n 21 and [25] respectively.

described the constitutional distribution of housing roles amongst the three governmental spheres in *Grootboom*, he did not delineate absolute and inflexible divisions of governmental responsibilities among the three spheres.[57]

[55] At the time of *Grootboom* there was no—

> "express provision to facilitate access to temporary relief for people who have no access to land, no roof over their heads, for people who are living in intolerable conditions and for people who are in crisis because of natural disasters such as floods and fires, or because their homes are under threat of demolition."[58]

Therefore, the essential question was—

> "whether the nationwide housing programme is sufficiently flexible to respond to those in desperate need in our society and to cater appropriately for immediate and short-term requirements."[59]

[56] By virtue of the glaring gap in the national housing framework this Court accentuated the need for national government to legislate and ultimately fulfil the right of access to adequate housing. Without a national policy to get the ball rolling from a legislative and budgetary perspective, it would be impossible for the other spheres of government to do anything meaningful. It is in this light that this Court in *Grootboom* held:

> "Effective implementation requires at least adequate budgetary support by national government. This, in turn, requires recognition of the obligation to meet immediate

[57] *Grootboom* above n 12 at paras 39-44.

[58] Id at para 52.

[59] Id at para 56.

> needs in the nationwide housing program. Recognition of such needs in the nationwide housing program requires it to plan, budget and monitor the fulfilment of immediate needs and the management of crises. This must ensure that a significant number of desperate people in need are afforded relief, though not all of them need receive it immediately. Such planning too will require proper co-operation between the different spheres of government."[60]

[57] The City's submission that national or provincial government is the primary duty-bearer in relation to funding emergency housing is cogent only to the extent that, but for the existence of a national emergency housing policy and budget, the attempt of a local authority to fulfil the right of access to adequate housing would be empty. There is no basis in *Grootboom* for the assertion that local government is not entitled to self-fund, especially in the realm of emergency situations in which it is best situated to react to, engage with and prospectively plan around the needs of local communities.

[58] The City argues that the Supreme Court of Appeal's finding that the City was empowered to act outside of the national housing policy in the absence of a statutory prohibition violates the principle of legality. Relying on *Fedsure*,[61] it submits that an organ of state is not authorised to take action not prohibited by law; it is prohibited from taking action not so authorised. The City would have acted *ultra vires* if it met the Occupiers' circumstances, as the Supreme Court of Appeal found it should have done, so the City argues.

[60] Id at para 68.

[61] *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* [1998] ZACC 17; 1999 (1) SA 374 (CC); 1998 (12) BCLR 1458 (CC) at paras 55-6 (*Fedsure*).

[59] This argument is unpersuasive. In *Fedsure* this Court described the central features of the principle of legality under the Constitution:

> "It seems central to the conception of our constitutional order that the Legislature and Executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law. At least in this sense, then, the principle of legality is implied within the terms of the interim Constitution. Whether the principle of the rule of law has greater content than the principle of legality is not necessary for us to decide here. We need merely hold that fundamental to the interim Constitution is a principle of legality."[62]

[60] The Court did not endeavour to determine when a local authority would be acting outside its legally conferred powers in particular situations. It stated the importance of legality and constitutionality. Drawing on the work of Dicey, the Court noted that there is "nothing startling in this proposition – it is a fundamental principle of the rule of law".[63] This axiomatic holding cannot serve to show that the City would act unlawfully if it accommodates the Occupiers' emergency situation.

[61] The City relies on its Housing Report, the document in which its policy is contained, for its interpretation of Chapter 12. It submits that both the Housing Report and Chapter 12 make it clear that local government's capacity to provide emergency accommodation is directly dependent on funding from the provincial government. The City's responsibility is to process an application to the province for emergency assistance and to implement the emergency measure as approved and funded. But the

[62] Id at para 58.

[63] Id at para 56.

correct interpretation of Chapter 12 cannot be based on the Housing Report, as the Housing Report is itself based on an interpretation of Chapter 12.

[62] The City submits that it cannot budget for that which it is unable to show is a current need. Counsel was adamant that an emergency situation covered by Chapter 12 is not something which it can predict, plan and budget for and thus all that is expected of it is to deal with an emergency as it arises in an *ad hoc* fashion by way of an application to the province.[64] Unpredictability is central to an emergency situation and the City's only duty and entitlement is to identify emergency situations and apply to the province for their alleviation.

[63] There is no unequivocal indication in the wording of Chapter 12 that local government's capacity to provide emergency accommodation is dependent solely on funding by provincial government. If the City were required always to apply, on an *ad hoc* basis, to the province to fund emergency situations in order to be able to act, it would go against the very essence of an emergency policy. Emergencies cannot be dealt with on the basis of *ad hoc* applications only. Besides truly exceptional or unforeseen circumstances, the budgetary demands for a number and measure of emergency occurrences are at least to some extent foreseeable, especially with regard

[64] Section 12.3.3 of Chapter 12 provides:

> "In terms of section 12.5 of this part of the Code
>
> - funds will be made available by the provincial departments of housing either through the reservation of funds or reprioritisation as emergency circumstances arise, to fund projects approved under this Programme; and
> - the authority to consider and approve projects and the financing of such projects will vest in the Member of the Executive Council, responsible for Housing of the Provincial Government."

to evictions. Predictions can be made on the basis of available information. For example, surveys may serve to establish how many buildings in a municipality are dilapidated and might give rise to sudden eviction proceedings.

[64] Notwithstanding the City's apparently inconsistent stance in respect of the Occupiers,[65] the conclusion seems inevitable that the City itself believes that it is entitled and duty-bound to provide for and to fund at least those who currently benefit under its policy. Otherwise, it would have to admit that it is acting *ultra vires* in funding the accommodation of people presently included in the policy.

[65] The City refers to specific sections of Chapter 12 to buttress its argument. For example, it relies on section 12.2.2 which states that the City has to account for the funding provided only if the funds "contributed materially to a future permanent housing solution for the beneficiary." This, it argues, supports the idea that it has no duty or power to fund emergency or temporary housing needs.

[66] However, other provisions of Chapter 12 are important. Section 12.4.1 states that municipalities must "[i]nitiate, plan and formulate applications for projects relating to emergency housing situations". Section 12.6.1(b) states that "[t]he provision for possible emergency housing needs must be identified through pro-active

[65] In April 2009 the City made an application to the province for funding in terms of Chapter 12. It did so despite having hitherto denied that the Occupiers were eligible for assistance in terms of the Emergency Housing Programme.

planning or in response or reaction to a request for assistance from other authorities or the public." Section 12.6.1(c) states:

> "The municipality must immediately investigate and assess the identified need giving due consideration to the following aspects:
>
> . . .
>
> - If the situation requires intervention, and, if so, *whether the municipality can itself address the situation utilising its own means*.
> - If the situation requires immediate or emergency assistance beyond the means of the municipality, in which case the provincial housing department must be notified immediately and be requested to assist". (Emphasis added.)

These provisions indicate a legislative purpose that the City ought to plan proactively and to budget for emergency situations in its yearly application for funds.

[67] Besides its entitlement to approach the province for assistance, the City has both the power and the duty to finance its own emergency housing scheme. 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.

Resources

[68] The Supreme Court of Appeal made findings on the issue of resources, which the City attacks. According to the City, it lacks the resources to provide the Occupiers with emergency housing if they are evicted. It is simply impossible to assist them, it says.

[69] But the City's budget was the product of its incorrect understanding of Chapter 12. Had the City prepared a budget on a proper understanding of Chapter 12, it might have made provision for emergency housing. It is thus not strictly necessary to consider the attack on the factual findings of the Supreme Court of Appeal. However, it would be quite inappropriate for a court to order an organ of state to do something that is impossible, the more so in a young constitutional democracy. Hence, the City's assertion about a lack of resources deserves consideration.

[70] The City's Housing Report states that it is urgently relocating people from identified dangerous buildings to temporary accommodation due to the threat to their safety, but that the City does not have alternative accommodation available to temporarily or permanently accommodate those who face homelessness as a result of eviction by private property owners.

[71] The Supreme Court of Appeal rejected the City's submission that it lacked resources. It observed that the City spoke "in the vaguest terms" about the affordability of meeting demands for housing. It noted that the record showed that the City had been operating in a financial surplus for the past year. Furthermore, the City did not state that it was unable to reallocate funds or to meet the temporary housing needs of the Occupiers. Finally, it observed that the Occupiers sought only temporary housing, whereas the City's affidavits mainly set out its inability to meet the Occupiers' permanent housing needs. This, coupled with the fact that the City had

three years of prior knowledge of the Occupiers' circumstances, led the Court to find that to a great extent the City had itself to blame for its unpreparedness to deal with the Occupiers' plight.[66]

[72] In this Court counsel for the City criticised the Supreme Court of Appeal's findings as factually and legally wrong. The City submits that it is not obliged to go beyond its available budgeted resources to secure housing for homeless people. To do so would amount to incurring unauthorised expenditure. Resources not budgeted for are not available.

[73] The Occupiers put the City's budgetary projections in its Integrated Development Plan before the High Court. The City objected to the projections being used. It pointed out that not all projections are accurate. A budget surplus was predicted, but the City says this projection was incorrect and that it is now in a budget deficit. Projections are an unreliable source of information, because they are simply estimates that may prove to be inaccurate, the City submits. However, it has not provided documentation to substantiate its claims of a deficit. The Occupiers' calls for it to do so went unanswered.[67]

[66] Above n 3 at paras 49, 50 and 52.

[67] During oral argument counsel for the City was asked from the bench how much time the City would require if ordered to provide the Occupiers with temporary accommodation. Counsel undertook to file a response in writing. After two written requests for more time, the City responded in a letter dated 25 August 2011. It stated that it cannot accommodate the Occupiers in any building or vacant land owned by the City and that it cannot divert any funds, because this would adversely impact other housing projects. At best, it could apply to the province for funding in terms of Chapter 12 of the National Housing Code to consider the application and allocate funding in the next budget cycle, commencing on 1 July 2012. It appears that further correspondence was exchanged between Blue Moonlight, the Occupiers and the City. Not all of this correspondence was sent to this Court. There is no need to go into the details of this exchange, however, because it does not take the matter any further. The matter must in any event be adjudicated on the evidence as it was at the date of the hearing.

[74] The City provided information relating specifically to its housing budget, but did not provide information relating to its budget situation in general. We do not know exactly what the City's overall financial position is. This Court's determination of the reasonableness of measures within available resources cannot be restricted by budgetary and other decisions that may well have resulted from a mistaken understanding of constitutional or statutory obligations. In other words, it is not good enough for the City to state that it has not budgeted for something, if it should indeed have planned and budgeted for it in the fulfilment of its obligations.

[75] Furthermore, this being an application for leave to appeal against a decision of the Supreme Court of Appeal, the question is whether this Court has been persuaded that the findings of the Supreme Court of Appeal are wrong, factually or in law, and should be set aside. I cannot answer yes. The Supreme Court of Appeal's finding that the City has not shown that it is incapable of meeting the needs of the Occupiers has to stand.

Constitutional validity of the differentiation in the City's policy on emergency housing

[76] It is now necessary to determine the constitutional validity of the differentiation in the City's housing policy. That policy distinguishes between those relocated by the City itself and those evicted by private landowners. I deal with this differentiation because the City relied on that policy to support its position that it is not obliged to

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The letter was supposed to respond to a specific question. The response maintained the position that the City took in its submissions, namely that it is unable to provide accommodation.

provide emergency accommodation for people evicted by private landowners, whether they are rendered homeless or not. The High Court and the Supreme Court of Appeal found the policy to be unconstitutional.

[77] The policy is set out in the Housing Report the City files when served with a notice in terms of section 4(2) of PIE. It states that while the City is taking steps, within its available resources, to provide access to those in need, it faces challenges of an existing housing backlog, continuous influx of people into the City through urbanisation and immigration, illegal land and building invasions, unemployment and poverty.[68] The policy's overall goals are stated as formalising informal settlements, providing 100 000 housing units by 2011 and effectively managing the City's housing stock. These goals are to be achieved through private sector investment, stimulation of a functioning secondary property market in historically disadvantaged areas and rejuvenation of the inner city in collaboration with private and government stakeholders.[69] In relation to temporary or emergency accommodation, the City's delivery target for the year commencing 1 July 2010 was to provide 100 beds (that is one bed per person).[70]

[78] The Housing Report contains separate sections on "temporary accommodation"[71] and "emergency accommodation".[72] "Temporary accommodation"

[68] See Housing Report at paras 7-10.

[69] Id at paras 12-3.

[70] Id at para 14.6.

[71] Id at paras 22-7.

[72] Id at paras 28-38.

is defined as very cheap housing provided for a maximum of one year. The City uses designated buildings, listed in the policy,[73] to accommodate affected households while attempting to address their longer-term needs. These buildings are referred to by the City as "temporary accommodation as decant". The City's approach is to engage with communities and, as far as possible and within its resources, relocate households to temporary accommodation from identified "bad buildings", described as "unfit for human occupation due *inter alia* to serious fire hazard (they are multi-storey buildings) and/or the risk caused by unhygienic conditions within such buildings."[74]

[79] However, the temporary accommodation programme is not available to persons evicted by private owners. The Housing Report notes that an average of 200 eviction proceedings are instituted each month, and states:

> "26 . . . The City does not currently have alternative accommodation available to temporarily or permanently accommodate those who face homelessness as a result of such eviction or threatened eviction. All the buildings that have been identified by the City for purposes of alternative accommodation can be categorised into one of the following categories:
>
> 26.1 currently occupied;
>
> 26.2 have been earmarked and will be occupied by affected households from other identified buildings;

[73] Id at para 25.

[74] Id at para 24. The City notes that prior to this Court's judgment in *Olivia Road* above n 12, the City obtained eviction orders against the occupiers of "bad buildings" by way of section 12 of the National Building Regulations and Building Standards Act 103 of 1977, but since that judgment such evictions have ceased and the City now seeks to relocate the occupiers of such buildings voluntarily. The Housing Report states at para 24:

> "The City considers it a priority to assist the occupiers of these buildings by relocating them to temporary accommodation because of the threat to their lives. The City endeavours to do so on an emergency basis within its resources. . . . The City's approach is to engage in so far possible, with the owners and occupiers of these buildings in order to negotiate the urgent voluntary relocation of the occupiers to temporary alternative accommodation provided by the City".

26.3 are currently being converted or refurbished; or

26.4 there is no budget available to undertake their refurbishment.

27 Where an eviction application is instituted by a private landowner and it is brought to the attention of the City that the matter may be an '*emergency*' as envisaged and defined in Chapter 12 of the National Housing Code, the procedures described below will apply."[75]

[80] The City's housing policy differentiates between those relocated by the City and those whose eviction is sought by private landowners. Persons relocated at the instance of the City are housed in temporary accommodation in one of the buildings made available by the City for this purpose. Persons evicted by private landowners are however not so housed.

[81] The "emergency accommodation" programme is outlined in the Housing Report within the parameters of Chapter 12, which aims to assist people who, for reasons beyond their control, find themselves in an emergency housing situation that they are unable to address. The City's functions, when faced with households in need of emergency accommodation, are to "[investigate] and [assess] whether a particular set of circumstances merits the submission to Province of an application for assistance under Chapter 12."[76]

[82] Besides the process of application to the province, the City has planned for City-owned recreational facilities to be used in situations of extreme emergency like

[75] The City's Housing Report then goes on at paras 31-3 to describe the procedure that it thinks should be followed under Chapter 12: that in an emergency situation the City assesses and investigates the scenario and, if it feels that it attracts an emergency status, applies to the province for an emergency to be declared and an emergency project to be approved.

[76] Id at para 32.

natural disasters. The City has also earmarked specified buildings as part of its emergency accommodation stock. At the time of the Housing Report, these buildings were occupied, already earmarked for households to be relocated in the future or not ready for occupation.[77]

[83] At the time of the proceedings in the High Court, the City's housing policy was reflected in a report filed in early 2009 (2009 Report). The Housing Report was not before that Court. The housing policy considered by the High Court, therefore, was slightly different from the Housing Report under consideration by this Court in that the former did not contain the Chapter 12 safeguards for those facing eviction by private landowners. The Reports are substantially similar, however. The 2009 Report likewise stated that the City was focused, "without being obliged to do so, from its own resources and within its financial constraints, on the provision of shelter to occupiers of dangerous buildings, who qualify as being desperately poor and who find themselves in a true crisis situation."[78]

[84] The Supreme Court of Appeal held that the policy inflexibly and therefore irrationally excluded from temporary emergency accommodation those who are evicted by private landowners. This differentiation violated section 9(1) of the Constitution, which provides that everyone is equal before the law and has the right to

[77] Id at paras 36-8. For example, the Alexandra Emergency facility was vacant and to be handed over to the City in early 2011 and Stand 902 New Doornfontein/Linatex was to commence development in the 2010/2011 financial year but potential beneficiaries were already identified.

[78] 2009 Report at para 6.

equal protection and benefit of the law.[79] The differentiation bore no rational connection to the City's legitimate purpose of providing temporary accommodation to those who are vulnerable and most in need.[80] Further, the City's inflexible approach undermined the Occupiers' right to dignity, a founding value and right entrenched in section 10 of the Constitution.[81] The Supreme Court of Appeal declared the policy unconstitutional to the extent that it excluded the Occupiers from consideration for temporary emergency housing.

[85] The City submits that the approach adopted by the Supreme Court of Appeal deviates from *Grootboom* and has the potential to handicap reasonable policies and programmes. The City also submits that the section 9 enquiry does not arise.

[86] In considering these submissions, it must be accepted that state resources for housing in any country – and particularly in South Africa – are limited. Section 26(2) recognises this by stating that reasonable legislative and other measures must be taken within available resources. Because the demand necessarily exceeds the availability of resources, any housing policy will have to differentiate between categories of people and to prioritise. The differentiation needs to be scrutinised though.

[79] See [19] above for the text of section 9(1) of the Constitution.

[80] See above n 3 at paras 59-61 and 66.

[81] Id at para 67.

[87] The present challenge deals with section 9(1) and section 26(2) of the Constitution. The concepts of rationality[82] and reasonableness are thus central. A policy which is irrational could hardly be reasonable. Whether a policy which meets the requirements for rationality would necessarily be reasonable does not have to be decided here.

[88] In the area of the right of access to adequate housing, of which the provision of temporary or emergency accommodation is a part, the question is essentially one of *reasonableness*. The availability of resources is an important factor in determining the reasonableness of the measures employed to achieve the progressive realisation of the right.[83] This does not mean that the state may arbitrarily decide which measures to implement. The measures taken must be reasonable. While there will be a range of possible measures that may be reasonable and the Court will not set aside a policy for the mere reason that other measures may have been more desirable or favourable, the enquiry must still take place.[84]

[89] A policy that, for example, differentiates between general housing needs and emergency situations might well be understandable. The question is whether it is reasonable to differentiate within the category of emergencies between people

[82] In *Harksen* above n 38 at para 43 Goldstone J, interpreting section 8(1) of the interim Constitution, posed the question whether the differentiating measure bears a rational connection to a legitimate governmental purpose.

[83] *Grootboom* above n 12 at para 46. See also *Soobramoney v Minister of Health, KwaZulu-Natal* [1997] ZACC 17; 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (CC) at para 11 where Chaskalson P held that both the obligations imposed and rights conferred by section 26 are limited by the availability of resources.

[84] *Grootboom* above n 12 at para 41.

relocated by the City and those evicted by private landowners and inflexibly to include the first but exclude the second group.

[90] In *Grootboom* this Court held that a reasonable housing programme cannot disregard those who are most in need. A programme that leaves out the most desperate and vulnerable, even if conceived with the best of intentions, will fail to respond to the actual circumstances that section 26 is intended to ameliorate.[85]

[91] The City argues that the needs of those who live on properties it has designated as "bad buildings" are greater than those rendered homeless through eviction by a private landowner. While the City's programme to relocate persons from "bad buildings" cannot in itself be faulted, these relocations occur under the "temporary accommodation" part of its policy. People who are evicted by private landowners fall under the "emergency accommodation" part of the housing policy. The question is whether under the City's policy anyone in a housing crisis – besides those relocated by the City from "bad buildings" – will ever qualify for temporary or emergency housing.

[85] Id at para 44 the Court stated:

> "To be reasonable, measures cannot leave out of account the degree and extent of the denial of the right they endeavour to realise. Those whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril, must not be ignored by the measures aimed at achieving realisation of the right. It may not be sufficient to meet the test of reasonableness to show that the measures are capable of achieving a statistical advance in the realisation of the right. Furthermore, the Constitution requires that everyone must be treated with care and concern. If the measures, though statistically successful, fail to respond to the needs of those most desperate, they may not pass the test."

[92] By drawing a rigid line between persons relocated by the City and those evicted by private landowners, the City excludes from the assessment, whether emergency accommodation should be made available, the individual situations of the persons at risk and the reason for the eviction. Affected individuals may include children, elderly people, people with disability or women-headed households, for whom the need for housing is particularly great or for whom homelessness would result in particularly disastrous consequences.[86] Individuals may have a range of incomes – some may be able to afford subsidised housing while others may be completely destitute. In the present case, the Occupiers have a myriad of personal circumstances to be taken into account in considering their eligibility for housing.[87] Furthermore, it cannot necessarily be assumed that the City evicts or relocates mainly for reasons of safety whilst private property owners do so only for commercial reasons. Once an emergency of looming homelessness is created, it in any event matters little to the evicted who the evictor is. The policy does not meaningfully and reasonably allow for the needs of those affected to be taken into account.[88]

[93] The City rightly argues that "queue jumping" must not be permitted. Opportunists should not be enabled to gain preference over those who have been

[86] These are also factors to be considered under sections 4 and 6 of PIE.

[87] The Survey above n 9 reveals, for example, that the Occupiers' ages range from 11 months to 68 years and that their incomes range from nil to R2 200 monthly.

[88] See *Khosa and Others v Minister of Social Development and Others; Mahlaule and Others v Minister of Social Development and Others* [2004] ZACC 11; 2004 (6) SA 505 (CC); 2004 (6) BCLR 569 (CC) at para 49 where this Court noted that when determining whether an exclusion is reasonable regard must be had to: the purpose of the right in question; the impact of the exclusion on those excluded; the relevance of the ground of exclusion to the purpose of the right in question; and the potential impact the exclusion has on other intersecting rights. From the foregoing, it is evident that the Occupiers are disproportionately impacted by the exclusion. The effect that this exclusion has on their rights to life and dignity is significant.

waiting for housing, patiently, according to legally prescribed procedures. But, as the Supreme Court of Appeal found, queue jumping is not in issue in this case.[89] The Occupiers do not claim permanent housing, ahead of anyone else in a queue. They have to wait in the queue or join it. What they ask is not to be excluded from the City's provision of temporary housing, even though their situation is an emergency under Chapter 12, simply because they are being evicted by a private landowner and not by the City.

[94] This Court found that the occupiers in *PE Municipality* could not accurately be defined as "queue jumpers", as they were a homeless community that had been evicted once and then found land to occupy with what they considered to be the owner's permission where they had been residing for eight years.[90] They did not deliberately invade land with an intention of disrupting the housing programme and placing themselves at the front of the queue. Here, too, the Occupiers did not invade the building.

[95] As a result, I find that whereas differentiation between emergency housing needs and housing needs that do not constitute an emergency might well be reasonable, the differentiation the City's policy makes is not. To the extent that eviction may result in homelessness, it is of little relevance whether removal from one's home is at the instance of the City or a private property owner. The policy follows from the City's incorrect understanding of its obligations under Chapter 12

[89] Above n 3 at para 55.

[90] *PE Municipality* above n 12 at para 55.

and its claim that it lacks resources. The City's housing policy is unconstitutional to the extent that it excludes the Occupiers and others similarly evicted from consideration for temporary accommodation. The exclusion is unreasonable.

Summary

[96] The findings are briefly summarised. To the extent that it is the owner of the property and the occupation is unlawful, Blue Moonlight is entitled to an eviction order. All relevant circumstances must be taken into account though to determine whether, under which conditions and by which date, eviction would be just and equitable. The availability of alternative housing for the Occupiers is one of the circumstances. The eviction would create an emergency situation in terms of Chapter 12. The City's interpretation of Chapter 12 as neither permitting nor obliging them to take measures to provide emergency accommodation, after having been refused financial assistance by the province, is incorrect. The City is obliged to provide temporary accommodation. The finding of the Supreme Court of Appeal that the City had not persuaded the Court that it lacks resources to do so has not been shown to be incorrect and must stand.

[97] The City's housing policy is unconstitutional in that it excludes people evicted by a private landowner from its temporary housing programme, as opposed to those relocated by the City. Blue Moonlight cannot be expected indefinitely to provide free housing to the Occupiers, but its rights as property owner must be interpreted within the context of the requirement that eviction must be just and equitable. Eviction of the

Occupiers would be just and equitable under the circumstances, if linked to the provision of temporary accommodation by the City.

Just and equitable remedy

[98] It must be emphasised that this case concerns temporary relief in an emergency as defined in Chapter 12 and not permanent housing.

[99] A remedy must be formulated. The order of the Supreme Court of Appeal requires the Occupiers to vacate the premises on a specific date.[91] It also declares the

[91] The Supreme Court of Appeal ordered:

> "1. The application by the appellant to have new evidence admitted on appeal succeeds and the appellant is to pay the costs of the application on the unopposed scale.
>
> 2. Save as is reflected in the substituted order set out hereunder, the appeal is dismissed and the appellant is ordered to pay the second respondents' costs, including the costs of two counsel.
>
> 3. No order is made in respect of the cross-appeal by the second respondent.
>
> 4. In respect of the abandoned cross-appeal by the first respondent, no costs order is made in relation thereto.
>
> 5. The order of the court below is set aside and substituted as follows:
>
> '1. The first respondent and all persons occupying through them (collectively 'the occupiers') are evicted from the immovable property situate at Saratoga Avenue, Johannesburg, and described as Portion 1 of Erf 1308, Berea Township, Registration Division IR, Gauteng ('the property');
>
> 2. The first respondent and all persons occupying through them are ordered to vacate by no later than 1 June 2011, failing which the Sheriff of the Court is authorised to carry out the eviction order;
>
> 3. The second respondent's housing policy to the effect that it only provides temporary emergency accommodation to those evicted from unsafe buildings by the City itself or at its instance, in terms of the National Building Regulations and Building Standards Act 103 of 1977, is declared unconstitutional to the extent that it excludes the occupiers from consideration for such accommodation;
>
> 4. The second respondent shall provide those occupiers whose names appear in the document entitled 'Survey of Occupiers of 7 Saratoga Avenue, Johannesburg' filed on 30 April 2008, and those occupying through them, with temporary emergency accommodation as decant in a location as near as feasibly possible to the area where the property is situated, provided that they are still resident at the property and have not voluntarily vacated it;

City's policy unconstitutional. It orders the City to provide "temporary emergency accommodation" to the Occupiers. The order does not link the date of eviction to a specified date on which the City has to provide the accommodation. Thus, from the date of eviction until the date on which the City provides emergency housing, the Occupiers may find themselves homeless. This may be a long time.

[100] The relief sought in the Occupiers' cross-appeal must therefore be considered in order not to render them homeless. The date of eviction must be linked to a date on which the City has to provide accommodation. Requiring the City to provide accommodation 14 days before the date of eviction will allow the Occupiers some time and space to be assured that the order to provide them with accommodation was complied with and to make suitable arrangements for their relocation. Although Blue Moonlight cannot be expected to be burdened with providing accommodation to the Occupiers indefinitely, a degree of patience should be reasonably expected of it and the City must be given a reasonable time to comply. The date should not follow too soon after the date of the judgment.[92]

[101] The City's appeal has to be dismissed. The Occupiers' cross-appeal must succeed to the extent that eviction must be ordered, but the City must provide the

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5. The second respondent is ordered to pay the applicant's costs and the costs of the first respondent, including the costs of two counsel.'"

[92] It seems that the distinction apparently drawn by the City between temporary accommodation and emergency accommodation in its policy is erroneous. The City also refers to temporary accommodation as "temporary accommodation as decant". For a discussion on the difference between temporary accommodation and emergency accommodation under the City's policy, see [28] and [78]-[82] above. Chapter 12 provides for temporary accommodation as a part of its emergency provisions. The "temporary emergency accommodation as decant", ordered by the Supreme Court of Appeal, can be provided, as it is a type of temporary accommodation in emergency circumstances that falls within the scheme of Chapter 12. The Supreme Court of Appeal was justified in ordering it, although the term "as decant" does not necessarily add clarity.

Occupiers with temporary accommodation on a date linked to the date of eviction. The Occupiers' submissions in support of a structural interdict against the City in their written argument were neither persuasive, nor seriously pursued during oral argument. In this respect the cross-appeal cannot succeed.

[102] The City mounted a wide-ranging attack against the judgment of the Supreme Court of Appeal. We have found most of its criticisms unpersuasive. The judgment of the Supreme Court of Appeal is strongly reasoned. There is no reason not to confirm its conclusions in all material respects.

Costs

[103] The City has lost its appeal to this Court. The eviction order that the Supreme Court of Appeal granted in favour of Blue Moonlight has not been upset. It was the City's stance in the matter that brought Blue Moonlight to this Court. It was entitled to be heard. The Occupiers have been partially successful in their cross-appeal. They have ensured that they will not be evicted before the City provides them with temporary accommodation. It follows that the City must pay the costs of Blue Moonlight and the Occupiers in this Court. There is no need to interfere with the costs order of the Supreme Court of Appeal.

Order

[104] The following is ordered:

(a) The application for leave to appeal is granted.

(b) The appeal is dismissed.

(c) The application for leave to cross-appeal is granted.

(d) The cross-appeal is upheld to the extent set out below.

(e) Paragraphs 5.1 to 5.4 of the order of the Supreme Court of Appeal are set aside and replaced with the following:

(i) The first respondent in the South Gauteng High Court, Johannesburg and all persons occupying through them (collectively, the Occupiers) are evicted from the immovable property situate at Saratoga Avenue, Johannesburg, and described as Portion 1 of Erf 1308, Berea Township, Registration Division IR, Gauteng (the property).

(ii) The Occupiers are ordered to vacate the property by no later than 15 April 2012, failing which the eviction order may be carried out.

(iii) The housing policy of the second respondent in the South Gauteng High Court, Johannesburg, the City of Johannesburg Metropolitan Municipality, is declared unconstitutional to the extent that it excludes the Occupiers and other persons evicted by private property owners from consideration for temporary accommodation in emergency situations.

(iv) The City of Johannesburg Metropolitan Municipality must provide those Occupiers whose names appear in the document entitled "Survey of Occupiers of 7 Saratoga Avenue,

Johannesburg" filed on 30 April 2008 with temporary accommodation in a location as near as possible to the area where the property is situated on or before 1 April 2012, provided that they are still resident at the property and have not voluntarily vacated it.

(f) The applicant is ordered to pay the costs of the first and second respondents, including the costs of two counsel, in this Court.

For the Applicant:	Advocate JJ Gauntlett SC and Advocate FB Pelser instructed by Moodie & Robertson.
For the First Respondent:	Advocate MSM Brassey SC and Advocate GA Fourie instructed by Schindlers Attorneys.
For the Second Respondent:	Advocate P Kennedy SC, Advocate H Barnes and Advocate S Wilson instructed by Wits Law Clinic.
For the Amicus Curiae:	Advocate AA Gabriel SC and Advocate BSM Bedderson instructed by Lawyers for Human Rights.