IN THE SOUTH GAUTENG HIGH COURT

JOHANNESBURG

Case No. 08/17819

In the matter between:

MNISI, MAUREEN AND OTHERS Applicants

and

CITY OF JOHANNESBURG Respondent

JUDGMENT

BERGER, AJ:

1. The applicants are residents of the Protea South Informal Settlement, an informal settlement in Soweto, within the respondent municipality. In this judgment, I shall refer to the informal settlement as "the settlement" or "Protea South" and to the respondent as "the City of Johannesburg" or "the City".

2. The first applicant, in addition to being a resident of the settlement, is also the chairperson of both the provincial and local structures of the Landless Peoples' Movement ("the LPM"), a social movement focused primarily on land related issues.

3. As she was entitled to do in terms of sections 38(a), (b), (c) and (d) of the Constitution of the Republic of South Africa ("the Constitution"), the first applicant instituted the present application: (a) in her own interest, (b) on behalf of those residents of the settlement who have authorised her to do so (the second and further applicants), (c) as a member of a group of persons (the second and further applicants) and in the interest of that group and (d) in the public interest.

4. At the heart of the application is the contention that the residents of Protea South are living in a desperate situation, in particular that their housing is inadequate, that they are living with the prospect of being forcibly removed from their homes and that basic interim services such as water, sanitation, refuse removal and high mast lighting are not being provided to them.

5. The application was launched on 13 June 2008. In their notice of motion the applicants sought relief in the following terms:

> "1. The Respondent is under a constitutional and statutory obligation in terms of section 26 of The Constitution of The Republic of South Africa, 1996 and

Chapters 12 and 13 of the Housing Code read with section 9(1) of The Housing Act, 1997, to have a policy and or programme in place which:

1.1 makes short-term provision for the applicants residing at The Protea South Informal Settlement, who are in a crisis or in a desperate situation;

1.2 provides housing relief for the applicants, who are in a crisis or desperate situation;

1.3 gives adequate priority and resources to the needs of the applicants residing at Protea South Informal Settlement, who do not have access to a suitable place where they may lawfully live;

2. The Respondent is directed within one month of the date of this order to deliver a report or reports under oath stating:

2.1 What steps it has taken, including steps to get an agreed, mediated solution, to comply with its constitutional and statutory obligations to devise and implement within its available resources a comprehensive and co-ordinated programme to progressively realise the right to adequate housing for the Applicants, stating in particular whether it has fully investigated the options of *in situ* upgrading of the Protea South Informal Settlement and/or relocation to sites as close as possible to the Protea South Informal Settlement.

2.2 What steps it has taken, pending the formulation and implementation of permanent housing solutions for the occupiers of the Protea South Informal Settlement, in compliance with its constitutional and statutory

obligations in terms of sections 26 and 27 of The Constitution of The Republic of South Africa, 1996 and Chapters 12 and 13 of the Housing Code read with section 9(1) of The Housing Act, 1997, Regulation 3(b) of the Regulations Relating to Compulsory National Standards and Measures to Conserve Water promulgated in Government Notice No. R. 509 dated 8 June 2001 in terms of the Water Services Act, 108 of 1997 and By-Law 3 of the Johannesburg Metropolitan Municipality Water Services By-Laws published in Provincial Gazette Extraordinary No. 179, dated 21 May 2004, Notice No 835, to provide to the Protea South Informal Settlement, the following basic interim services:

2.2.1 The provision of potable water;

2.2.2 Temporary Sanitation Facilities;

2.2.3 Refuse Removal Facilitation; and

2.2.4 High Mast Lighting in key areas to enhance community safety and access by emergency vehicles.

3. The Applicants may within four weeks of delivery of that Report, deliver commentary thereon, under oath.

4. The Respondent may within two weeks of delivery of that commentary, deliver its reply thereto, under oath.

5. The case is postponed to a date to be fixed by the Registrar for consideration and determination of the aforesaid report, commentary and reply.

6. Pending the finalization of this case, alternatively until such time as suitable accommodation is provided to the Applicants, the Respondent is interdicted

from evicting or seeking to evict the Applicants from the Protea South Informal Settlement.

7. Further and/or alternative relief.

8. Costs of suit."

6. In the notice of motion the respondent was given five days within which to notify the applicants' attorney of its intention to oppose the application and a further fifteen days within which to deliver its answering affidavits, if any.

7. Although the respondent delivered its notice of intention to oppose on 23 June 2008, the City filed no answering affidavits.

8. On 12 August 2008 the application came before Goldstein J. Without admitting to the truth of the contents of the applicants' founding affidavit, the respondent consented to an order in terms similar to those of prayers 1 to 5 of the notice of motion. The order of Goldstein J provided that:

"1. The Respondent is under a constitutional and statutory obligation in terms of section 26 of The Constitution of The Republic of South Africa, 1996 and Chapters 12 and 13 of the Housing Code read with section 9(1) of The Housing Act, 1997, to have a policy and or programme in place which:

1.1 makes short-term provision for residents in the area of jurisdiction of the Respondent who are in a crisis or in a desperate situation, including those of the Applicants who are living in a similar situation at the Protea South [Informal] Settlement;

1.2 provides housing relief for residents in the area of jurisdiction of the Respondent, including those of the Applicants, who are in a crisis or desperate situation;

1.3 gives adequate priority and resources to the needs of the residents in the area of jurisdiction of the Respondent, including those of the Applicants residing at Protea South [Informal] Settlement, who do not have access to [a] suitable place where they may lawfully live.

2. The Respondent is directed within one month of the date of this order to deliver a report or reports under oath stating:

2.1 what steps it has taken, including steps to get an agreed, mediated solution, to comply with its constitutional and statutory obligations to devise and implement within its available resources a comprehensive and co-ordinated programme to progressively realise the right to adequate housing for the Applicants, stating in particular whether it has fully investigated the options of in situ upgrading of the Protea South [Informal] Settlement and/or relocation to sites as close as possible to the Protea South Informal Settlement; …

2.2 What steps it has taken, pending the formulation and implementation of permanent, housing solutions for the occupiers of the Protea South

Informal Settlement in compliance with its constitutional and statutory obligations in terms of sections 26 and 27 of the Constitution of The Republic of South Africa, 1996 and Chapters 12 and 13 of the Housing Code read with section 9(1) of The Housing Act, 1997, Regulation 3(b) of the Regulations Relating to Compulsory National Standards and Measures to Conserve Water promulgated in Government Notice No. R. 509 dated 8th June 2001 in terms of the Water Services Act, 108 of 1997 and By-Law 3 of the Johannesburg Metropolitan Municipality Water Services By-Laws published in Provincial Gazette Extraordinary No. 179, dated 21st May 2004, Notice No. 835, to provide to the Protea South [Informal] Settlement, the following [basic] interim services:

2.2.1 The provision of potable water;

2.2.2 Temporary Sanitation Facilities;

2.2.3 Refuse Removal Facilitation; and

2.2.4 High Mast Lighting in key areas to enhance community safety and access by emergency vehicles.

3. The Applicants may within four weeks of delivery of that Report, deliver commentary thereon, under oath.

4. The Respondent may within two weeks of delivery of that commentary, deliver its reply thereto, under oath.

5. The case is postponed to a date to be fixed by the Registrar for consideration and determination of the aforesaid report, commentary and reply.

6. The parties shall pay their own costs to the date of this order."

9. Save in three respects - (a) the recognition by the learned Judge that the constitutional and statutory obligations of the respondent extend to all residents within its area of jurisdiction (including the residents of Protea South), (b) the fact that the learned Judge did not grant the interdict sought and (c) costs - the terms of the order granted by Goldstein J reflect the essential terms of the relief originally sought by the applicants.

10. On 26 September 2008 the respondent produced a report pursuant to paragraph 2 of the order of Goldstein J. The applicants' response to the report (being the commentary envisaged by paragraph 3 of the order of Goldstein J) was delivered on 27 October 2008. On 3 November 2008 a supplementary response by the applicants was also delivered. No reply in terms of paragraph 4 of the order of Goldstein J was delivered.

The relevant constitutional and statutory provisions

11. Before embarking upon a consideration and determination of the report and the commentary, I pause to consider the constitutional and statutory provisions upon which the order of Goldstein J is premised.

    11.1. Section 26 of the Constitution deals with the right to housing. It provides as follows:

"(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."

11.2. The right to health care, food, water and social security is dealt with in section 27 of the Constitution. The section states:

"(1) Everyone has the right to have access to -

a) health care services, including reproductive health care;
b) sufficient food and water; and
c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.

(3) No one may be refused emergency medical treatment."

11.3. Chapters 12 and 13 of the National Housing Code are voluminous documents. It is neither practical nor necessary for me to quote their content *verbatim*. Chapter 12 deals with "*housing assistance in emergency housing circumstances*"; chapter 13 with "*upgrading of informal settlements*". The following paragraphs of chapter 13 are however of particular significance in light of the facts of this matter and warrant quotation (emphasis in the original):

> "**13.3.2 Application of programme**
>
> This programme is applicable to the in situ upgrading of informal settlements, the relocation of an entire settlement and or in cases where persons will be required to be resettled due to the revised township layout as a result of the upgrading project. ..."

> "**13.3.4.2 Phase 2: Project Initiation**
>
> During this phase of the upgrading process, municipalities will receive funding to undertake the following activities:
>
> …
>
> - Install **interim services** to provide basic water and sanitation services to householders within the settlement on an interim basis pending the formalisation of the settlement. The principle must be upheld that any interim services should first and foremost be designed on the basis that it could be utilised/ upgraded for the permanent services infrastructure. The provision of interim services should also address lighting in key

areas to enhance community safety and access by emergency vehicles. Funding for the latter should first and foremost be obtained from the MIG project funding. Should this fail the programme could finance such;

…"

"**13.4 RELOCATIONS**

Residents living in informal settlements are often dependant on fragile networks to ensure their livelihoods and survival. A guiding principle in the upgrading of these communities is the minimisation of disruption and the preservation of community cohesion. The Programme accordingly discourages the displacement of households, as this not only creates a relocation burden, but is often a source of conflict, further dividing and fragmenting already vulnerable communities.

In certain limited circumstances, it may however be necessary to permanently relocate households living in hazardous circumstances or in the way of essential engineering or municipal infrastructure. In all such cases and where feasible and practicable, the relocation must take place at a location as close as possible to the existing settlement and within the context of [a] community approved relocation strategy that must be submitted with the final business plan for approval by the MEC.

…

Where possible, relocations should be undertaken in a voluntary and negotiated manner.

…"

11.4. The functions of municipalities in respect of housing development are set out in section 9 of the Housing Act, No. 107 of 1997. In terms of section 9(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;
>
> (ii) conditions not conducive to the health and safety of the inhabitants of its area of jurisdiction are prevented or removed;
>
> (iii) services in respect of water, sanitation, electricity, roads, storm-water drainage and transport are provided in a manner which is economically efficient;
>
> 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;
>
> g) provide bulk engineering services, and revenue generating services in so far as such services are not provided by specialist utility suppliers; and

h) plan and manage land use and development."

11.5. Section 3 of the Water Services Act, No. 108 of 1997 deals with the right of access to basic water supply and basic sanitation. The section provides as follows:

> "(1) Everyone has a right of access to basic water supply and basic sanitation.
>
> (2) Every water services institution must take reasonable measures to realise these rights.
>
> (3) Every water services authority must, in its water services development plan, provide for measures to realise these rights.
>
> (4) The rights mentioned in this section are subject to the limitations contained in this Act."

11.6. The relevant definitions (Water Services Act, section 1) stipulate that:

> "**basic sanitation**" means the prescribed minimum standard of services necessary for the safe, hygienic and adequate collection, removal, disposal or purification of human excreta, domestic wastewater and sewage from households, including informal households;
>
> "**basic water supply**" means the prescribed minimum standard of water supply services necessary for the reliable supply of a sufficient quantity

> and quality of water to households, including informal households, to support life and personal hygiene;
>
> "**water services authority**" means any municipality, including a district or rural council as defined in the Local Government Transition Act, 1993 (Act No. 209 of 1993), responsible for ensuring access to water services;
>
> "**water services institution**" means a water services authority, a water services provider, a water board and a water services committee:

11.7. The Regulations Relating to Compulsory National Standards and Measures to Conserve Water, promulgated on 8 June 2001 in terms of the Water Services Act in Government Notice No. R. 509 provide in regulation 3(b) thereof that the minimum standard for basic water supply services is at least 25 litres of potable water per person per day or 6 kilolitres per household per month, such water to be supplied within 200 metres of the household.

12. There is no dispute between the parties that the respondent is bound by the constitutional and statutory provisions quoted above to devise and implement a comprehensive and co-ordinated programme to achieve the progressive realisation of the applicants' (and the other residents') right to access to adequate housing, focusing in particular on the viability of *in situ* upgrading of Protea South and/or the relocation of the applicants (and the other residents) to sites as close as possible to Protea South. Nor is there

any dispute that such a programme ought to be arrived at within the context of community approval.

13. There is also no dispute between the parties that, pending the formulation and implementation of the programme, the respondent is bound to provide basic interim services to the residents of the settlement, including potable water, temporary sanitation facilities, refuse removal facilities and high mast lighting in key areas to enhance community safety and access by emergency vehicles.

The report and the commentary thereon

14. I now turn to a consideration of the report and the commentary thereon. It is significant that the report was produced as a result of an application to this Court. No answering affidavit was filed on behalf of the respondent. The report ought therefore to have been written against the backdrop of the allegations in the applicants' founding affidavit.

15. The main thrust of the founding affidavit concerns the alleged failure of the respondent to consult with the Landless Peoples' Movement on the future development of Protea South and the housing needs of its residents. The affidavit also deals briefly with the respondent's alleged failure to provide

basic interim services (potable water, temporary sanitation facilities, refuse removal facilities and high mast lighting) to the residents of the settlement.

16. The report begins with a description of the background circumstances. It states that there are presently more than 6000 "*beneficiaries*" housed in the informal settlement. This appears to confirm the applicants' contention that there are some 6400 households in the informal settlement.

17. According to the report, the original township of Protea South was meant to accommodate approximately 800 stands on 45 hectares of land. In November 2003 the Gauteng Department of Housing ("GDOH") appointed the Johannesburg Social Housing Company ("Joshco") to implement high density housing in Protea South. Joshco awarded a contract to Lumekani Developments in March 2004. It was said that, through consolidation and sub-division of the 800 stands, 3200 units could be achieved. The balance of the beneficiaries "*were to be relocated*" into the Doornkop / Greenfields project.

18. The report states that the development of Protea South was to commence on 1 April 2006. However, development was delayed for various reasons. In January 2006 consultants known as Africa Exposed were appointed to conduct geotechnical investigations of the area. According to the report, the investigations of Africa Exposed indicated that the area is dolomitic.

Recommended densities by the Council for Geoscience ("CGS") envisage approximately 583 stands being developed on those parts of Protea South that are suitable for such development. The GDOH therefore needed to identify alternative areas of land to house the balance of the Protea South beneficiaries.

19. Of the various areas considered, the Doornkop / Greenfields project was considered best placed to accommodate "*overflows from Protea South*". The report records that, as far back as 2003, the City of Johannesburg identified this area as having the potential to accommodate those who could not be housed at Protea South. According to the report, the project has already commenced.

The issue of consultation

20. In response to the applicants' allegations of lack of consultation the report states that:

> "Throughout the process, the community was at all times informed of the development. For some time now and currently, communication takes place through the Protea South Development Forum (the "Forum"), which has adopted a comprehensive communication plan. The Forum has met with the Protea South community on various occasions, *inter alia*, as follows:-

1. Meeting of the Forum - 11 July 2004.
2. Meeting of the Forum - 18 January 2006.
3. Meeting of the Forum - June 2006. Members of the Protea South Informal Settlement informed of the new proposal for the relocation of the Protea South community to Doornkop / Lufhereng.
4. Meeting of the Forum - 30 July 2006. Members of the Protea South Informal Settlement informed that in terms of a geo-tech study on dolomite in the area, large parts of Protea South not suitable for low income housing development. Further informed that the roll-over partial *in situ* development of Protea South would be abandoned and the "decant" camp would be closed. Further informed that 329 houses only could be built in Protea South and that the contractor will not agree to build such a small number of houses." (Underlining added)

21. On the basis of the extract quoted above it is not reasonably possible to conclude that there has been proper consultation with the members of the Protea South community on the future development of the settlement and the housing needs of its residents. There is clearly a profound difference between informing the community of decisions taken and engaging the community in arriving at agreed or mediated solutions.

22. The report does however cite other meetings between 25 July 2005 and 24 February 2008 at which it is alleged developments were communicated to the residents of the settlement. In order to assess the veracity of this

allegation, it is necessary to have regard to the correspondence attached to the applicants' founding affidavit.

22.1. On 30 March 2004 the applicants' attorney, Mr Moray Hathorn, wrote to Mr Mavi Panyani, the Director of Housing, Region 6, City of Johannesburg requesting a meeting between Mr Panyani and his clients, the members of the LPM resident in the settlement, to discuss the future development of the settlement and the housing needs of his clients.

22.2. A few days later, on 2 April 2004, Mr M S Sekgota, the Assistant Director: Legal Services, City of Johannesburg wrote to Mr Hathorn, confirming an earlier discussion with Mr Hathorn that he (Mr Hathorn) would send a breakdown of the issues which the LPM wished to discuss and that the Housing Department would respond in writing. Mr Sekgota added that a petition could be addressed by the LPM to the Public Participation and Petitions Committee of the City.

22.3. Mr Hathorn replied to Mr Sekgota on 8 April 2004. He said that the LPM required the following information: the details of plans for the future development of the settlement; how the housing needs of the residents would be accommodated; if not at the settlement,

then where and how would residents be accommodated; whether the City intended to consult with the people. Mr Hathorn stated that a thorough programme of consultation was important.

22.4. Having received no response to his letter, Mr Hathorn wrote to Mr Sekgota on 21 May 2004 asking him to respond.

22.5. On 10 June 2004 Mr M.A. Lekabe, the Legal Advisor: Legal Services, City of Johannesburg wrote to Mr Hathorn to inform him that the City intended to de-densify the settlement and that a feasibility study revealed that not all families in the area would be accommodated. Mr Lekabe further stated that a forum had been established but that Mr Hathorn's clients had not accepted an invitation to be part of the process. Mr Hathorn was informed that his clients were invited to attend a meeting of the forum, to be held the following day, 11 June 2004, at 09h00.

22.6. Mr Hathorn responded to Mr Lekabe on 29 June 2004. He stated that it was not true that his clients had rejected an invitation. Mr Hathorn attached a letter (dated 14 April 2004) sent by the first applicant to the Area Manager, Protea South, in which the Protea South branch of the LPM expressed its desire to participate in the Protea South Development Committee. Mr Hathorn further stated

that a sign board had been put up during May 2004 at the entrance to the settlement informing the residents that 3200 houses were to be developed by Joshco (Pty) Ltd. Mr Hathorn pointed out that a notice establishing a township could not be found in the Government Gazette. He requested details of both the plans for the development of the settlement and the relevant gazette.

22.7. A mass meeting of all residents of the settlement was held on 25 July 2004. This meeting is referred to in the respondent's report. Although the applicants and the respondent refer to this meeting having taken place in 2005, it appears from the contemporaneous documents that the meeting took place in 2004. Unfortunately the report does not contain any detail of the meeting. The applicants contend that the residents were informed by Mr Panyani that 3200 houses were to be built in Protea South. A feature of the meeting was Mr Panyani's insistence that Mr Hathorn leave the meeting before it could proceed.

22.8. On 29 July 2004 Mr Hathorn wrote to Mr Lekabe to register the objection of the LPM to the exclusion of their legal representative from the meeting of 25 July 2004. Mr Lekabe responded on 2 August 2004. He stated that the Council's Legal Section was not

informed that Mr Hathorn would be attending the meeting; further that Mr Hathorn was not allowed to attend such a meeting unless he was a member of the community. In future, according to Mr Lekabe, only the LPM's nominated forum representatives should attend such meetings.

22.9. Accordingly, on 3 November 2004 Mr Hathorn wrote to Mr Lekabe to inform him that Ms Liza Khoza and Ms Angelina Thebula would represent the LPM at meetings of the Protea South Development Forum. He further recorded that the LPM representatives on the forum were being frustrated, in that the details of plans were not being divulged or discussed. The respondent was requested to furnish the plans before 14 November 2004, so that the LPM could make informed inputs at the next meeting of the forum.

22.10. On 3 January 2005 Mr Hathorn submitted a formal request for information on behalf of the LPM to the respondent in terms of the Promotion of Access to Information Act, No. 2 of 2000 ("PAIA"). The information in respect of which access was sought was described as follows:

> "(1) Details of any plans for the future development of Protea South, specifically the areas of Protea South in which the informal settlement is situated. …

(2) Details of plans to accommodate the housing needs of residents of the informal settlement at Protea South.

(3) Details of plans to accommodate the housing needs of the residents of Protea South informal settlement to the extent that the City of Johannesburg does not intend to accommodate the housing needs of the informal settlement at Protea South."

22.11. On 6 September 2005 a further request was made by Mr Hathorn for the plan for the development of Protea South. This time the request was made to Mr Pat Nhlapo, the Director, Community Participation, Office of the Speaker because Mr Panyani had told the first applicant that the plan would be furnished by Mr Nhlapo.

22.12. Despite getting no response of substance from any official source, Mr Hathorn continued undeterred. On 13 October 2005 he wrote again to Mr Sekgota. He pointed out that he had not received a single response to any of his letters requesting the plan for the future development of Protea South and that the LPM's request for information in terms of PAIA had also been ignored. He quoted the provisions of section 13.4 of the National Housing Code to emphasise the need for all relocations from informal settlements to be undertaken in a voluntary and negotiated manner and with community approval. He referred to the *dictum* of Sachs J in *Port Elizabeth Municipality v Various Occupiers* (reported at 2005 (1)

SA 217 (CC) at 246F-G) to underline the need for municipalities to take all reasonable steps to secure agreed, mediated solutions. He gave reasons for his clients not wishing to move to alternative land.

22.13. It is significant that, although the applicants had been attempting to gain access to the City's plans for Protea South for more than a year, the City saw no need to respond to Mr Hathorn's letters or to conduct meetings of its own with the residents of the settlement. Other than the meeting which is mistakenly alleged to have taken place on 25 July 2005 (instead of 25 July 2004), the respondent's report is silent on any meetings or other forms of communication during 2005.

22.14. On 26 January 2006 Mr Hathorn again wrote to Mr Sekgota. He referred to a meeting on Sunday 22 January 2006 at which Mr Panyani had stated that people would be moved from 2 April 2006 to the Midway area until their houses have been built in Protea South. Mr Hathorn said that it seemed that only 3200 households would be accommodated in Protea South. As a result of the lack of consultation, certain questions remained unanswered, such as whether 3200 units at Protea South were appropriate; who was to stay and who was to move; the basis for identifying those who

would be allowed to stay; where those who were to be moved would be housed; what would happen to the education of the children of those who were to be moved. Mr Hathorn mentioned the statement to him by the Headmaster of the Altmont Technical High School in Protea South on 10 February 2004 concerning the prejudice that would be suffered by those children who would be required to leave his school, having regard to the specialist nature of the school.

22.15. The respondent's report records a visit by the then Gauteng MEC for Housing (Ms Nomvula Mokonyane) and the Executive Mayor of Johannesburg (Mr Amos Masondo) to Protea South on 25 February 2006. The report does not disclose any further details regarding the visit. In their commentary, the applicants state that the MEC told the residents that 3200 houses would be built in Protea South, that the remaining 3200 households would be relocated to Lehae and that the people who moved would do so voluntarily.

22.16. Mr Hathorn tried again on 30 March 2006 when he wrote to Mr Sekgota to inform him that his clients had been told that those not accommodated in Protea South would be housed either at Protea Glen or at Lehae, without them ever being shown Lehae; and that

the Johannesburg Social Housing Company had informed his clients that 800 households were to be moved to the decant camp in Midway, commencing on 2 April 2006, so that the development of Protea South could begin. Once again, Mr Hathorn pointed out that the threatened actions of the respondent were unlawful and urged the City to engage in proper consultations.

22.17. On 26 April 2006 Mr Lekabe wrote to Mr Hathorn. Instead of addressing the issues raised in the earlier correspondence, Mr Lekabe informed Mr Hathorn that all issues regarding Protea South would be addressed by officials of Region 6. Mr Hathorn was asked to contact Central Housing in Braamfontein.

22.18. The LPM and others were invited to a meeting on 11 October 2006 with the MEC for Housing at the offices of the Department of Housing in Sauer Street, Johannesburg. According to the report of the respondent on this meeting, the residents of Protea South were "*informed*" by the MEC that 3800 households were to be relocated to Doornkop, 478 to Unity at Pumpings, 400 to Orange Farm and others to private land at Jeppestown. According to the applicants, this was the first time they had heard of residents being relocated to Doornkop. Despite this, the LPM raised certain issues at the meeting (the purchasing of privately owned land

around Protea South, the education of children in Protea South and transport for people who had employment in nearby Lenasia). The applicants contend that the MEC undertook to revert to them but has not yet done so.

22.19. On 13 February 2007 Mr Hathorn wrote to the Regional Manager Housing, Region 6 to inform him that the LPM had, by invoking the provisions of PAIA, obtained a copy of the report by Africa Exposed concerning dolomite at Protea South. Mr Hathorn also advised that the LPM had consulted with independent geologists and the Council for Geoscience in Pretoria. Mr Hathorn conceded that it seemed "*that low income housing development is in the premises not appropriate at Protea South.*" However, Mr Hathorn referred to a newspaper report in which it was stated that 583 houses would be built in Protea South. If that was the case, Mr Hathorn said, such housing should be for members of the low income group (such as the applicants). Mr Hathorn noted that there had been no consultations with the community after the publication of the dolomite study and once again urged the City to do so.

22.20. The report of the respondent records a public meeting on 17 March 2007 where Mr James Maluleke of Joshco "*informed the*

occupiers of Protea South informal settlement that they would be relocated to Doornkop / Greenfields (Lufhereng)". Once again, it is clear from the report itself that there was no consultation with the residents. They were simply informed.

22.21. On 3 April 2007 Mr Hathorn addressed the Regional Manager Housing, Region 6 by letter. He recorded that no reply to his letter of 13 February 2007 had been received; and further that the residents were informed by Joshco on 17 March 2007 at a public meeting that they would be relocated to Doornkop.

22.22. Still Mr Hathorn was unable to elicit a response. On 11 April 2007 he wrote again to the Regional Manager Housing, Region 6. He asked for a response to his letters of 13 February and 3 April 2007. He recorded that the LPM's two representatives on the Community Development Forum ("CDF") had withdrawn because of a rule that all attendees who signed the attendance register were deemed to have agreed with any decision of CDF, whether that was in fact the case or not. Mr Hathorn pointed out that such a rule undermined the requirement for community consultation.

22.23. Mr Hathorn addressed the Regional Manager Housing, Region 6 on 9 May 2007, for the fourth time. He referred to his unanswered

letters. He attached an article from the *Protea Urban News* of 27 April 2007 which had reported the possible relocation of residents to Doornkop. He repeated that there had been no consultation concerning the possible relocation and the fact that, as a result, there were many unanswered questions. He noted that low income housing development had taken place at the Winnie Mandela Park informal settlement in spite of the fact that it was underlain by dolomite. That being the case, he said, the City was required to demonstrate in proper and open consultations why the same was not possible in Protea South.

22.24. Mr Hathorn followed his letter of 9 May 2007 with another letter, dated 22 May 2007, to the Regional Manager Housing, Region 6 in which the City was called upon to demonstrate why low income housing was not possible in Protea South, in light of the fact that two schools and a community hall had been built in the area and were functioning. Mr Hathorn also pointed to other developments in the area such as the People's Housing Development Project, the RDP housing development and the middle income houses. He reiterated the LPM's call for open consultations.

22.25. On 20 June 2007 a meeting took place at the office of Counsellor S M Ralegoma, a member of the Mayoral Committee of the City

of Johannesburg. In the applicants' founding affidavit, the point is made that Clr Ralegoma failed to address the question of housing those moved from Protea South on land as close as possible to the settlement; and that, in any event, the decision to relocate residents of Protea South had been taken without consultation. In the respondent's report, it is simply recorded that a meeting took place between Clr Ralegoma and representatives of the LPM. No further details are provided. Nor is any attempt made to deal with the points raised in the founding affidavit.

22.26. Councillor Ralegoma's account of the meeting is contained in his letter, dated 16 July 2007 and addressed to the first applicant in her capacity as Branch Chairperson of the LPM (Protea South). He denied that there had been a lack of consultation and pointed in this regard to meetings of the Community Development Forum and general public meetings. After recording the various stand sizes as they had evolved over time, he referred to the report by Africa Exposed and advised that the City Council "*has since resolved that the proposed housing project be put on hold, and the housing beneficiaries be relocated to the Doornkop Greenfields Project, which is currently being planned*". He admitted that parts of Doornkop are also dolomitic, but contended that the problem at Doornkop is not as severe as that at Protea

South. He stated that no residential development was planned in the dolomitic areas of Doornkop. He assured the LPM that his doors are always open for further contact.

22.27. A public meeting was held in Protea South on 5 September 2007. Clr Ralegoma addressed the meeting. The applicants state that the meeting followed upon public demonstrations by the residents of the settlement at the failure of the City to consult them about their future. Clr Ralegoma was very angry when he addressed the meeting. He said that Government's decision that the people would be moving to Doornkop was final. The respondent's report once again lacks detail. It states that Clr Ralegoma repeated the City's position that all households registered by Joshco "*would be moved*" from Protea South to Doornkop / Greenfields.

22.28. No further meetings were held until February 2008. It seems that a meeting was held on 7 February 2008, although the report of the respondent gives the date as "*February 2008*". The report states that it was a public meeting held at Doornkop to discuss the Doornkop development and that it was organised by the Gauteng Department of Housing (GDOH). No further details are given. The applicants, in their commentary, state that the meeting was organised by the GDOH to inform the Doornkop farmers of

the impending development at Doornkop. This seems likely given that the meeting was held at Doornkop. The applicants further state that the LPM was invited to the meeting by the Doornkop farmers. Even though the respondent's report cites this meeting as evidence of communication with the residents of Protea South, it appears that this meeting was not intended to consult with the LPM or the residents of the settlement.

22.29. The final meeting cited in the respondent's report is the one held on 24 February 2008 at the Multi Purpose Centre in Protea South. It was called by Counsellor Mapule M Khumalo. Mr Andre van der Walt, an official of the GDOH, also addressed the meeting. The contents of the respondent's report in this regard follow the precise wording of paragraphs 54.1 to 54.4 of the applicants' founding affidavit. Accordingly, the points made by the officials at the meeting are common cause. One such point is the statement that "*the Government had decided that the occupiers at the Protea South Informal Settlement would be housed at Doornkop.*" At the meeting, the LPM once again raised the complaint that the occupiers of Protea South had not been consulted on the decision to relocate them to Doornkop and the impact this would have on access to schools, health care facilities and their places of work.

23. I have traversed the correspondence attached to the founding affidavit in some detail because it reveals a disturbing pattern of official indifference to the plight of the residents of Protea South. While the persistence and determination of Mr Hathorn to persuade the respondent of the need to engage in open and proper consultations is commendable, the conduct of the officials with whom he attempted to communicate is shameful.

24. The respondent, in seeking to devise and implement a comprehensive and co-ordinated programme to progressively realise the right of the residents of Protea South to access to adequate housing, ought to have welcomed the intervention of Mr Hathorn and the LPM. Instead, they were sent on a wild goose chase, from official to official, without anyone engaging meaningfully with the real and legitimate concerns of the residents.

25. The respondent contends in its report that *in situ* development at Protea South is not viable because of the findings of the report by Africa Exposed. The respondent further contends that the risk posed by dolomite at the Doornkop site "*can be mitigated*". The applicants, on the other hand, rely on a review of the Africa Exposed report by a firm of consulting engineers with specialist geotechnical knowledge (the "SRK report"). The SRK report found that, as far as the risk of dolomite was concerned, there appeared to be no advantage of Doornkop over Protea South. It is neither necessary nor desirable for me to attempt to resolve this dispute between the parties.

The relevant point that is not disputed is that these opposing contentions have not been the focus of any consultations between the City and the residents of the settlement.

26. The respondent is obligated to consult meaningfully with the residents of Protea South with the intention of agreeing on a comprehensive and co-ordinated programme that would progressively realise their right to access to adequate housing. However, if no agreement is reached after *bona fide* discussions have deadlocked and a mediator has been unable to bring the parties together, the respondent must nevertheless ensure that its housing programme is reasonably and appropriately implemented in the light of all the provisions in the Constitution. (*Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) at 83E - 84B, par. [82] - [84]; Compare, within the context of evictions, *Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg v City of Johannesburg and Others* 2008 (3) SA 208 (CC) at 216G - 217D, par. [17] - [18]; *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) at 239B - 240C, par. [39] - [42])

27. However, despite repeated calls by the applicants that they be consulted on the future development of Protea South, the respondent has paid lip-service to the issue of consultation and has carried on regardless, making unilateral decisions.

28. There is no community approved relocation strategy in place nor has any attempt been made to secure one. It follows therefore that the decision to relocate the residents of the settlement to Doornkop was made contrary to the provisions of section 13.4 of the National Housing Code. The decision is also in conflict with the requirements of section 26 of the Constitution, read with section 10 of the Constitution and section 2(1)(b) of the Housing Act.

29. In order to reach a negotiated outcome, the respondent will have to start afresh with full and open consultations involving all relevant stakeholders, including the applicants and the LPM. Mr Hathorn's participation should also be welcomed.

30. However, the consultations will only be meaningful if the respondent, in advance, makes available all relevant information, including development plans and technical reports. The applicants must be able to consider the information in advance of the consultations. If it subsequently appears during the consultations that *in situ* development of Protea South is not possible and that relocation is unavoidable, the applicants must be given a proper opportunity of contributing to the identification of an appropriate location and the development of a fair relocation programme. Even if it appears that *in situ* development of Protea South is possible, it might still

be that certain households will have to be relocated within the context of a community approved strategy.

31. Above all, the respondent must realise that the need to consult with those affected by its decisions is not a formalistic requirement. Rather, genuine consultation respects the dignity of those consulted and ensures that any agreement reached as a result will sustain itself because of its legitimacy.

32. Ms Mansingh, on behalf of the applicants, submitted that I should order the respondent to commence with *in situ* development of Protea South without any further consultations between the parties. In the alternative, she submitted that I should order the respondent to engage in proper consultations with the applicants. I do not agree with Ms Mansingh that I should order *in situ* development.

33. Section 172(1)(b) of the Constitution empowers this Court, when deciding a constitutional matter within its power, to make any order that is just and equitable. It is not necessary at this stage for me to decide whether this Court has the power to order an institution of government to embark on *in situ* development of an informal settlement. In my view, the evidence presently before me is not sufficient to justify the conclusion that *in situ* development of Protea South is viable.

34. Further, the applicants have not sought an order for *in situ* development in their notice of motion. Ms Mansingh attempted to cure this by relying on the *dictum* of Harms JA in *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 (A) at 52D - E. However, in my view, the evidence does not establish that the failure of the respondent to develop the settlement *in situ* constitutes a constitutional breach. Its failure properly to consult on *in situ* development and other issues is of course another matter.

<u>The provision of interim services to the settlement</u>

35. The respondent claims that it is complying with its obligation to provide basic interim services to the settlement. The section of the report dealing with this issue is so brief and uninformative that it merits quotation in full:

> "In line with the City of Johannesburg's policies on provision of rudimentary services, the following basic services are available at Protea South Informal Settlement:-
>
> 1. Communal stand pipes
> 2. VIP toilets
> 3. Public lighting "high mast"

4. Periodic collection of refuse by Pikitup”

36. In their founding affidavit, the applicants contend that the respondent has failed to provide potable water, temporary sanitation facilities, refuse removal facilities and high mast lighting in key areas. However, in her argument, Ms Mansingh informed me that refuse collection was no longer an issue between the parties.

37. It therefore remains in issue whether the respondent has complied with its constitutional and statutory obligations to provide potable water, temporary sanitation facilities and high mast lighting. On the information provided by the respondent, and in view of the applicants' persistent denial, it is not possible to assess whether these basic interim services have indeed been provided, or to what extent.

38. Ms Mansingh submitted that this Court should, without further delay, order the respondent to provide the aforesaid services. She argued that there is no need for another report by the respondent on this issue. I do not agree.

39. In their notice of motion, the applicants have not sought any order for specific performance in relation to the provision of basic interim services. For the reasons set out above, the *dictum* of Harms JA in the *Modderklip Boerdery* case at 52D - E cannot assist the applicants in this respect

either. The evidence does not establish that the respondent has failed to provide the basic interim services; the difficulty I have is that the report of the respondent is so lacking in the detail required by the order of Goldstein J that it is not possible to determine what steps have been taken, if any, to provide the services.

40. Furthermore, even if I were mindful to order specific performance, it is not clear how much water, how many toilets or how many high mast lights the respondent should be ordered to provide. In relation to the issue of water, Ms Mansingh referred me to regulation 3(b) of the Regulations Relating to Compulsory National Standards and Measures to Conserve Water. The minimum standard stipulated in that regulation is 25 litres of potable water per person per day or 6 kilolitres per household per month, such water to be supplied within 200 metres of the household. However, Ms Mansingh also referred me to the unreported judgment of Tsoka J in *Mazibuko and Others v City of Johannesburg and Others* (Case No. 06/13865, South Gauteng High Court), in which the Court, *inter alia*, reviewed and set aside the limitation of 25 litres per day or 6 kilolitres per month and ordered the City of Johannesburg or Johannesburg Water (Pty) Ltd to provide each applicant and other similarly placed residents of the applicants' township a free basic water supply of 50 litres per person per day.

41. The order of Tsoka J in the *Mazibuko* case has since been replaced by the order of the Supreme Court of Appeal in *City of Johannesburg and Others v Mazibuko and Others* 2009 (3) SA 592 (SCA), where the SCA declared, *inter alia*, that 42 litres of water per person per day (for residents of the township concerned) would constitute sufficient water in terms of section 27(1) of the Constitution.

42. The facts of the present application and the manner in which the case has been presented are so far removed from the facts and presentation of the *Mazibuko* case that I cannot simply replicate an order that the respondent provide 42 litres of water to each resident of Protea South.

43. In relation to the provision of temporary sanitation facilities and high mast lighting, the position is even starker. The statutory provisions to which I was referred do not specify a minimum number of toilets or high mast lights per person or per household.

Conclusion

44. Having considered the respondent's report and the commentary thereon, I find that the report fails to set out the steps envisaged in paragraphs 2.1 and 2.2 of the order of Goldstein J, in particular:

44.1. As a result of its failure to engage meaningfully with the applicants and their representatives (the LPM and Mr Hathorn), no steps of substance have been taken by the respondent to seek an agreed or mediated solution with the applicants. Indeed, the intervention of a mediator has not even been suggested. As a result, the report purports to deal with these issues but fails to do so.

44.2. No steps have been identified by the respondent to demonstrate that it has complied with its constitutional and statutory obligations to provide basic interim services to the residents of Protea South.

45. In my view, an appropriate order in the circumstances would be to give the parties an opportunity to engage in fresh consultations and then to require that the respondent deliver a report dealing with the issues contemplated in the order of Goldstein J. I intend to detail the matters to be covered in the report. The applicants will then have an opportunity to comment on the report and the respondent will have an opportunity to reply. (Compare *City of Cape Town v Rudolph and Others* 2004 (5) SA 39 (C) at 76B - 77B and 87E - 88H)

46. As for the question of costs, Mr Hathorn has acted *pro bono* throughout this matter. However, having regard to the conduct of the respondent and the contents of its first report, it is my view that it would be just and fair for

the respondent to be ordered to pay the applicants' disbursements since the order of Goldstein J, including the costs of counsel.

47. In the result, I make the following order:

1. The respondent is ordered to furnish the legal representatives of the applicants, by no later than 14 August 2009, with all information necessary to conduct proper consultations in relation to the future development of Protea South Informal Settlement ("Protea South"), including but not limited to:

    i. Copies of all plans (past and present) in the possession of the respondent concerning the development of Protea South;
    ii. Copies of all plans (past and present) in the possession of the respondent concerning development at Doornkop/Greenfields;
    iii. The identification of the areas in Protea South that are currently earmarked for future development;
    iv. The identification of parcels of land (both privately and publicly owned), within a 12 kilometre radius of Protea South, which are not presently used or developed;
    v. The identification of the land referred to in paragraph 1 on page 6 of the respondent's report dated 26 September 2008; and

vi. All information in the possession of the respondent relevant to a determination whether the land in (v) above may be developed for low income housing.

2. The parties (assisted, if they so wish, by their legal representatives) are ordered to engage in open and *bona fide* consultations aimed at reaching agreement on a comprehensive and co-ordinated programme to achieve the progressive realisation of the applicants' right to access to adequate housing, focusing in particular on the viability of *in situ* upgrading of Protea South and/or the relocation of the applicants to sites as close as possible to Protea South. Such consultations are to commence no later than 1 September 2009 and may include the appointment of a mediator, if so required.

3. The respondent is ordered to deliver a report or reports under oath ("the report") by no later than 15 October 2009, stating:

i. what steps it has taken since the date of this order to engage in the open and *bona fide* consultations required by par. 2 of this order;

ii. a full description of the consultations conducted in terms of par. 2 of this order, including a full description of all meetings held, communications made and agreements reached. If no mediator

was appointed, the respondent must state the reasons for such non appointment.

iii. what steps it has taken since 13 June 2008, to provide the following basic interim services to the occupiers of the Protea South Informal Settlement:

a) The provision of potable water. In addition, the respondent must state the amount of water that is currently supplied to each person per day or to each household per month and must specify the manner in which such water is supplied. If the amount of water supplied is less than 42 litres per person per day, the respondent must specify the reasons for such discrepancy.

b) Temporary Sanitation Facilities. In addition, the respondent must specify the nature and location of the facilities and the number of people on average who currently use each such facility on a daily basis. If more than one household on average is currently using any particular facility on any day, the respondent must specify the reasons for not providing one such facility per household.

c) High Mast Lighting in key areas. In addition, the respondent must indicate the location of each high mast light on a map of the settlement and provide an explanation

for such locations, having regard to issues of community safety and access by emergency vehicles.

4. The applicants may, within four weeks of delivery of the report by the respondent, deliver their commentary thereon, under oath.

5. The respondent may, within two weeks of delivery of the applicants' commentary, deliver a reply thereto, under oath.

6. Any party may thereafter set the matter down for consideration and determination of the report, commentary and reply.

7. The respondent is ordered to pay the applicants' disbursements, including the costs of counsel, from 13 August 2008 to the date of this order.

On behalf of the applicants:	Adv U.R.D. Mansingh Instructed by Webber Wentzel (incorporating Mallinicks) Ref: Mr. M. Hathorn
On behalf of the respondent:	Mr G.B. McMaster (attorney) Kunene Ramapala Botha Attorneys
Date of hearing:	13 February 2009
Date of judgment:	4 August 2009
