REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 40067/2014

(1) REPORTABLE: YES / ~~NO~~
(2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~
(3) REVISED.

7/12/2014
DATE

SIGNATURE

In the matter between:

THELMA MBATHA	First Applicant
THE RESIDENTS OF FREEDOM CHARTER SQUARE AS LISTED IN ANNEXURE "A"	Second to Twelfth Applicants
FURTHER RESIDENTS ON THE FLOODLINE	Thirteenth Applicant

and

CITY OF JOHANNESBURG METROPOLITAN MUNICIPALITY	First Respondent
MMC FOR HOUSING, CITY OF JOHANNESBURG	Second Respondent
MEC, DEPARTMENT OF HUMAN SETTLEMENTS AND LOCAL GOVERNMENT AND TRADITIONAL AFFAIRS	Third Respondent
MINISTER OF HUMAN SETTLEMENTS	Fourth Respondent

SUMMARY

Housing – urgency – temporary emergency accommodation – when to be considered – applicants inhabitants of informal settlement on flood line prone to frequent rain – seeking urgent relief to be relocated to temporary emergency accommodation in terms of the respondents' National Housing Code ("*NHC*") – the first respondent's offer to provide temporary emergency at civic hall infringing applicants' constitutional rights to human dignity, freedom and security, and privacy as well as the children's rights to basic nutrition, shelter, basic healthcare services, and social services – sec 9(1)(a(ii) of Housing Act 107 of 1997, as well as sec 1 of the Disaster Management Act 57 of 2002 – applicants and other affected residents on flood line entitled to relief and temporary emergency accommodation.

JUDGMENT

MOSHIDI, J:

[1] This is an application brought on urgent basis by the applicants claiming relief against the respondents as follows:

> "2. *Directing the first respondent to relocate the applicants from the flood line at Freedom Charter Square, Kliptown, to a site within the area identified by the respondents, in terms of the Emergency Housing Programme contained in Part 3, Volume 4 of the National Housing Code, 2009, within 24 hours of the court order;*

3. *Declaring that the first respondents' failure to act accordingly is in contravention of the applicants' constitutional rights to dignity and access to adequate housing;*

4. *Directing that the first respondent investigate the circumstances of all 250 affected households on the flood line in terms of the Emergency Housing Programme contained in Part 3, Volume 4 of the National Housing Code 2009;*

5. *Ordering that the first respondent to pay the costs of the application on attorney and client scale.*"

[2] The applicants also claimed that the remaining respondents pay the costs jointly and severally in the event of any opposition.

THE PARTIES

[3] The applicants, represented by the first applicant, are resident in the Kliptown Freedom Square Informal Settlement and have been adversely affected by the excessive flooding in Kliptown, Soweto, for over five years now, and more recently on Saturday 25 October 2014. The second to the twelfth applicants are also residents of Kliptown who all reside in the flood line ("*the residents*"). The applicants are listed in annexure "A" attached to the notice of motion. They are represented in these proceedings by the Centre for Applied Legal Studies ("*CALS*").

[4] In addition, there are approximately an additional 250 households who are also residents of Freedom Charter Square, Kliptown, Soweto, and reside on the flood line as well. They too, have been affected by the floods and

therefore have a direct interest in this application. It will be convenient to refer to all the applicants as "*the affected residents*".

[5] The first respondent is the City of Johannesburg Metropolitan Municipality ("*the City*") established in terms of secs 151 and 155 of the Constitution, and in terms of the Local Government: Municipal Structures Act 117 of 1998 ("*the Municipal Structures Act*"). The first respondent is cited as the Local Government Authority with the necessary jurisdiction over Kliptown, and therefore the responsible municipality in terms of the National Housing Code, 2009. The affected residents alleged that the City, is represented by one Thabo Padi ("*Padi*") of Dobsonville. However, the City, in the opposing papers, denied that Padi is its representative. However, in my view, nothing significant turned on this dispute.

[6] The second respondent is the Member of the Mayoral Committee for Housing in the City. The third respondent is a Member of the Executive Council for the Gauteng Department of Human Settlements and Local Government and Traditional Affairs ("*the MEC-Province*"). The fourth respondent is the Minister of Human Settlements ("*the Minister*"). She is cited in her capacity as the Cabinet Minister responsible in terms of the Housing Act 107 of 1998 ("*the Housing Act*") for its administration. The MEC and the Minister are represented in these proceedings but chose to abide by the decision of the court.

THE FREEDOM CHARTER SQUARE INFORMAL SETTLEMENT

[7] There were several but insignificant disputes in the background facts. Briefly stated, the Freedom Charter Square Informal Settlement comprises of approximately 3 000 households. Of these, approximately 350 are situated on the flood line. They live in informal houses constructed out of material such as corrugated iron, wooden planks and plastic sheets collected in and around the area. The affected residents began residing in the informal settlement approximately before 2003.

[8] The affected residents started experiencing flooding since 2010. In or about December 2010 excessive rainfall caused floods. As a result, the residents on the flood line were displaced. Their meagre belongings, including food, furniture and clothes, were damages and some were lost. The floods recurred in 2011 and 2013. Similar damage and loss happened. Officials from the City became involved in one way or the other. The affected residents were provided with food and shelter and accommodated at the local community hall, as was the case previously. During the weeks of 3 March 2014, 10 March 2014 and 17 March 2014, there was excessive rainfall in many parts of South Africa, including the Gauteng Province. Once more, the affected residents were severely touched, as their homes are situated on the flood line. On this occasion, they claimed that apart from damage and loss experienced before, the children's clothing and school books were also damaged. There was a high risk of loss of life because their homes, generally referred to as "*shacks*", are small in size. For this reason, it is

common practice for children, and other adults, to sleep on the floor in various homes. When the floods occur, the water levels have been known to reach at least 3 metres high, and as a result, some family members now have nowhere to sleep.

[9] On Saturday 25 October 2014, shortly whereafter the present application was launched, there were heavy rainfalls in Gauteng, and the residents' homes were once more flooded. The Ward Councillor was informed about the flooding but the residents alleged that there was no assistance forthcoming from the City. Since 2003 the affected residents had been informed verbally on several occasions by the City that the government will provide the residents of Kliptown Informal Settlements with State subsidised housing. The development was said to commence soon. However, their destitution persisted and deteriorated up to now. There are limited water and sanitation facilities. Approximately 25 households use one tap whilst approximately 10 households use one toilet. The affected residents contended that they are unable to afford accommodation elsewhere. Their respective personal circumstances are almost identical. Most of them are unemployed, whilst those who are in fact employed, earn meagre salaries. They lack sufficient income to purchase and replace belongings, structures and food which are damaged each time when floods occur. Each of the affected residents have set out in full their personal circumstances in the annexures and confirmatory affidavits.

[10] The applicants range from the elderly to toddlers, unemployed persons who survive by doing piece jobs, to persons employed in low-income jobs such as cleaners and security guards. The income of the households who reside in the informal settlement area ranges from approximately R350,00 to R3 000,00 per month. There are also, unfortunately, children as well as elderly women and persons suffering from various chronic illnesses. As is a novel phenomenon in our country, there are many households which are headed by women and in some cases, children.

[11] At the commencement of argument, the issue of the urgency of the matter was debated by the parties. The first respondent contended that the matter was not urgent at all, and that if any urgency existed, this arose in March 2014 already when the first respondent declined to relocate the applicants. In addition, it was submitted that the applicants knew all along that their dwellings are prone to flooding, and they omitted to launch the application sooner. This contention on the part of the first respondent was plainly flawed in a number of respects. Regrettably, it equally displayed substantial misunderstanding and appreciation of the actual plight of the applicants, particularly in a developing democratic society such as ours where the Constitution and the rule of law are supreme.

[12] As discussed later below, the applicants have been in constant engagements with the first respondent and/or its representatives concerning their plight. However, all of these efforts were in vain. It cannot be disputed that the situation in which the applicants, and many others in similar

circumstances elsewhere, is an ongoing, imminent life-threatening one. Whilst preparing this judgment, it was raining and there were threats of thunderstorms with hail damage as dispatched and warned by both the weather bureau and certain insurance companies. In my view, it would be a dereliction of duty for the courts to shirk the duty of rescuing persons like the affected residents and applicants in the circumstances. It is not inconceivable that the current rainy season may last for the next five or six months.

[13] Indeed, as argued by the applicants, this kind of plight was apparent in *Schubart Park Residents' Association and Others v City of Tshwane Metropolitan Municipality and Another*[1]. That case concerned an eviction in respect of a complex of apartments leased by the City of Tshwane (the City) to various residents. The complex was in poor condition. This led to some of the residents to engage in a protest which involved throwing of stones and starting fires. In response, the police removed the residents from one of the blocks comprising the complex, and, later the remaining residents. The residents then applied to the high court for re-occupation, and they also raised sec 26(3) of the Constitution, which provides that:

> '*No one may be evicted from their home … without an order of court made after considering all the relevant circumstances.*'[2]

[1] 2013 (1) SA 323 (CC).

[2] Sec 26(3) of the Constitution in full provides that:

> "*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.*"

The Court, founding its order on sec 38 of the Constitution[3], dismissed the application, but ordered the City to ensure that temporary accommodation it had tendered was available, and also that the parties meet to agree on a draft order, before appearing again before it. The parties, however, could not reach agreement and the high court incorporated the tender in its order. It provided that the City would supply temporary dwellings to the residents etc. The residents sought, but were refused leave to appeal by both the high court and the Supreme Court of Appeal. The residents were, however, granted leave by the Constitutional Court. The issue before the latter Court was whether the high court's order dismissing the residents' application to re-occupy, and the order incorporating the City's tender, were '*appropriate relief*' in terms of sec 38 of the Constitution. In upholding the appeal, the Court at para [49] said:

> "*These remarks were made in cases relating to eviction orders, but they are equally if not more apposite in the case like the present. Here the applicants were as a matter of law entitled to restoration of their occupation but were nevertheless deprived of that restoration for a long period. Not only did their inherent right to dignity entitle them to be treated as equals in the engagement process, but also their legal entitlement to return to their homes absent a court order for their eviction. It is so that the high court could not immediately order restoration. But, as a matter of law, it could and should have issued a declaratory order indicating the residents' eventual entitlement to restoration.*"

Part of the order[4], provided that:

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[3] "*Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights …*"

[4] See para [53] 5.5 of the judgment.

> "*Alternative accommodation that must be provided to the identified residents by the City, until restoration of their occupation of Schubart Park.*"

Part of the significance of the judgment of the Constitutional Court, in the context of the present matter, is that it heard and adjudicated the appeal although a year had already passed. The violation of the rights of the applicants in the instant matter is continuous, especially during the rainy season. For this reason, the current application, in my view, was more than adequately urgent for the court to intervene.

THE CORRESPONDENCE EXCHANGED BETWEEN THE PARTIES

[14] The founding papers were replete with a plethora of correspondence exchanged between the applicants and the first respondent and/or its representatives. These showed largely how the applicants' legal representatives, CALS, engaged with the local authorities involved. These attempts to engage are all well articulated in the applicants' heads of argument, and were unnecessary to repeat in full here.

[15] Briefly stated, CALS addressed a letter on 20 March 2014 to the first and second respondents requesting information about the consultation process followed in relation to the relocation of the residents who were affected by the floods. Plans for relocation were also required. Later, on the same day, CALS contacted one Patricia Nhlabathi ("*Nhlabathi*") in the Legal Department of the first respondent requesting some response. Nhlabathi said that she would contact the Gauteng Department of Housing and revert. There

was no reaction. Some eight days later, Nhlabathi responded that the matter was with the office of the third respondent for investigation and that a response will be provided in due course. There was no receipt of the alleged investigation.

[16] On 8 April 2014, CALS made contact with one Themba Ndlozi ("*Ndlozi*") of the respondents who was in charge of the relocation process concerning the residents in their flood line who had not been relocated. Ndlozi responded that he will not relocate the residents without the so-called B and C forms. These forms are apparently papers which were previously obtained from the Department of Housing pursuant to an application for state subsidised housing. On the same day, CALS addressed a further letter to the first, third and fourth respondents. The letter set out instances of non-compliance with the Emergency Housing Policy on the basis that B and C forms are not a pre-requisite for an emergency relocation[5]. The letter also requested information on the plans for relocation in accordance with the Emergency Housing Policy[6]. A response was promised by the third respondent by 16 April 2014.

[17] The applicants' attorneys of record later, and on 24 June 2014, attended a meeting convened by a Mr Mokopo ("*Mokopo*") of the first respondent. At this meeting, an update on the relocation of the residents was requested. Although he undertook to convene a further meeting, Mokopo never did so. The founding papers showed that the pattern of inertia and

[5] See founding affidavit p 22 para 64.
[6] See founding affidavit p 22 para 65.

sending the applicants' legal representatives 'from pillar to post' on the part of the respondents, endured until 25 October 2014.

[18] On the last-mentioned date, a Saturday, the applicants' homes were flooded. The next day, applicants' legal representatives contacted Padi of the respondents, and requested urgent intervention. The response was that since it was a Sunday, the matter could not be attended to. The next day, 27 October 2014, Padi was again contacted on behalf of the applicants for intervention and the facilitation of relocation. However, when Padi reverted later, he conveyed that his clients awaited to speak to the 'relevant authorities'. Later, the applicants' representatives were informed that the informal settlement was visited by officials, but no "*life-threatening*" situation was observed[7]. The sum total was that the engagement process on behalf of the applicants with the respondents proved to be fruitless, on the version of the applicants.

THE FIRST RESPONDENT'S OPPOSING PAPERS

[19] The first respondent's papers were in the form of an affidavit by Mr Thulani Nkosi ("*Nkosi*"), its Deputy-Director Region D of its Housing Department. In it, Nkosi contended that the settlement under discussion forms part of the greater Kliptown Housing Development Project ("*the Project*"), which includes the City's Informal Settlement Upgrade Programme. There is currently a backlog of some 6 900 households within the project.

[7] See founding affidavit p 27 para 78.

[20] He further contended that a Project Steering Committee ("*the PSC*") was established in May 2013 comprising of Ward Councillors, Community Representatives and the City. The PSC has monthly meetings where the community, through their representatives, is informed of the progress in regard to the project. The residents in the Settlement are currently earmarked for relocation to Klipspruit Extension 7. Houses will be built in the latter Extension, and the construction thereof is due to be completed in December 2018.

[21] Nkosi alluded to what he called miscommunication with the community representation at the PSC. The present applicants seemingly do not form part of the representation. In addition, relocation and allocation of beneficiaries is based on, among other things, the beneficiaries must be on the City's regional register of the informal settlement, and such beneficiaries must have been approved for a state subsidy. These requirements are for beneficiaries who will require permanent relocation and allocation of housing units in terms of the project.

[22] In as far as the objectives of the housing assistance in emergency circumstances is concerned, Nkosi asserted that it was to provide temporary relief only to citizens who find themselves in emergencies as envisaged in Chapter 2.3.1 of Part 3 of the National Housing Code ("*the NHC*"). The current applicants ought not to be allowed to 'jump' the queue by demanding to be allocated as they claimed in the founding papers, and without following the proper procedures.

[23] According to the first respondent, the City is obliged, within its available resources, to provide temporary emergency shelter to only those occupiers who are defined in Chapter 2.4 of Part 3 of the NHC. The obligation apparently takes into account the individual circumstances of each person seeking such accommodation, and a comparison with other more deserving cases. The more vulnerable were the occupiers in Block G where the process of relocation commenced. These occupiers were not relocated because they did not have either forms B or C. There is currently no available land in and around Kliptown. It is the City's requirement that occupiers who wished to be considered for temporary emergency accommodation to first register on the City's Expanded Social Package ("*the ESP*"), through the provision of documentation, and information relating to their personal circumstances.

[24] In short, the City, alleged that the flooding was not a novelty; that Padi is not representing it; the applicants failed to produce forms B or C; the applicants' houses were not flooded; that if there was flooding at all, the applicants ought to have approached the court earlier than they did and presently they are relying on self-created urgency; and that the applicants have previously been provided with temporary emergency shelter, but what they now seek is permanent relocation.

THE NATIONAL HOUSING CODE

[25] Part 2.3 of the NHC[8], under the "*Definition of Emergency Housing Circumstances*" provides that:

> "*This Programme will apply to emergency situations of exceptional housing need, such situations being referred to as 'Emergencies', as defined below:*
>
> *An emergency exists when the MEC, on application by a municipality and or the PD, agrees that persons affected owing to situations beyond their control:*
>
> *a) Having become homeless as a result of a declared state of disaster, where assistance is required, including cases where initial remedial measures have been taken in terms of the Disaster Management Act, 2002 (Act No. 57 of 2002) by government, to alleviate the immediate crisis situation;*
>
> *b) Have become homeless as a result of a situation which is not declared as a disaster, but destitution is caused by extraordinary occurrences such as floods, strong winds, severe rainstorms and/or hail, snow, devastating fires, earthquakes and/or sinkholes or large disastrous industrial incidents;*
>
> *c) Live in dangerous conditions such as on land being prone to dangerous flooding, or land which is dolomitic, undermined at shallow depth, or prone to sinkholes and who require emergency assistance;*
>
> *d) Live in the way of engineering services or proposed services such as those for water, sewerage, power, roads or railways, or in reserves established for any such purposes and who require emergency assistance …*"

In addition Part 2.4[9], in the first paragraph thereof provides that:

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[8] See p 15 of NHC.
[9] See page 16 of NHC.

"The Programme will benefit all affected persons who are not in a position to address their housing emergency from their own resources or from other sources such as the proceeds of superstructure insurance policies and the following households will qualify for assistance under this Programme ..."

SOME LEGAL PRINCIPLES APPLICABLE

[26] The starting point in regard to some legal principles applicable to the above contentions, is sec 26(1) of the Constitution[10]. The sec 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."*

The present matter was of course, not concerned with an eviction but rather, temporary emergency relocation.

[27] In addition, sec 9(1)(a)(ii) of the Housing Act[11], provides that:

> *"(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 policy to –*

[10] See Constitution of RSA Act 108 of 1996.
[11] Act 107 of 1997.

(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.*" (underlining added)

Section 1 of the latter Act defines, "*housing development*" to mean,

"*the establishment and maintenance of habitable, stable and sustainable public and private residential environments to ensure viable households and communities in areas allowing convenient access to economic opportunities, and health, educational and social amenities in which all citizens and permanent residents of the Republic will, on a progressive basis, have access to –*

(a) *permanent residential structures with secure tenure, ensuring internal and external privacy and providing adequate protection against the elements; and*

(b) *portable water, adequate sanitary facilities and domestic energy supply.*" (underlining added)

[28] In terms of sec 1 of the Disaster Management Act[12],

"'*disaster*" *means a progressive or sudden, widespread or localised, natural or human-caused occurrence which –*

(a) *causes or threatens to cause –*

(i) *death, injury or disease;*

[12] 57 of 2002.

(ii) damage to property, infrastructure or the environment; or

(iii) disruption of the life of a community; and

(b) is of a magnitude that exceeds the ability of those affected by the disaster to cope with its effects using only their own resources."

[29] The case of *Dada v Unlawful Occupiers*[13], had to do with the eviction of unlawful occupiers from trust land owned by a Trust. However, although readily distinguishable from the facts of the present matter, the learned acting judge made some interesting and pertinent comments in the course of the judgment. At para [34] of the judgment it was said that:

> *"In Government of the Republic of South Africa and Others v Grootboom and Others 2001 (1) SA 46 (CC) (2000 (11) BCLR 1169) the Constitutional Court held that s 26 guaranteed a right of housing to those who did not have resources to provide for themselves. In its decision the court recognised that the State has a particular and special obligation to provide housing to those who cannot afford to provide for themselves, as a question of access."*

At paras [45] to [47] of the judgment, the learned acting judge went on to say that:

> *"[45] Section 9(1) of the Housing Act 107 of 1997 (the Housing Act) requires every municipality to take all reasonable steps to ensure inhabitants in its area have access to housing on a progressive basis. This has to be done in a manner which gives priority to the needs of the poor in respect of a housing development.*
>
> *This is clear from the provisions s 9(1)(a) of the Housing Act.*

[13] 2009 (2) SA 492 (W).

> *[46] The National Housing Code's Programme for Housing Assistance in Emergency Housing Circumstances (the emergency housing programme) defines an emergency as a situation where –*
>
> > *the affected persons are, owing to circumstances beyond their control, evicted or threatened with imminent eviction from land or unsafe buildings, or situations where pro-active steps ought to be taken to forestall such consequences …*
>
> *[47] This programme makes funding available from the provincial departments of housing for emergency housing assistance. It requires municipalities to investigate and assess the emergency housing need in their areas of jurisdiction and to plan proactively therefor."*

It is indeed so that in the present application we have to do with, not access to housing as such, but Temporary Emergency Accommodation ("*TEA*"), as was discussed in *Schubart Park Residents' Association and Others (supra)*.

[30] Once more, in *City of Johannesburg v Changing Tides 74 (Pty) Ltd and Others*[14], although the Court dealt with eviction proceedings, it alluded to the plight of the occupiers, in the following terms:

> "*Both approaches overlook the fact that the court is dealing with a situation in which people are living in a 'death trap'. Their situation is one of dire need. They should not be required to continue living in such circumstances, which pose a health and a personal-safety danger, any longer than is strictly necessary to enable the City to discharge its constitutional obligations to them. The question then is how to achieve this as a matter of some urgency. Unfortunately, none of the orders submitted by the parties addressed the matter from that perspective. The City wishes to follow its established procedures and exclude those whom it believes are not entitled to temporary emergency accommodation …*"[15]

[14] 2012 (6) SA 294 (SCA).
[15] See para [52] of the judgment.

In my view, these observations are of equal application to the facts of the present matter, and the matter ought to be approached and decided in favour of the applicants on that basis and approach. A contrary approach, i.e. to allow the first respondent to first follow its established procedures, will have the inevitable disastrous consequences to the applicants. The requirements of the first respondent, especially in regard to the B and C forms, and state subsidy, and perceived notion of the applicants, in order to be instantly relocated, having to 'jump the queue' sounded typically like our pre-Constitution era. In particular, the allegation by the first respondent that on an occasional visit to the informal settlement, there was no sign of flooded houses, was mindboggling. In any event, no B or C form is required in terms of the criteria advanced by the first respondent, and the requirement is therefore not applicable to the applicants' request for temporary emergency accommodation. The requirement of B or C forms amounts to a proper register search, which is equally not applicable in the circumstances of the applicants.

[31] The first respondent alleged that the matter was not urgent, and that the area was flooded previously when it intervened by relocating the applicants. This response was both a blatant misconstruing of the applicants' relief sought, as well as a misinterpretation of its own policies and procedures on which it relied. The applicants seek TEA based on their dire situation and continuous life-threatening condition, and not permanent relocation. They have provided their collective individual personal details to the first

respondent, and which were sufficient for intervention. It was unreasonable in the circumstances to expect them to do more.

[32] A proper scrutiny and reading of the provisions of the NHC (clause 2.3.1) (*supra*), is in favour of the applicants. The clause plainly refers to, "*emergency situations of exceptional housing*". Further that, "*an emergency occurs when the MEC, on application by a municipality, and or the PD, agrees that persons affected owing to circumstances beyond their control*" have become homeless as a result of a declared state of disaster, where assistance is required, including cases where initial remedial measures have been taken in terms of the Disaster Management Act (*supra*) by government, to alleviate the immediate crisis situation. The definition of "*disaster*" quoted above, makes it clear that it covers a localised, natural occurrence which causes or threatens to cause death, injury or disease, damage to property, disruption of the life of a community, and is of such a magnitude that exceeds the ability of the applicants to cope with its effects, using only their own resources. In this regard, the applicants have provided adequate information to show, *inter alia*, that the settlement consisted of children, the elderly, the sickly, the unemployed, the low income sector, and that their meagre assets had been damaged previously, when the first respondent was compelled to intervene. The PD (referred to in the relevant clause of the NHC) is the Provincial Department responsible for human settlement.

[33] In addition, a proper reading of clause 2.3.1 of the NHC makes it equally plain that it caters for persons who have become homeless as a result of a situation which, although not declared as a disaster, but the destitution is caused by "*extraordinary occurrences such as floods, strong winds, severe rainstorms and/or hail*". In addition, that the occupiers live in dangerous conditions such as on land being prone to dangerous flooding and require emergency assistance. In my view, the applicants pre-eminently fall into this category, and have made out a case for the relief sought. This must be so since, the first respondent, in the opposing papers and closing argument, offered to relocate the affected residents to the nearby Kliptown community hall, as was the case previously. In my view, and in addition, a proper construction and reading of clause 2.4 of the NHC provides for persons, like the applicants, who are not in a position to address their own housing emergency from their own resources or from other sources such as the proceeds of superstructure insurance policies. The founding papers and replying affidavit were replete with credible and convincing evidence in this regard and the first respondent's contentions to the contrary were without any merit.

[34] In addition to the above, sec 9(1) of the Housing Act (*supra*) makes it plain that the first respondent has the obligation to ensure that conditions not conducive to the health and safety of inhabitants, like the applicants, in its area of jurisdiction, are prevented or removed. The first respondent has conceded that the applicants reside in a flood prone area. It is currently the rainy season which is likely to last for several months, and Gauteng weather

is capricious. The floods are likely to occur and recur with the continuous rainfall experienced over the past days or weeks. As correctly argued on behalf of the applicants, to provide the applicants with temporary accommodation at the community hall until the development is completed in 2016 and 2018, would create issues relating to their rights to privacy, dignity, freedom and security as enshrined in the Constitution. In addition, and of particular importance, are the rights of children at stake. In this regard, secs 28(1)(c) and (2) of the Constitution guarantee that every child has the right to basic nutrition, shelter, basic healthcare services and social services, and that a child's best interests are of paramount importance in every matter concerning the child, respectively. All of these rights will undoubtedly be infringed should the applicants be given temporary emergency accommodation at the civic hall, as offered by the first respondent. This, the court cannot countenance. The offer made by the first respondent was therefore untenable. In terms of both the Emergency Housing Programme and the Disaster Management Act (*supra*), government institutions are supposed to already have appropriate mechanisms in place. Furthermore, in regard to the first respondent's contention that it has no land for the applicants to erect informal settlements, the simple answer was that there was no evidence at all presented that the first respondent had approached the provincial and/or national governments for assistance with sourcing, capacity, resources or expertise to relocate the affected residents.

CONCLUSION

[35] Having considered all the circumstances of this matter, and the applicable legal principles, I have reached the conclusion that the applicants have succeeded, on a balance of probabilities, to make out a case for their temporary emergency relocation. Indeed, the question which arose in *City of Johannesburg v Changing Tides 74 (Pty) Ltd and Others (supra)*, remained a valid consideration. The first respondent has offered to relocate the applicants to the Kliptown communal hall since there are no other available options. In this regard, the first respondent argued that, "*the only available short-term emergency accommodation is the town hall which has the capacity to accommodate 100 households*". The founding papers contended that there are about 250 other affected households in the flood line, whose situation required urgent investigation by the first respondent. In argument, the applicants countered that the Kliptown hall has inadequate facilities to accommodate them in a manner consistent to the applicants' constitutional rights to dignity and privacy and access to adequate housing. These are not easy matters to determine for a court. However, what was clear, is that the applicants are entitled to be rescued from their current plight. The application must succeed. Whatever factual disputes may be present, these must be decided on the version of the applicants. The version of the respondents is so untenable that on the disputed facts the robust, common-sense approach as enunciated in *Soffiantini v Mould*[16], was justified. The first respondent should also properly and correctly be ordered to investigate the circumstances of all

[16] 1956 (4) SA 150 (E) at 154E-H.

the other 250 affected households on the flood line with a view to assisting them. These are the second to the thirteenth applicants.

COSTS

[36] The costs should follow the result. There was no credible reason advanced why this should not be the case. It is in any event, a discretionary matter. In addition, in matters of this nature, the approach in *Biowatch Trust v Registrar Genetic Resources and Others*[17], remained instructive. The first and second respondents ought to pay the costs of the application.

ORDER

[37] The following order is made:

1. An order is granted in terms of prayers 2, 3 and 4 of the notice of motion dated 31 October 2014, save that, in respect of prayer 2 of the notice of motion, the order therein made shall be carried out and be effective within seven (7) court days from the date of service of this court order on the respondents, and not within 24 hours.

[17] 2009 (6) SA 232 (CC).

2. The first respondent and the second respondents shall pay the costs of the application, jointly and severally, the one paying the other to be absolved.

D S S MOSHIDI
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

COUNSEL FOR THE APPLICANTS	MS A RAWHANI
INSTRUCTED BY	CENTRE FOR APPLIED LEGAL STUDIES JOHANNESBURG
COUNSEL FOR THE FIRST RESPONDENT	W T MOLOKOMME
INSTRUCTED BY	STATE ATTORNEY JOHANNESBURG
DATE OF HEARING	5 NOVEMBER 2014
DATE OF JUDGMENT	5 DECEMBER 2014