REPUBLIC OF SOUTH AFRICA

(Reportable)

IN THE HIGH COURT OF SOUTH AFRICA
CAPE OF GOOD HOPE PROVINCIAL DIVISION

CASE: 8970/01

In the matter between:

THE CITY OF CAPE TOWN Applicant

and

NEVILLE RUDOLPH AND FORTY NINE OTHERS Respondents

JUDGMENT DELIVERED ON 7 JULY 2003

SELIKOWITZ J:

Selikowitz J:

Introduction

Applicant is the City of Cape Town, a metropolitan municipality and legal *persona* established in terms of the Local Government: Municipal Structures Act, 1998 read with the Province of the Western Cape: Provincial Notice 479/2000 dated 22 September 2000.

First to Forty Seventh Respondents are all individuals who are described by Applicant as "*presently unlawfully occupying a structure on a public open space in a built-up urban area registered in Applicant's name*" as erven 2999 and 3366. Cape Town. (hereinafter "the park"). The park, which is situated in a suburb known as Valhalla Park, measures 9303 square metres.

Forty Eighth and Forty Ninth Respondents are those possible further persons who respectively currently unlawfully occupying and intend to unlawfully occupying the park and whom Applicant has not been able to identify.

Fiftieth Respondent was the member of the National Executive who is responsible for the administration of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, No 19 of 1998 (hereinafter "PIE"). The Minister of Housing was joined as the constitutionality of PIE was an issue in the proceedings. She advised that she would abide the decision of the Court. Applicant thereafter withdrew the application against the Fiftieth Applicant.

Reference hereinafter to "Respondents" is a reference to the First to the Forty Seventh Respondents all of whom are occupying the park and all of whom have opposed the application.

The park is zoned 'public open space' and is situated in a residential area. Applicant states that prior to 3 October 2001 the park had been dedicated and used as a public park with playground equipment for children. Respondent's dispute this. They aver that only an area of 900 square metres is tarred and designed as a play park. The tarred area is, in fact, used by an adjoining occupier to store vehicles which he repairs.

On 3 October 2001 it came to Applicant's notice that First Respondent had erected a shack in the park. Efforts were made to persuade him to remove the structure. First Respondent advised Applicant's officials that he had waited long enough for Applicant to provide him with formal housing and had accordingly moved to the park from the nearby backyard where he and his family had rented space which he could no longer afford. A meeting with representatives of the local community failed to resolve the impasse but demonstrated that First Respondent's action enjoyed considerable support from the local community. The number of 'squatters' grew overnight and Applicant's attempts to remove them and to demolish their shacks with the South African Police Services in attendance met with a hostile reaction from a

large group of local residents who gathered to demonstrate their opposition to Applicant's actions. Applicant's employees were forced to retreat.

By 12 October 2001, the settlement in the park had grown to 23 structures and more were under construction. Applicant describes the events as an 'orchestrated land grab' in terms of which the occupiers "*decided to take the law into their own hands and to resort to self-help by invading the park for residential purposes*."

Applicant states further that "*[t]he Respondents are unlawfully occupying the Applicant's property and they do not have the consent of the Applicant either expressly or tacitly to occupy the park in question. They have no other right in law whatsoever*."

It is acknowledged by Applicant that there is a duty on local government when developing housing to promote the establishment, development and maintenance of socially and economically viable communities and of safe healthy living conditions. There is also a duty to provide community and recreational facilities and to ensure that conditions which are not conducive to health and safety are eliminated.

Applicant states that it has a policy "*in place*" with which it is complying. It is ensuring the progressive realisation of access to housing to those within its jurisdiction who have applied for housing. It is limited by the available financial resources which are extremely inadequate. There is an enormous delay in the allocation of housing and the demand outstrips the supply "*by a considerable margin*". The Respondents, by resorting to self-help, have jumped the queue and seek a manifestly unfair advantage over many thousands of people on the waiting list who have a legitimate expectation of receiving housing in turn according to the date of their application.

Respondents reply that Valhalla Park is faced with a serious lack of access to housing and that Applicant - and its predecessors - have failed dismally to deliver adequate housing. Indeed, during the period 1994 to 2002 only 45 new houses were built in Valhalla Park and twelve rental houses became available. Valhalla Park is by no means a unique area in regard to lack of access to housing and overcrowding.

Respondents have filed affidavits which demonstrate their desperate housing situation. Many are unemployed and few can afford to pay even a paltry rental, let alone a reasonable rental should a lease be available to them. The affidavits show that families lived in overcrowded yards; in abandoned car wrecks and one family even found refuge overnight in a school which they had to vacate at the crack of dawn each day to avoid detection. The misery and a feeling of hopelessness is manifest in every affidavit. Many of the Respondents have been on municipal housing waiting lists for more than a decade.

Applicant confirms that there are in excess of a quarter of a million applicants for housing on its waiting list. The waiting list grows by 25 000 names per year. The available funds which are granted and devolve from the National Government to Applicant for the building of homes in the Cape Town metropolitan area is only enough to build 10 000 homes per year. The backlog is, avccordingly, growing by 15 000 homes a year.

Applicant states that it has, at all times, been in possession of the park and that it has "*been despoiled of its possession*".

Applicant contends that PIE does not apply to Respondent's actions. It therefore seeks common law relief in order to regain possession of the park. In the alternative, and only in the event of PIE being found to apply, Applicant seeks relief in terms of

section 5(2) of PIE. Should the court find that Applicant is not entitled to relief under section 5, then Applicant submits that PIE is unconstitutional at least insofar as it sanctions 'land grabbing'.

In its Notice of Motion Applicant prays for an order:

1Condoning the Applicant's failure to comply with the time limits, forms and procedures prescribed by the rules of Court and hearing this application as a matter of urgency in terms of Rule 6(12) of the Rules of Court.

2That a Rule Nisi do issue calling upon the Respondents to give reasons, if any, on or before the return day on Thursday, 22 November 2001, why a final order in the following terms should not be granted:

2.1 That a declaratory order be issued in which it is declared that the provisions of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, Act No 19 of 1998 (*"the Act"*) are not applicable to these proceedings in which the eviction of the Respondents is sought;

2.2 That the Applicant's peaceful and undisturbed possession of the public open space registered in the Deeds Office, Cape Town, in the Applicant's name as Erf 3366, Cape Town, Western Cape (hereinafter referred to as *"the park"*) be restored *ante omnia* and that the Respondents be ordered to vacate the park and to demolish and remove all structures and makeshift dwellings and their

belongings and/or personal effects from the park, all by no later than 15h00 on Friday, 30 November 2001.

2.3 In the alternative to paragraph 2.2, that the Respondents be interdicted and restrained from being in the park for the purpose of unlawfully occupying it or residing there and erecting and/or completing any structure or makeshift dwelling therein and that they vacate the park and remove all structures and makeshift dwellings and their belongings and/or personal effects from the park, by no later than 15h00 on Friday, 30 November 2001.

2.4 In the further alternative and only in the event of paragraphs 2.2 and 2.3 not being granted, that a declaration be issued that the Applicant, in its capacity as the legal owner and possessor of the park, has the right to retain possession thereof to the exclusion of anybody who wishes to occupy it unlawfully for the purposes of the erection of any structure or makeshift dwelling and that, to enforce the Applicant's possessory rights, it is entitled to evict the Respondents therefrom.

2.5 In the further alternative and only in the event of paragraphs 2.2, 2.3 and 2.4 not being granted, that pending the return day, alternatively, the outcome of proceedings for a final order to be instituted by the Applicant on or before Friday, 14 December 2001, the Respondents be evicted from and ordered to vacate the

park and to demolish the structures erected in the park and to remove their belongings and/or personal effects from the park by no later than 15h00 on Friday, 30 November 2001.

2.6 That in the event of the Respondents failing to comply with any of the orders in paragraphs 2.2 to 2.5 above:

2.6.1 The Sheriff and/or any persons appointed by him are authorised to evict the Respondents from the park, if necessary by the use of such force which may be reasonably necessary in the circumstances;

2.6.2 The Sheriff and/or other persons appointed by him are authorised to demolish and remove the structures and makeshift dwellings erected or occupied by the Respondents in the said park;

2.6.3 The Sheriff and/or any persons appointed by him are authorised to remove any possessions of the Respondents found in, at or near such structures and makeshift dwellings, which possessions and/or demolished structures and makeshift dwellings shall be kept in safe custody by the Sheriff until released to the lawful owner thereof;

2.7 Insofar as it may be necessary to enable the Sheriff

and/or his appointees to execute their duties in terms of paragraphs 2.6.1 to 2.6.3 above, the South African Police Service, through its members, is authorised to assist and protect the Sheriff and/or his appointees to enable them to fulfil their duties above.

2.8 Alternatively to paragraphs 2.2 to 2.5 above and only in the event of the above Honourable Court not finding in favour of the Applicant in terms of any one of them, an order declaring that the following provision of the Act is unconstitutional and invalid in that it constitutes an infringement of the fundamental rights of property owners: The definition of *"unlawful occupier"* in that it fails to prescribe the period of occupation and to qualify occupation, thereby including:

2.8.1 Occupation taken stealthily without the knowledge of the owner or person in charge;

2.8.2 Occupation taken forcibly or violently, notwithstanding objection or resistance thereto by the owner or person in charge;

2.8.3 Occupation falling outside the ambit of Section 5.1 of the Act which is then adjudicated upon in terms of Section 4 of the Act, resulting in ongoing and protracted prejudice to the owner or person in charge.

2.9 That the First to Forty-Ninth Respondents be ordered to pay the costs of this application jointly and severally, the one paying the other to be absolved;

2.10 In the event that the Fiftieth Respondent opposes this application, a costs order is sought against the Fiftieth Respondent jointly and severally with the First to Forty-Ninth Respondents' the one paying the other to be absolved.

3Further and/or alternative relief.

One day after delivering their answering affidavits Respondent's filed a counter-application seeking an order declaring that Applicant's housing programme fails to comply with its constitutional and statutory obligations. Respondent also asks the Court to order Applicant to comply with these obligations and to issue a structural interdict requiring Applicant to report back to the Court stating what steps it intends to take and how it will execute them.

The hearing of the merits of the application and counter-application was considerably delayed after the Court found, *in limine*, that Applicant had not established that it had properly authorised the proceedings. The subsequent attempt by Applicant to cure the defect was later found by the Court to have been ineffective and the hearing was again delayed to enable Applicant to pass the necessary resolution in which it authorised the application and ratified the steps that had already been taken.

THE MAIN APPLICATION

Applicant is applying to evict Respondents and to demolish the structures they have erected without following the provisions of PIE. On the basis that PIE does not apply Applicant seeks the common law remedies of the *mandament van spolie*, alternatively an interdict and mandamus, in the further alternative a declarator. If PIE does apply, Applicant, in any event, asks for a spoliation order. If it achieves no common law success then Applicant falls back on an order in terms of section 5 of PIE. Finally, and only if all else fails, Applicant avers that the definition of *'unlawful occupier'* in PIE is unconstitutional.

Because the matter was ripe for hearing Applicant sought final relief and not a *rule nisi.*

It is worthy of note that this case is not about whether it would be 'just and equitable', in terms of section 4 or section 6 of PIE, for Respondents to be evicted from the property. Applicant has deliberately chosen not to make that case. The Court is not required to consider that issue nor make that decision.

Is PIE applicable here?

Applicant submits that the facts reflect a "*typical case of illegal land grabbing*" and that PIE does not apply to cases of illegal land grabbing. Accordingly, Applicant seeks, in the alternative, to enforce a variety of common law remedies. Prayers 2.1 to 2.4 are aimed at the enforcement of these common law remedies. Prayer 2.5 is in the further alternative and is intended to afford Applicant an order pursuant to the provisions of section 5 of PIE in the event of PIE being found to be applicable. If prayers 2.1 to 2.5 fail, then Applicant will be left with no option but to act in terms of sections 4 and 6 of PIE.

> **"If that is the case it would follow that unlawful occupiers, who invade the land and/or buildings of an owner forcibly or stealthily without the owner's consent and knowledge are protected by the provisions of the PIE Act and that to that extent the ordinary property rights of the owner, which are also protected fundamental rights under the Constitution are *pro tanto* denied and taken away."**

Applicant further "*contends that the provisions of the PIE Act are unconstitutional to the extent that it may allow such a result*."

Mr Le Roux SC, who together with *Ms Williams*, appeared for Applicant emphasised that our courts have in recent times repeatedly expressed their strong disapproval of illegal land grabbing. (See for example: *City of Cape Town and Another v The occupiers of erf 4832, Philippi*, Case No.s 5746 and 5747/2000, unreported, CPD, delivered on 13 September 2000 p. 12; *Betta Eiendomme (Pty) Ltd v Ekple-epoh,* 2000 (4) SA 468 (WLD) at 475G - I; *Government of the RSA & Others v Grootboom & Others* 2001 (1) SA 46 (CC) at 85J - 86A; *Paarl Municipality v The occupiers of houses situated at certain erven, Mbekweni, Paarl*, Case No 8937/2000, unreported, CPD, delivered in 2001 at pp 21, 26, 28 and 29; *Port Elizabeth Municipality v Peoples Dialogue on Land and Shelter & Another,* (2001) 1 All SA 381 (ECD) at 390g; *Groengras Eiendomme (Pty) Ltd & Others v Elandsfontein Unlawful Occupants & Others*, 2002 (1) SA 125 (T) at p.133, 137, 139, 143).

Mr Le Roux submitted that PIE forms part of a trilogy of acts which were intended to give effect to the provisions of Section 26(3) of the Constitution which reads as follows:

> **"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."**

It was submitted that because the other two Acts dealt with use and occupation of land that involved a degree of continuity or permanence, PIE should be interpreted to include a similar requirement.

The Interim Protection of Informal Land Rights Act, No. 31 of 1996, has as its aim *"to provide for the temporary protection of certain rights to and interests in land which are not otherwise adequately protected by law, and to provide for matters connected therewith."*

The Act prohibits the denial of an informal right to land for a period which will lapse when the Minister so determines. An informal right defined to include an unlawful occupier who has had beneficial occupation of land for a continuous period of not less than five years prior to 31 December 1997. It was emphasised that the Act is intended to apply to the use and occupation of and access to land where there is a degree of continuity or permanence.

The Extension of Security of Tenure Act, No 62 of 1997 ("ESTA") aims to provide measures for the regulation of *inter alia* security of tenure in respect of certain land. Again the type of tenure that is protected has a degree of continuity or permanency.

In *Grootboom, supra*, para [22] the court held that when interpreting PIE, it must be read in conjunction with Section 26(3) of the Constitution and both the contextual setting as well as the social and historical context must be taken into account. The provisions of the two Acts, it was argued, are consistent with the use of the term "home" in Section 26(3) of the Constitution and a similar approach was needed when interpreting and applying PIE. However, the elements of continuity and permanence in the two Acts are to be found in their terms. PIE makes no such reference. In my view, PIE cannot simply be infected by the concepts which are included in the other

two Acts.

Mr Le Roux submitted that the aim of PIE was to give those who live in informal settlements procedural protection from arbitrary eviction and, not the effective deprivation or expropriation of ownership and possessory rights. Section 25(1) of the Constitution reads:

> **"No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property."**

The Supreme Court of Appeal has recently ruled that Section 4 of PIE requires two notices in respect of eviction proceedings. A notice of motion as prescribed by Rule 6 of the Rules of Court to be served in accordance with Rule 4 thereof and, in addition, a separate notice in terms of Section 4(2) of PIE. (See: *Cape Killarney Property Investments (Pty) Ltd v Fusile Mahamba & Ors*, 2001 (4) SA 1222 (SCA) *Mr Le Roux* characterises the effect of the SCA judgment as:

> **"Effectively [making] it impossible in law for any land-owner to evict an unlawful occupier from his/her land or home under a period of 14 days, (in practice this period is likely to become many weeks or months as a result of the logistics involved e.g. translations that have to be made, notice boards that have to be manufactured, etc.) and even then eviction is only possible after strict compliance with the provisions of the Act. In the cases of certain urgent matters which comply with Section 5 of the Act it is theoretically possible to evict under 14 days, but also only if there is compliance with that section."**

Turning to the meaning of the words used in the Act, it was submitted that:

> **"The definition of 'unlawful owner' is so wide that it embraces all occupiers who occupy without consent, regardless of whether occupation was taken forcibly, stealthily, or otherwise.**
>
> **This is not consistent with the type of occupation protected under Acts 31 of 1996 and 62 of 1997, nor is it consistent with the notion of *"home"* in Section 26(3) of the Constitution insofar as it reflects an intention of some degree of**

duration, continuity or permanence.

PIE therefore, on a literal interpretation, serves to protect much more than the unlawful occupation of land by way of informal settlement.

Effectively it overrides property rights entrenched in Section 25 of the Constitution and deprives or expropriates property and possessor rights which have to succumb to potentially deliberate and intentional illegal land grabs."

After pointing to a number of judgments in which the phrase '*unlawful occupier*' was given a restrictive interpretation, Mr *Le Roux* concluded his argument by submitting that:

"It is unthinkable that Parliament could have considered affording protection under PIE to deliberate criminal actions such as, e.g. the occupation of a house on land by armed robbers holding the inhabitants hostage.

If that is accepted as a matter of principle it is equally unthinkable that Parliament could have contemplated that PIE should protect deliberate and criminally motivated land grabbers who have the intention of holding the authorities to ransom in order to secure housing or the avoidance of waiting lists.

It is submitted that the intention of the legislature with PIE was clearly to afford procedural protection in the case of eviction proceedings against unlawful occupiers who had, at the time of the transitional negotiations and thereafter, been living in informal settlements and who had established themselves in such a way that their structures could be said to have become their homes - i.e. implying some degree of established settlement as opposed to a deliberate grab of land in terms of which a physical presence thereon was achieved."

The Supreme Court of Appeal handed down its judgment in *Ndlovu v Ngcobo; Bekker v Jika,* 2003 (1) SA 113, ten days before the hearing on the merits. This was after Applicant's counsel had filed their heads of argument. *Mr Le Roux*, acknowledged the judgment but sought to distinguish it on the basis that although '*squatters*' are referred to in all the judgments the findings are not applicable in a case of deliberate illegal occupation.

During the course of the hearing *Mr Le Roux* was asked by the Court to suggest a definition of a 'land grabber' to whom PIE would not apply so that such an occupier could be distinguished from other 'unlawful occupiers'. In other words what is the distinguishing factor that characterises a '*land-grabber*' and differentiates him from a squatter who has moved onto the land of another without consent of the owner.

Mr Le Roux was unable to furnish a definition. He did, however, seek to justify his stance by stating that the concept he was aiming at was an occupation of land that is "*designed in its intention or effect not only to be unlawful but also to enhance general lawlessness or public disorder and occurs by way of self-help*".

I cannot find any indication in PIE to justify the distinction which Mr Le Roux seeks to draw.

In my view, the decision in *Ndlovu* goes a long way to effectively answering the question: Does PIE apply here? And to reject the arguments advanced on Applicant's behalf.

It is quite apparent from the majority judgment as also the two dissenting judgments that the learned judges of appeal accepted without question that PIE applies to the eviction of squatters whom Harms JA defined as those who '*unlawfully took possession of land*'. Olivier JA referred to " *the situation where an 'informal settler' (a squatter) moves onto vacant land without any right to do so and without the consent of the landowner or his or her agent*". Nienaber JA spoke of "*squatters properly so called, ie homeless people who settle on publicly or privately owned land without legal title or permission to do so."* In my view there is no warrant for the exclusion of those whom *Mr Le Roux* describes as '*land grabbers'* from the concept of '*squatters*' as described by each of the learned Judges of Appeal.

Delivering the majority judgment, Harms JA, said that:

> **"[1] The question that arises is whether 'unlawful occupiers' are only those who unlawfully took possession of land (commonly referred to as squatters) or whether it includes persons who once had lawful possession but whose possession subsequently became unlawful."**

Focussing upon the proper interpretation of the phrase 'unlawful occupier' the learned Judge continued:

> **"[4] PIE defines an 'unlawful occupier' in s 1 to mean 'a person who occupies land without the express or tacit consent of the owner or person in charge, or without any other right in law to occupy such land, excluding a person who is an occupier in terms of the Extension of Security of Tenure Act, 1997, and excluding a person whose informal right to land, but for the provisions of this Act, would be protected by the provisions of the Interim Protection of Informal Land Rights Act 31 of 1996'. (Emphasis added.)**
>
> **[5] When the applications for eviction were launched the consent of the owner in the case of Ndlovu had lapsed and in the case of Bekker the occupier, who originally held qua owner, never had the consent of the present owner. Both are cases of holding over. The quoted definition is couched in the present tense. Consequently, at the time of the launch of the applications to evict, both these occupiers - according to the ordinary meaning of the provision - were 'unlawful occupiers' because they occupied the land without consent. By the very nature of things the definition had to be in the present tense because the question of eviction cannot arise in relation to someone who, at the time of the application, is a lawful occupier albeit that he had formerly been in unlawful possession. In other words, someone who took occupation without the necessary consent but afterwards obtained consent cannot be an unlawful occupier for the purposes of eviction. To exclude persons who hold over from the definition would require more than a mere change in tense and one would have to amend the definition to apply to 'a person who occupied and still occupies land without the express or tacit consent of the owner or person in charge, or without any other right in law to occupy such land'.**
>
> **[6] The first question is whether there are indicators in PIE as a whole that can justify such an emendation. *Mr Kuper*, for the landlords, did not suggest that there were any. *Mr Trengove*, who argued the case of the occupiers, submitted that everything in PIE in fact points in the opposite direction. First, he sought support for the ordinary meaning in the fact that occupiers protected by the Extension of Security of Tenure Act 62 of 1997 (ESTA) are by the quoted definition expressly excluded from the provisions of PIE. ESTA protects persons who, at some stage or another, had consent or some other right to**

occupy (basically) agricultural land. It would not have been necessary to exclude that class from PIE, he submitted, if PIE did not protect persons whose occupation, at a prior stage, had been lawful. The argument has some force but is not conclusive because persons protected by the provisions of the Interim Protection of Informal Land Rights Act 31 of 1996 are also excluded from PIE's protection. Those persons do not appear to be otherwise covered by the definition in PIE and their exclusion from PIE appears to be unnecessary and meaningless."

After considering further factors which informed the decision in *Absa Bank Ltd v Amod*, [1999] 2 All SA 423 (W) which held that PIE did not apply to '*holding over*' Harms JA concluded:

"[11] Since the factors discussed are essentially neutral, one is left with the ordinary meaning of the definition which means that (textually) PIE applies to all unlawful occupiers, irrespective of whether their possession was at an earlier stage lawful. *Mr Kuper*, as did other courts, relied on external factors that would indicate that Parliament could not have intended to cast the net so wide, and I proceed to consider them.

[12] It is apparent from the long title that PIE has some roots in PISA. PISA had its origin in the universal social phenomenon of urbanisation. Everywhere the landless poor flocked to urban areas in search of a better life. This population shift was a threat to the policy of racial segregation. PISA was to prevent and control illegal squatting on public or private land by criminalising squatting and by providing for a simplified eviction process. PIE, on the other hand, not only repealed PISA but in a sense also inverted it: squatting was decriminalised (subject to the Trespass Act 6 of 1959) and the eviction process was made subject to a number of onerous requirements, some necessary to comply with certain demands of the Bill of Rights, especially s 26(3) (housing) and s 34 (access to courts)."

In his dissent Olivier JA said that:

"[38] From the aforegoing provisions, it is abundantly clear that the concept of 'unlawful occupier' is of pivotal importance. PIE defines the term in s 1:

> **'(U)nlawful occupier" means a person who occupies land without the express or tacit consent of the owner or person in charge, or without any other right in law to occupy such land, excluding a person who is an occupier in terms of the Extension of Security of Tenure Act, 1997, and excluding a person whose informal right to land, but for the provisions of this Act, would be protected by the provisions of the Interim Protection of Informal Land Rights Act 31 of 1996.'**

Considering the meaning of the term '*unlawful occupier*' Olivier JA continued:

"C: The term 'unlawful occupier': the problem of its meaning:

[40] The definition of 'unlawful occupier' in PIE appears, on a first perusal, to be clear and unambiguous. But this appearance is illusory and deceptive, and Courts have struggled to fathom its correct meaning and in the process to demarcate the purview of PIE: to whom is it applicable and to which categories of property?

[41] The problem inherent in the expression 'unlawful occupier' is that it is latently capable of two expositions. The verb 'occupy' can legitimately be used in two senses, viz, firstly, 'to hold possession of . . . reside in; to stay, abide'; or, secondly, 'to take possession of (a place) by settling in it, or by conquest' (see The Shorter Oxford Dictionary sv 'occupy'). On the face of it, the words 'a person who occupies land without the express or tacit consent of the owner . . .' means anyone who now continues in occupation without the necessary consent irrespective of whether that person originally took occupation of the land with or without the necessary consent. But the words can also refer to a specific act, viz the taking of possession or occupation without the necessary consent.

[42] The Afrikaans text of PIE is the unofficial one and arguably favours the interpretation referring to a specific act. The term used for 'unlawful occupier' is 'onregmatige okkupeerder', which is defined as ''n persoon wat grond sonder die uitdruklike of stilswyende toestemming van die eienaar of persoon in beheer *beset*, of sonder enige ander wettige reg om sodanige grond te beset . . . ' (my emphasis).

Die *Woordeboek van die Afrikaanse Taal*, Deel 1 (P C Schooneess *et al*) explains 'beset' as follows:

> **'beset. 1. w. 1. In besit neem: Die pioniers het hul plase beset. 2. (mil.) Van troepe, van 'n garnisoen voorsien: 'n Vesting beset met 'n groot garnisoen. 3. (mil.) Inneem, bemeester: Die rante, die hoogtes beset. 4. In beslag neem: Al sy aande met lesse beset. 5. Volsit: Die voorste ry stoele, alle sitplekke beset. 6. Beklee: Hulle nakomelinge H het tot 1910 die troon beset. 7. Belê, aanbring op: 'n Kledingstuk met kant beset. 8. Beplant: 'n Pad met bome beset. 9. Ook besit. Bevrug, beswanger: Die merrie laat haar beset; vgl. BESIT.'**

(See also the *Verklarende Handwoordeboek van die Afrikaanse Taal, (HAT) sv 'beset'.)*

There is thus an indication, in the Afrikaans text, that PIE was intended to

apply to the unlawful occupation of land as a positive action, as in the case of squatters taking occupation of land, and not to apply to defaulting ex-tenants and ex-mortgagors who simply remain in unlawful occupation.

[43] The problem of ascertaining to which situations PIE applies is, however, not capable of a definite and final solution by a mere textual interpretation of the definition itself. The answer is to be found in broad, context-sensitive to PIE and its place in the constitutional and legislative framework of land tenure laws.

[44] There seems to be general agreement that PIE applies to the situation where an informal settler (a squatter) moves onto vacant land without any right to do so and without the consent of the landowner or his or her agent. There are thousands, if not millions, of such squatters in our country. They are usually unemployed, the poorest of the poor, and live with their families in self-erected tin, cardboard or wooden shacks."

I note that Olivier J considers that the term 'unlawful occupier' is capable of two expositions. An analysis of the two shows, however, that they both include squatters and, indeed, so-called *'land grabbers'*.

Nienaber JA who delivered a dissenting judgment had no issue with the proposition that PIE applies to squatters whom he defined. He differed with the majority solely on the issue as to whether PIE applied to cases of '*holding over*'. The learned Judge said:

"[100] I have had the benefit, after listening to argument of quality from counsel on both sides, of reading the judgments prepared by my Brothers Harms JA and Olivier JA respectively. There is, if I may I say so with respect, much to be admired in both judgments. Both deal in depth with the textual hash that is PIE (Act 19 of 1998) and with its contiguity to other enactments such as PISA (Act 52 of 1951), ESTA (Act 62 of 1997) and the Rental Housing Act (Act 50 of 1999), amongst others, in an effort to discern a pattern of meaning as to its true reach. What is evident from studying the two judgments in conjunction with divers others cited therein are, first, that the provisions of PIE unquestionably do apply to the occupation of land by squatters properly so called, ie homeless people who settle on publicly or privately owned land without legal title or permission to do so; and, secondly, that the solution to the further problem posed in this case (whether the terms of PIE extend to a different class of persons, ie those who once were but are no longer lawful

occupiers of the land) cannot unquestionably be abstracted from within the four corners of PIE itself or its juxtaposition to other antecedent or contiguous pieces of legislation."

Turning to the argument that the legislature could not have intended PIE to benefit what were described as '*deliberate land grabbers'* I find strong support for the rejection of that contention in the following remarks of Harms JA:

[16] ..... The Bill of Rights and social or remedial legislation often confer benefits on persons for whom they are not primarily intended. The law of unintended consequences sometimes takes its toll. There seems to be no reason in the general social and historical context of this country why the Legislature would have wished not to afford this vulnerable class the protection of PIE. Some may deem it unfortunate that the Legislature, somewhat imperceptibly and indirectly, disposed of common-law rights in promoting social rights. Others will point out that social rights do tend to impinge or impact upon common-law rights, sometimes dramatically."

As to the true effect of PIE and whether or not it impinges on the provisions of section 25(1) and (2) of the Constitution the majority in *Ndlovu* found that:

"**[17] The landlord's problem with the affluent tenant is not as oppressive as it seems at first. The latter will obviously be entitled to the somewhat cumbersome procedural advantages of PIE to the annoyance of the landlord. If the landlord with due haste proceeds to apply for eviction the provisions of s 4(6) would apply:**

> **'If an unlawful occupier has occupied the land in question for less than six months at the time when the proceedings are initiated, a court may grant an order for eviction if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances, including the rights and needs of the elderly, children, disabled persons and households headed by women.'**

If the landlord is a bit slower, s 4(7) would apply, but one may safely assume that the imagined affluent person would not wish to be relocated to vacant land possessed by a local authority and that this added consideration would not be apposite. The period of the occupation is calculated from the date the occupation becomes unlawful. The prescribed circumstances, namely the

rights and needs of the elderly, children, disabled persons and households headed by women, will not arise. What relevant circumstances would there otherwise be save that the applicant is the owner, that the lease has come to an end and that the tenant is holding over? The effect of PIE is not to expropriate the landowner and PIE cannot be used to expropriate someone indirectly and the landowner retains the protection of s 25 of the Bill of Rights. What PIE does is to delay or suspend the exercise of the landowner's full proprietary rights until a determination has been made whether it is just and equitable to evict the unlawful occupier and under what conditions. Simply put, that is what the procedural safeguards provided for in s 4 envisage.

[18] The court, in determining whether or not to grant an order or in determining the date on which the property has to be vacated (s 4(8)), has to exercise a discretion based upon what is just and equitable. The discretion is one in the wide and not the narrow sense (Cf: *Media Workers Association of South Africa and Others v Press Corporation of South Africa Ltd ('Perskor'),* 1992 (4) SA 791 (A) at 800, *Knox D'Arcy Ltd and Others v Jamieson and Others,* 1996 (4) SA 348 (A) at 360G - 362G). A court of first instance, consequently, does not have a free hand to do whatever it wishes to do and a Court of appeal is not hamstrung by the traditional grounds of whether the court exercised its discretion capriciously or upon a wrong principle, or that it did not bring its unbiased judgment to bear on the question, or that it acted without substantial reasons (*Ex parte Neethling and Others,* 1951 (4) SA 331 (A) at 335E, *Administrators, Estate Richards v Nichol and Another,* 1999 (1) SA 551 (SCA) at 561C - F).

[19] Another material consideration is that of the evidential onus. Provided the procedural requirements have been met, the owner is entitled to approach the court on the basis of ownership and the respondent's unlawful occupation. Unless the occupier opposes and discloses circumstances relevant to the eviction order, the owner, in principle, will be entitled to an order for eviction. Relevant circumstances are nearly without fail facts within the exclusive knowledge of the occupier and it cannot be expected of an owner to negative in advance facts not known to him and not in issue between the parties. Whether the ultimate onus will be on the owner or the occupier we need not now decide."

There can be no doubt that the shelters erected by Respondents are their homes. Indeed, their only homes. They reside with their families in their shelters and have nowhere else to live. They have entered into agreements with their neighbours who reside in houses adjoining the park to allow them to use their potable water and toilet facilities.

A "*home*" is defined as a "*dwelling-place; house, abode; the fixed residence of a family or household; one's own house; the dwelling in which one habitually lives*." (See: The Shorter Oxford English Dictionary, 3rd ed. 1973). Respondents can, on the evidence, justifiably claim that they have established their homes in the park and that they had already done so when the application was instituted.

Applicant's approach in relation to the interpretation of "*unlawful occupier*" can, in my view, and not unkindly, be characterised as "*... placing upon it a meaning of which it is not reasonably capable, in order to to give effect to what [it] may think to be the policy or object of the particular measure*". (See: Innes CJ in *Dadoo Ltd and Others v Krugersdorp Municipality,* 1920 AD 530 at 543 - recently adopted in *Standard Bank Investment Corporation Ltd v Competition Commission and Others: Liberty Life Association of Africa Ltd v Competition Commission and Others,* 2000 (2) SA 797 (SCA) para [16]).

In my view both the plain language and the purpose of PIE are irreconcilable with the notion that PIE is not applicable to the circumstances of this case. Whether you characterise Respondents as '*squatters*' or, indeed as *Mr Le Roux* would have it, as '*land grabbers'* they fall four square within the terms of the definition of '*unlawful occupier*' and I find no warrant for depriving them of the protection for which the legislature enacted PIE.

Can applicant rely upon any of the common law remedies?

In *Ndlovu, supra*, Nienaber and Olivier JJA dissented as to the reach of PIE. I do not detect any dissent as to the effects of PIE where it is applicable.

Olivier JA analysed the effect of PIE as follows:

"[47] But, in those cases where PIE is admittedly applicable, for example in the case of squatters, the common law has been changed drastically, both as to procedure and to substance. No longer is there in such cases a simple *rei vindicatio* procedure available to the owner. Section 4 of PIE introduces a unique and peremptory procedure. Section 4(2) requires that notice of the eviction proceedings be given to the unlawful occupier and the municipality having jurisdiction, at least 14 days before the hearing of those proceedings. The juxtaposition of this procedure and that prescribed by the Court Rules is opaque, and has already given rise to an appeal to this Court - vide *Cape Killarney Property Investments (Pty) Ltd v Mahamba and Others* 2001 (4) SA 1222 (SCA). In terms of that judgment, both the ordinary court procedures and the procedure under PIE must be followed. Furthermore, it seems that a further ex parte application is necessary in order to obtain the court's directions for serving the notice required by s 4(2). Be that as it may, it is clear that if PIE is applicable the procedure for the eviction of an unlawful occupier is cumbersome, costly and time-consuming.

[48] The important impact of PIE, however, is to be found in the substantive provisions of s 4(6), (7) and (8). These provisions turn the common law on its head and they draw a thick black line through *Graham v Ridley* (supra) and *Chetty v Naidoo (supra)* as far as proceedings under PIE are concerned, ie if PIE is applicable. No longer does the owner have an absolute right to evict the unwanted and unlawful occupier. The court is now given a discretion to evict or to allow the occupier to remain in possession. The discretion is given in wide and open terms - is it, in the opinion of the court, 'just and equitable' to grant an eviction order? The circumstances to be taken into account by the court in forming such an opinion are also wide-ranging - all the relevant circumstances must be considered, including the rights of the elderly, children, disabled persons and households headed by women. If the period of occupation exceeds six months, further considerations must also be taken into account, viz 'whether land has been made available or can reasonably be made available by a municipality or other organ of State or another land owner for the relocation of the unlawful occupier'.

[49] Even if it is accepted, as it must be, that the discretion given to the particular judicial officer hearing the case will be exercised judicially, the result of the conditions and qualifications contained in ss 4(6), (7) and (8) may, in a particular case, be extremely injurious to the landowner. Suppose that s 4(7) is applicable and no other land can be found to accommodate the widow and her family. The consequence is that they must remain on the property, obviously to the detriment of the owner who will not be able to use, sell or lease the property. And so examples of hardship to the landowner can be multiplied.

[50] It is clear that PIE created a new perspective on the age-old conflict of interests between the traditional rights of a landowner and the statutory protection of the unlawful occupier. No surprise, therefore, that the landowners would energetically endeavour to avoid the application of PIE to their eviction

proceedings and that the ex-tenants holding over, ex-mortgagors and former precarists would with equal vigour contend for its application."

Section 4(1) of PIE states:

"Notwithstanding anything to the contrary contained in any law or the common law, the provisions of this section apply to proceedings by the owner or person in charge of land for the eviction of an unlawful occupier".

The Supreme Court of Appeal has held that the provisions of section 4(1) and the sub-sections that follow it are peremptory:

"Section 4(1) makes it clear that the provisions of the sub-section that follow are peremptory. It also defines the "proceedings" to which the section applies, namely proceedings for the eviction of an unlawful occupier."

(See: *Cape Killarney, supra*, para [11]).

To hold that the common law remedies available in our law for the eviction of unlawful occupiers exist alongside the remedies provided for in PIE, at the option of the Applicant, or at all, would fundamentally undermine the overall purpose of PIE and particularly the purpose of the protections provided for therein.
The idea that an owner can avoid the peremptory provisions of PIE by electing to use the common law remedies to evict an occupier from land must be rejected.

Does the reach of PIE extend to the *mandament van spolie?*

Applicant submitted that the *mandament van spolie* was available to it because that remedy did not to seek the eviction of Respondents but was designed to re-establish the *status ante quo* prior to the court entering into the determination as to whether or not to evict Respondents.

In my opinion the framing of an order in terms which refer to "restoring possession *ante omnia*" to the person from whom it was despoiled is simply another way of effectively evicting the spoliator. To permit an applicant to use the mandament to evict a person who has established a home on the land and who would otherwise qualify as an '*unlawful occupier*' would, as in the case of the other common law remedies, overlook the wording and purpose of PIE and would permit the statute to be undermined by a simple device.

As in the case of other common law remedies which effectively evict an '*unlawful occupier*', I find that the *mandament van spolie* is not available where PIE applies.

Urgent relief in terms of section 5 of PIE

In paragraph 2.5 of the notice of motion, and in the event that prayers 2.1 to 2.4 fail, Applicant seeks an order evicting Respondents pending the outcome of proceedings to be instituted for a final order. The applicant relies on sec 5 of PIE in this regard.

The legislature did not intend that occupiers would be lightly deprived of the protection against arbitrary eviction. The circumstances under which an urgent interim eviction order may be granted are therefore closely circumscribed. These circumstances are, in effect, jurisdictional prerequisites for the consideration of the merits of a sec 5 order.

In terms of section 5(1) PIE a court may grant an urgent interim eviction order against an unlawful occupier *only* if it is satisfied that:

(i) the proceedings are urgent; (Section 5(1))

(ii) there is a real and imminent danger of substantial injury or damage to any person or property if the unlawful occupier is not forthwith evicted from the land; (Section 5(1)(a))

(iii) the balance of hardship favours the granting of the order; (Section 5(1)(b)) and

(iv) there is no other effective remedy available to the applicant. (Section 5(1)(c))

It is the Applicant's case in support of prayer 2.5 is that:

It is the owner of the land and has at all material times been in possession thereof;

It has been despoiled of its possession;

It happened stealthily and forcibly;

Its ownership rights are violated and effectively nullified;

A precedent is being created;

If the precedent is not restored forthwith, it has the extremely serious potential of encouraging others to do the same;

That is in fact happening at the moment - numerous shacks have been added since this application was brought;

Unlawful land grabbing has become a costly and time consuming reality for the Applicant, particularly where its law enforcement officers have been rendered impotent as occurred in the present instance;

Applicant has found that unless immediate and effective legal process is utilised it leads to further invasions;

At the moment the land cannot fulfil its town planning purpose of a public park and playground for the inhabitants of the surrounding area;

There are no municipal services available at the property such as sanitation, potable water and electricity;

It is the Applicant's experience that where people move onto land which does not have such facilities, a health risk ensues;

The lack of potable water will result in the rife spread of communicable diseases such as cholera, typhoid, shingellosis and infective hepatitis;

Poor sanitation or the lack thereof results in the spreading of parasites, for examples, helminth worms;

It will also contaminate nearby water sources including groundwater due to the high water table in the area;

The park has inadequate litter facilities - this will result in the uncontrollable breeding of vectors such as rodents, flies and cockroaches;

This will further result in the spreading of diseases;

The flimsy structures also pose a health risk as this exacerbates the incidence of respiratory diseases such as tuberculoses and asthma;

Several structures are poorly constructed and constitute a risk of injury to its occupants and others should the structure collapse;

There is no electrical supply;

There is a genuine concern, based on experience in similar situations, that the Respondents will unlawfully tap into the electrical supplies;

That will expose the Respondents and others to the risk of electrocution;

If the Respondents' conduct should receive judicial licence other public open spaces and road reserves are likely to suffer a similar fate;

The Applicant has firsthand experience of its property being invaded and encounters enormous difficulty in having the unlawful occupiers removed either through negotiation or court proceedings - this self-evidently places an enormous burden on the Applicant's manpower who are forced to concentrate on the preparation of court process rather than performing their municipal functions and duties. Moreover, an additional and often unnecessary financial burden is placed upon the Applicant as proceedings for eviction are costly. Very often the Respondent resile behind their indigence and the Applicant is unable to enforce a costs order;

The Applicant has limited financial resources and its already tight budget is now seriously being eroded by its ongoing efforts to control the ongoing land invasions;The Applicant does not have the manpower nor is it sufficiently equipped to prevent the invasion by land in large numbers;

There is in the circumstances a real and imminent danger of substantial injury to persons and property;

No action will probably lead to further encounters which may become violent and physical as a result of other invasions;

All other parks and/or public open spaces are potentially in jeopardy - there is a potential, if the situation is not restored, of massive invasions in numerous other areas particularly where

invasions are driven by organisations using people as pawns in the process. United Front Civic Organisation's role in causing the park to be occupied cannot be ignored;

Further invasions may have devastating consequences for proper town planning, health laws and management thereof and the maintenance of law and order;

On the other hand all the unlawful occupiers had a place where they stayed prior to the invasion - there are no convincing reasons why they cannot go back. Many of the Respondents are employed;

Applicant submits that, in the premises the requisites of Section 5 of PIE are present and the Respondents should be evicted.

It is necessary to consider whether Applicant has satisfied each of the four requirements for an order in terms of section 5 of PIE.

Urgency

Urgent proceedings before the High Court are regulated by the common law and the terms of Uniform Rule 6(12). An applicant is required to: (i) set out explicitly the circumstances which render the matter urgent and (ii) state the reasons why he or she would not be afforded substantial redress at a hearing in due course.

The test for urgency is flexible - the degree of relaxation of the normal procedures and time limits permitted will depend upon the exigency of the case. (See: *Luna*

Meubel Vervaardigers (Edms) Bpk v Makin and another (t/a Makin's Furniture Manufacturers), 1977 (4) SA 135 (W) 137E).

The "*urgency*" requirement of Section 5(1) is no different. It allows for a degree of flexibility. The court would, in my view be entitled to hear a matter brought in terms of section 5 on an urgent basis after considering the urgency and and implementing appropriate procedural steps to enable the respondents to be properly heard.

In this case, the proceedings were launched on an urgent basis on 15 October 2001. On 8 November 2001 the Court ordered the filing of affidavits according to an agreed timetable and postponed the matter for hearing on 28 November 2001. Implicit in the order is a recognition that the matter was sufficiently urgent so as to be accorded preference on the court roll.

It was on 28 November 2001 that the issue of the need to join the Minister of Housing arose and the point was taken that Applicant had not properly authorised the proceedings.

The issue of urgency accordingly fell away and although Applicant thereafter professed to seek final relief it did not abandon prayer 2.5. On the contrary it pursued it.

Real and imminent danger of substantial injury if respondents not evicted forthwith.

In order to justify the grant of an urgent interim eviction order, there must be a real and imminent danger of substantial injury to a person or damage to property which will result if the respondents are not evicted forthwith.

To the extent that disputes of fact exist on the papers, the approach to be adopted in determining those disputes is that set out in the well known judgment in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*, 1984(3) SA 623 (A) where (at p.634H - 635B) Corbett JA (as he then was) held that:

> **"Where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. The power of the Court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances the denial by the respondent of the facts alleged by the applicant may not be such as to raise a real genuine or bona fide dispute of fact"**

Applicant emphasises the following considerations in support of its contention that a real and imminent danger of substantial injury to persons and property exists:

> **"The occupants' health is at stake and no action will probably lead to further encounters which may become violent and physical as a result of other invasions. The park's invasion constitutes a serious violation of the Applicant's property rights which potentially places all other public parks owned by the Applicant or under the Applicant's control in jeopardy. The hardships following the unlawful invasion of the park if not restored, potentially include massive invasions in numerous other areas, including public open areas. It may have devastating consequences for proper town planning, health and the maintenance of law and order."**

(See: Applicant's founding affidavit - per Irwin Robert Robson, paragraph 74)

The alleged health risks to the occupants, about which Robson speculates in the founding affidavit (paragraphs 71.4 ('*where people move onto land which does not have such facilities, a health risk usually ensues*') and 71.5 ('*inadequate litter facilities ... will result in the uncontrollable breeding of vectors such as rodents, flies and cockroaches and this will further result in the spreading of diseases*') remain speculation and relate, at best, to a potential risk. As such, they do not constitute a

danger which is sufficiently imminent, even if it is accepted that it is real.

The health risks relied upon by Applicant are, in any event, denied and disputed by Respondents who testify that arrangements are in place for the residents on the park to utilise the toilet facilities and drinking water resources at houses adjoining the park. Respondent also organised a system for the regular removal of refuse and each home is equipped with a refuse bin.

The further allegations made in Applicant's founding affidavit concerning '*potential jeopardy*' to other public open areas, potential '*massive invasions in numerous other areas*' and *'devastating consequences for proper town planning, health and the maintenance of law and order*' constitute little more than unsubstantiated speculation which again does not satisfy the stringent criteria established in sec 5(1)(a) of the Act. Again, even if the danger of substantial injury is real there is no evidence from which to infer that it is imminent rather than a short to medium term risk.

The danger must be '*imminent*' - that is, threatening to happen soon - and of a kind that the anticipated injury or damage will result *'if the unlawful occupier is not evicted forthwith'*.

"*Forthwith*" means, *"immediately, at once, without delay or interval*" (See: The Shorter Oxford English Dictionary, *supra*)

To pass muster, the test demands a positive answer to the question as to whether the anticipated injury is such that it will be prevented by an eviction 'forthwith'. (Cf: the factual circumstances in *Groengras Eiendomme, supra*)

Applicant has failed make out a case as required to satisfy the requirements of

section 5(1)(a) PIE.

Balance of hardship

Section 5(1)(b) requires the weighing up of the likely hardship to the owner or any other affected person if an order for eviction is not granted, against the likely hardship to the occupiers if such an order is made. The term '*hardship*' is used in preference to the familiar weighing of the balance of convenience. '*Hardship*', in my view, connotes a degree of suffering and privation and indicates a state of affairs more weighty than '*convenience*'. Only matters of hardship should be weighed, not matters of convenience.

Applicant has failed to point to any hardship that it or anyone else will suffer if the application for urgent interim relief is refused. In contrast Respondents almost without exception, are in dire need of housing or shelter and, they and their families will be exposed to grave hardship if evicted from the property.

The position of Fifth and Sixth Respondents is illustrative. Sixth Respondent says that twelve years ago, her husband applied to Applicant for a house. She explains that before they moved to the park, she, her husband and their three young children lived in one room in the home of her husband's mother. Her mother-in-law, her father-in-law and their youngest child slept in the dining room. Two brothers-in law, and their wives and children, also lived in the house. In other words, four families with children lived in this one house, consisting of two bedrooms, a kitchen (which is too small to accommodate anyone) and a lounge. The situation became intolerable for her mother-in-law, who suffers from a heart ailment and sugar diabetes. She asked Fifth and Sixth Respondents to leave the house, which they did. They moved to the park. Sixth Respondent does not know where the family will go if they are

evicted. She and her children will suffer severe hardship if they are exposed to the elements in an unsafe environment.

Applicant does not deal with these circumstances at all. Its only answer is to say that Fifth and Sixth Respondents have been on the waiting list since April 1991, ie for almost eleven years. Applicant claims that they were offered a house in Delft Central, but 'did not accept the offer timeously'.

A proper analysis of the evidence, however, reveals that it is incorrect that Fifth Respondent was offered a house at Delft. The letter relied upon explicitly states that it *'does not guarantee that you will be assisted in the Delft'*, but merely enquires whether the recipient would like to be allocated a house in Delft.

Fifth Respondent did respond that he would like a house in Delft, but did not do so 'timeously', as a result of which it appears that his name was removed from the waiting list. It is unclear whether the Fifth Respondent will ever be allocated a house, or whether he must now make a new application, join the queue afresh and wait for many years.

The accounts of the other Respondents are not all as impelling as that of Fifth and Sixth Respondents. It remains clear that all of them, if evicted, will be compelled to return either to living in 'the bush', or to some other unsatisfactory, over-crowded and unhealthy conditions in which they previously lived.

I cannot find that the likely hardship to Applicant if an urgent eviction order were not to be granted, is greater than the likely hardship which Respondents will suffer if the order is granted. The balance of hardship overwhelmingly favours Respondents.

No other effective remedy available

Respondents submitted that the application is patently not a matter of such dire urgency that the eviction of the respondents is required "*forthwith*". Indeed, Applicant did not even ask for this in its Notice of Motion. Respondents therefore argue that if Applicant can establish that it is just and equitable for an eviction order to be granted, its proper remedy - and a perfectly adequate remedy - is to institute proceedings in terms of the ordinary procedure of sec 4 of the Act.

Applicant responds that inherent in the use of sections 4 or 6 is a delay of 14 days for notice plus the time taken to obtain the court's directions for service and the time needed to prepare and translate notices and, probably, to erect notice boards.

It seems to me, however, that to advance sections 4 or 6 of PIE as an effective alternative remedy is begging the question. In every case where urgent relief is sought, the provisions of section 4 and 6 will be available as an alternative remedy.

The effective remedy as required for section 5(1)(c) should offer appropriate and adequate relief. If there is a real and imminent danger as contemplated by section 5(1)(b) then the alternative relief is only an effective remedy if it provides an appropriate means of averting the dangers in question.

Had Applicant demonstrated the necessary imminent danger I would have held in its favour on the issue of there being no other effective remedy.

In regard to Applicant quest for speed, I note that the delays in this case have been caused primarily by Applicant's choice of remedies and failure to properly authorise the proceedings. The course chosen by Applicant has led to an unnecessary, and I

hesitate to add, futile degree of complexity motivated by an attempt to evade PIE. If Applicant had followed the normal procedures in PIE - and, of course, if it had properly authorised the proceedings *ab initio* - this matter could already have been finalised under the ordinary procedures of PIE.

Is PIE unconstitutional?

The final arrow in Mr Le Roux's quiver was aimed at having PIE declared unconstitutional. In prayer 2.8 claims:

> **"an order declaring that the following provision of the Act is unconstitutional and invalid in that it constitutes an infringement of the fundamental rights of property owners: The definition of *"unlawful occupier"* in that it fails to prescribe the period of occupation and to qualify occupation, thereby including:**
>
> **2.8.1 Occupation taken stealthily without the knowledge of the owner or person in charge;**
>
> **2.8.2 Occupation taken forcibly or violently, notwithstanding objection or resistance thereto by the owner or person in charge;**
>
> **2.8.3 Occupation falling outside the ambit of Section 5.1 of the Act which is then adjudicated upon in terms of Section 4 of the Act, resulting in ongoing and protracted prejudice to the owner or person in charge."**

Applicant relies upon the provisions of section 25 of the Constitution which provides that:

> **"(1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.**
>
> **(2) Property may be expropriated only in terms of law of general application -**
>
> **(a) for a public purpose or in the public interest; and**
>
> **(b) subject to compensation, the amount of which and the time and**

manner of payment of which have either been agreed to by those affected or decided or approved by a court."

The constitutionality of the definition of '*unlawful occupier*' must depend upon its significance and relevance in the broader scheme of the statute.

The purposes of PIE: procedural and substantive protection against eviction:

PIE *'has its roots inter alia in s 26(3) of the Constitution*'. (See: *Cape Killarney Property Investments, supra,* para. [21]).

The preamble demonstrates that through PIE, the legislature has sought to balance two rights which are in tension with one another. The right, on the one hand, not to be evicted from one's home without an order of court, *'made after considering all the relevant circumstances'* (section 26(3)) and, on the other, right to property (sec 25).

The Act affords unlawful occupiers protection in proceedings for their eviction. The protection is both procedural and substantive. (See: *Ndlovu, supra).*

The *procedural* protection is governed by ss 4(2), 4(4), 4(5), 5 and 6(6). The purpose and effect of these provisions is to afford respondents in eviction proceedings a better opportunity to put their case before the court than they would otherwise have had under the ordinary rules of court. (See: *Cape Killarney Property Investments, supra,* para. [21]).

The *substantive* protection relates to the circumstances in which a court may grant an eviction order, and the terms of the eviction order if such order is made Sections 4(6), 4(7), 6(1) and 6(3) provide in effect that a court may only grant an eviction order if it is of the opinion that it would be "*just and equitable"* to do so. In making that

determination, the court is required to consider "*all the relevant circumstances"* including, but not limited to, those specified in these sections.

Sections 4(8), 4(9) and 4(12) in effect vest the court with a discretion when it makes an eviction order, to regulate the date and terms of its implementation. It is to be guided in the exercise of this discretion by what is "*just and equitable"* and "*reasonable*" in the circumstances of the case. PIE mandates the courts is to ensure that justice and equity prevail. The common law is accordingly ameliorated in those cases where it would have yielded a result that would in all the circumstances not have been just and equitable.

The structure of the property rights in section 25 of the Constitution

The nature of the property rights protected by the Constitution has been described as follows by the Constitutional Court:

> **"The subsections ... must not be construed in isolation, but in the context of the other provisions of section 25 and their historical context, and indeed in the context of the Constitution as a whole.... under the 1996 Constitution the protection of property as an individual right is not absolute but subject to societal considerations"**

(See: *First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services* 2002 (7) BCLR 702 (CC) at [49]).

The Constitution draws a distinction between '*deprivation*' and '*expropriation*'. Expropriation is a form or species of deprivation of property - in mathematical terms, it is a subset of deprivation. Section 25(1) sets out the requirements for a valid deprivation. In those cases where the deprivation constitutes an expropriation, the further requirements of sec 25(2) must be met. (See: *Harksen v Lane* 1998 (1) SA

300 (CC) para 32 which deals with section 28 of the interim Constitution, which was identical in its structure to the relevant parts of sec 25 of the 1996 Constitution).

The meaning of 'arbitrary' deprivation

It must be accepted that the protections created by PIE do, indeed, provide for or permit the deprivation of certain property rights, to the extent that:

1. The *procedural* protection obliges land-owners to tolerate the presence on their land of unlawful occupiers, until the procedures required for an application to Court have been complied with.

1. the *substantive* protection obliges land-owners to tolerate the presence on their land of unlawful occupiers, to the extent determined by the Court.

These deprivations are, however, plainly in terms of a law of general application - the statute applies in respect of all land throughout the Republic (section 2).

The constitutional question is whether the deprivations are *arbitrary*. The meaning of this term has been analysed by the Constitutional Court in *First National Bank of SA Limited t/a Wesbank, supra* where the following was said by Ackermann J and concurred in by the whole court:

> **"[65] In its context "arbitrary", as used in section 25, is not limited to non-rational deprivations, in the sense of there being no rational connection between means and ends. It refers to a wider concept and a broader controlling principle that is more demanding than an enquiry into mere rationality. At the same time it is a narrower and less intrusive concept than**

that of the proportionality evaluation required by the limitation provisions of section 36. This is so because the standard set in section 36 is "reasonableness" and "justifiability", whilst the standard set in section 25 is "arbitrariness". This distinction must be kept in mind when interpreting and applying the two sections.

[67] It is important in every case in which section 25(1) is in issue to have regard to the legislative context to which the prohibition against "arbitrary" deprivation has to be applied; and also to the nature and extent of the deprivation. In certain circumstances the legislative deprivation might be such that no more than a rational connection between means and ends would be required, while in others the ends would have to be more compelling to prevent the deprivation from being arbitrary.

[99] That the word "arbitrary" can grammatically have such a substantive content is reflected in the Oxford English Dictionary definition of "in an arbitrary manner" which includes "without sufficient reason". The standard set in section 25(1) is "arbitrary" and not, as in section 36(1) of the Constitution, "reasonable and justifiable".

[100] Having regard to what has gone before, it is concluded that a deprivation of property is "arbitrary" as meant by section 25 when the "law" referred to in section 25(1) does not provide sufficient reason for the particular deprivation in question or is procedurally unfair. Sufficient reason is to be established as follows:

(a) It is to be determined by evaluating the relationship between means employed, namely the deprivation in question, and ends sought to be achieved, namely the purpose of the law in question.

(b) A complexity of relationships has to be considered.

(c) In evaluating the deprivation in question, regard must be had to the relationship between the purpose for the deprivation and the person whose property is affected.

(d) In addition, regard must be had to the relationship between the purpose of the deprivation and the nature of the property as well as the extent of the deprivation in respect of such property.

(e) Generally speaking, where the property in question is ownership of land or a corporeal moveable, a more compelling purpose will have to be established in order for the depriving law to constitute sufficient reason for the deprivation, than in the case when the property is something different, and the property right something less extensive. This judgment is not concerned at all

with incorporeal property.

(f) Generally speaking, when the deprivation in question embraces all the incidents of ownership, the purpose for the deprivation will have to be more compelling than when the deprivation embraces only some incidents of ownership and those incidents only partially.

(g) Depending on such interplay between variable means and ends, the nature of the property in question and the extent of its deprivation, there may be circumstances when sufficient reason is established by, in effect, no more than a mere rational relationship between means and ends; in others this might only be established by a proportionality evaluation closer to that required by section 36(1) of the Constitution.

(h) Whether there is sufficient reason to warrant the deprivation is a matter to be decided on all the relevant facts of each particular case, always bearing in mind that the enquiry is concerned with "arbitrary" in relation to the deprivation of property under section 25."

Does the procedural protection in PIE cause arbitrary deprivation?

Section 26(3) of the Constitution itself obliges land-owners to tolerate the presence on their land of unlawful occupiers, by prohibiting evictions *'without an order of court'*. This necessarily requires land-owners to follow the procedures set out in the rules of court before they can obtain legal authority to evict the unlawful occupiers.

The rules of court are designed to ensure that parties to a *lis* have notice of the dispute, and an adequate opportunity to present their case. The rules recognise the need for courts to permit deviations from those procedures in cases of urgency.

The purpose of the procedural requirements of PIE is:

" ...'clearly to afford the respondents in eviction proceedings a better opportunity than they would have under the rules to put all the circumstances

that they allege to be relevant before the court."

(See: *Cape Killarney Property Investments, supra,* at para [21]).

This is plainly a legitimate governmental purpose and the deprivation is well designed for that purpose. There is a very direct and rational relationship between the means (*additional notice*) and the end (a *better opportunity to put one's case*). Special provision is made, under the control of the court, for cases of urgency where deviation from the usual statutory procedure is warranted. The deprivation is limited in extent: it is limited to the time reasonably necessary to enable the occupier to prepare a defence. It affects only one incident of ownership, ie possession, and that only for a limited period. Protecting people's homes is itself a valid constitutional purpose, and one of the 'societal considerations' to which property rights are subject. The consequences of eviction can be calamitous. An order for the eviction of people from their home "*may and in most cases will, seriously affect the lives of the person or persons concerned"* and that "*[s]uch an order should not therefore be made without the fullest enquiry"*. (See: *S v Govender* 1986 (3) SA 969 (T) 971F to G).

As noted, PIE makes special provision in section 5 for cases of urgency. It is the Court that determines whether the urgency is such that deviation from the sec 4 procedures is justified.

There is always room for debate as to whether the procedural requirements could or should have been drafted differently. That is, however, essentially matter for political decision.

Having regard to all the circumstances I am of the opinion that the procedural protection in PIE is not without '*sufficient reason*'. The procedural requirements of

the PIE are accordingly not *'arbitrary'*.

Does the substantive protection in PIE cause arbitrary deprivation?

There is, in the final analysis, only one test under PIE for determining whether unlawful occupiers are to be evicted (except in the case of urgent proceedings under section 5). That test is whether the eviction would be '*just and equitable*'. (Sections 4(6), 4(7), 6(1)).

By setting the requirement of justice and equity as the threshold for eviction, PIE seeks to do no more than to pursue that to which the law should in any event always aspire.

In deciding whether eviction would be just and equitable, the court is required to consider "*all the relevant circumstances"*. These include, but are not limited to, the factors specified in these sections. The weight to be afforded to those circumstances; the determination of such further circumstances as might be relevant and the weight to be afforded to them as also the balance ultimately struck, are matters left entirely to the judgment and discretion of the court.

Whether or not an eviction will take place is therefore determined by a court, acting in terms of a statute which gives it an equitable discretion to make that decision, after considering all the relevant circumstances.

It is, in my view, difficult to conceive of what is *'arbitrary'* about this. It is the very antithesis of arbitrariness. It permits a court to identify and weigh all relevant factors, to give each of them appropriate weight, and then to decide what justice and equity require.

An underlying fallacy in the approach advanced by Applicant is that it must rest upon the contention that where an application for eviction is refused, it is PIE which deprives owners of the use of their land, thus arbitrarily depriving them of their property. But it is not the statute which does that - it is an independent court, exercising a judicial discretion, and after having had regard to all relevant circumstances. The substantive provisions of PIE cannot, in my opinion, be characterised as *'arbitrary'*. In order to succeed, Applicant would need to demonstrate that it is inherently and inevitably arbitrary to refuse an eviction order (or to permit a court to refuse an eviction order), whatever the circumstances. This is plainly not the case.

The question is not whether a court might in a particular case act without adequate regard to all of the rights and interests involved, including the property rights of the owner. The question is whether PIE *obliges* the court to do so. Again, the words of Ackermann J, this time in *S v Dzukuda and others; S v Tshilo*, 2000 (11) BCLR (CC) 1252 para [37] are apposite.

> **"The Constitution requires that judicial officers read legislation, where possible, in ways which give effect to its fundamental values. Consistently with this, when the constitutionality of legislation is in issue, they are under a duty to examine the objects and purport of an Act and to read the provisions of the legislation, so far as is possible, in conformity with the Constitution.**
>
> **The fact that statutory provisions ... are general in terms and contain no express limitations as to their application, does not mean that they are to be construed as permitting anything not expressly excluded. On the contrary, such provisions must be applied in conformity with the Bill of Rights.**
>
> **If such provisions, properly construed, compel the presiding officer (judicial or otherwise) to act in a way which would infringe any of the examinee's constitutional rights, then the constitutionality of such provisions would properly be in issue....**
>
> **The Court is not required to consider a multitude of questions relating to**

hypothetical decisions which may (not must) be made in applying such provisions, or the question whether such rulings or decisions would or might infringe any of the examinee's constitutional rights."

Where a court makes an order which is inconsistent with the Constitution, an aggrieved party will have his or her remedies. But a court reviewing the validity of legislation ought not to assume that courts will act in this manner, when the legislation does not require them to do so. This principle applies to the discretion given to the court to decide both whether an eviction order should be granted, and if so, to what would be a *'just and equitable'* date upon which the eviction should take place.

In regard to the determination of the date of eviction, PIE merely confirms and codifies a discretion that the courts have frequently exercised at common law. (See: *Voortrekker Pers v Rautenbach*, 1947 (2) SA 47 (A) 50; *Lovius and Shtein v Sussman*, 1947 (2) SA 241 (O) 243; *Potgieter v Van der Merwe,* 1949 (1) SA 361 (A) 374; *Van Reenen v Kruger*, 1949 (4) SA 27 (W) 29; *Palabora Mining Co v Coetzer,* 1993 (3) SA 306 (T) 310J to 311B).

The High Court is already empowered to suspend the operation of its orders. (Uniform Rule 45A). PIE provides guidance as to how this discretion should be exercised in matters involving the eviction of 'unlawful occupants' from their homes.

In my view, PIE neither compels nor authorises any 'arbitrary' deprivation of property rights. The substantive decision is made by a court, which exercises an equitable discretion, and which must do so in a manner which has regard to all of the constitutional rights which may be involved.

Does the Act bring about expropriation?

In *Harksen v Lane*, 1998 (1) SA 300 at p. 315, Goldstone J observes that:

> **"[32] The word "expropriate" is generally used in our law to describe the process whereby a public authority takes property (usually immovable) for a public purpose and usually against payment of compensation".**

In *Beckenstrater v Sand River Irrigation Board*, 1964 (4) SA 510 (T) at p.515 A-C, Trollip J held that:

> **"[T]he ordinary meaning of "expropriate" is "to dispossess of ownership, to deprive of property" ...; but in statutory provisions ..., it is generally used in a wider sense as meaning not only dispossession or deprivation but also appropriation by the expropriator of the particular right, and abatement or extinction, as the case may be, of any other existing right held by another which is inconsistent with the appropriated right."**

What PIE does, is to *regulate* the *exercise* of property rights. It is similar for example to rent control legislation and laws of a similar kind, which limit a landowner's exercise of his or her ownership rights, and which may compel him or her to tolerate occupation of the land by a person whom he or she wishes to evict. Analogous too, are building regulations which restrict or limit the development of immovable property. Laws of this kind are commonly held to create a deprivation, but not an expropriation. (See: *Thakur Baksa Singh v United Provinces,* 1946 AC 327; and the cases cited by Budlender '*The Constitutional Protection of Property Rights'* in Budlender Latsky and Roux (eds) *Juta's New Land Law* 1-17 in footnote 1).

I find, accordingly, that the provisions of PIE do not result in the expropriation of land, and nor does it authorise expropriation, as that term is properly understood.

If a court were to make an order which amounted to an expropriation which was inconsistent with the Constitution, that order would be liable to be set aside on appeal. PIE does not, on any basis, *compel* a court to order expropriations which are

inconsistent with the Constitution. The Act must, as pointed out in *Dzukuda's case, op cit*, be interpreted in a manner consistent with the Constitution. If in a particular case this does not happen, and an order which is inconsistent with the Constitution is made, then it is that order which is liable to attack, not the legislation. *In casu*, this is so, because, properly interpreted, PIE does not and could not either compel or authorise a decision which is inconsistent with the Constitution.

The failure of the Act to classify different sorts of unlawful occupiers

Applicant's complaint is that PIE does not distinguish between different classes of unlawful occupiers and occupation.

The different sorts of circumstances in which people occupy land which they have no legal right to occupy, are legion. They include for example:

1. people who have been on the land for a long time;

1. people who have been on the land for a short time;

1. tenants who hold over, after their leases have expired or been terminated

1. people who have lived on land in a former Black township without any form of permit, because of the breakdown in the administration of those townships;

1. people who have lived on land with the knowledge but not the actual consent of the owner;

1. people who have lived on land without the knowledge of the owner, without causing any hindrance to the owner or neighbours;

1. people who live on the land causing a nuisance to the owners and neighbours;

1. people who have occupied the land in desperation because they have been the victims of a natural disaster;

1. people who have occupied the land because they can not find anywhere else to live, or any suitable alternative accommodation;

2.

1. people who have taken occupation violently or forcibly

1. people who have suitable alternative accommodation available to them elsewhere - and people who do not

1. people who have occupied land with their followers for financial benefit;

1. people who have occupied land for political purposes.

The list of different circumstances, and of possible permutations of those circumstances, is potentially endless.

The legislature has, wisely in my view, not tried to categorise the many different

situations and to create different rules for each one of them. Instead, it has authorised the courts to determine what is just and equitable in each case. This is hardly arbitrary. *Per contra,* it is calculated to avoid the application of rigid rules to inappropriate situations - again, this is the very antithesis of arbitrariness.

The failure to classify different sorts of unlawful occupiers (for example by prescribing the period of occupation and by qualifying occupation) does not lead to arbitrary deprivation. *Per contra*, it avoids arbitrary deprivation, by enabling a court to have regard to all of the circumstances which it considers relevant (including the period of occupation and the nature of the occupation), and to make a decision which is just and equitable under the circumstances.

The Constitutional mandate to protect occupiers

As stated by the Supreme Court of Appeal in *Cape Killarney, op cit* the Act "*has its roots inter alia in s 26(3) of the Constitution"*. As noted above, the subsection 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."**

This sub-section is part of the constitutional right to housing, the core provision of which is that:

> **"Everyone has the right to have access to adequate housing."**

The Constitutional Court has pointed out that:

> **"Subsection (1) aims at delineating the scope of the right .... Although the subsection does not expressly say so, there is, at the very least, a negative obligation placed upon the State and all other entities and persons to desist from preventing or impairing the right of access to adequate housing."**

(See: *Grootboom, supra*, para 34]).

In terms of section 7(2) of the Constitution, the State is under a duty to *'respect, protect, promote and fulfil'* this right.

The *United Nations Committee on Economic, Social and Cultural Rights* has concluded, in its General Comment 14, that the duty to *'protect'* a right a right requires the state to take measures that prevent third parties from interfering with the right. Although dealing specifically with the right to health the finding is of equal application in respect of all other socio-economic rights. (See: *General Comment 14 E/C.12/2000/4*, paragraph 33; Craven: *The International Covenant on Economic, Social and Cultural Rights* (Clarendon, Oxford, 1995) at 112)

The significance of the *UN Committee and its General Comments* has been explained by the Constitutional Court in *Grootboom, supra*. (See: paras [29] to [31] and [45]. In dealing with the meaning of *'progressive realisation'*, the *General Comments* were treated as *'helpful'* in understanding our Constitution. The meaning ascribed to that phrase in the relevant General Comment:

> **" ... is in harmony with the context in which the phrase is used in our Constitution and there is no reason not to accept that it bears the same meaning in the Constitution as in the document from which it was so clearly derived."**

(See: *Grootboom, supra,* para [45]).

Similarly, the meaning given by the *UN Committee in its General Comments* to the requirement that a State should *'protect'* a right, is in harmony with the context in which that term is used in our Constitution, and there is no reason not to accept the meaning given to it by the Committee.

The European Court of Human Rights has similarly recognised that there may be a positive duty on the State to adopt measures which prevent third parties from impairing rights. (See: *X & Y* v *The Netherlands* 8 EHRR 235 para 23).

From what is set out above it is apparent that the State is as a matter of general constitutional principle under a duty,"*to put in place laws and to take appropriate action to protect individuals and groups against a violation of their rights by other private parties*." so as to fulfil its obligation to *'protect'* the right. (See: Liebenberg '*Socio-economic rights*' in Chaskalson & others (eds) *Constitutional Law of South Africa* para 41.6).

This duty is fortified by the injunction that an eviction may not take place without an order of court *'made after considering all the relevant circumstances'*. By enacting PIE, the legislature has done no more than the Constitution obliges it to do, or at the very least authorised it to do. This intention appears from the preamble to PIE.

For the reasons set out, I am of the opinion that the provisions of PIE and, in particular, its definition of "unlawful occupier" are not unconstitutional.

Finding on the Main Application

For the reasons stated Applicant's application must be dismissed.

I turn now to consider the counter-application.

THE COUNTER-APPLICATION

In their counter-application Respondents claim an order as follows:

1The Applicants' failure to comply with the time limits, forms and procedures prescribed in the Rules of Court is condoned, and the counter-application is heard as a matter of urgency in terms of Rule 6(12) of the Rules of Court;

2It is declared that the housing programme of the City of Cape Town fails to comply with the constitutional and statutory obligations of the City of Cape Town in that:

2.1 it does not make short-term provision for people in Valhalla Park who are in a crisis or in a desperate situation;

2.2 it does not provide any form of relief for people in Valhalla Park who are in a crisis or in a desperate situation;

2.3 it fails or has failed to promote the resolution of conflicts arising in the housing development process in Valhalla Park;

2.4 it fails to give adequate priority and resources to the needs of the people in Valhalla Park who have no access to a place where they may lawfully live;

2.5 in the allocation of housing, it fails to have any or adequate regard to relevant factors other than the length of time an applicant for housing has been on the waiting list, and in particular does not have regard to the degree and extent of the need of the applicants;

2.6 it has not been implemented in such a manner that the right to access to housing of residents of Valhalla Park is progressively realised

3The City of Cape Town is interdicted from evicting the Applicants from the property until such time as suitable alternative accommodation or land is available to them;

4The City of Cape Town is ordered to comply with its constitutional and statutory obligations as declared in this order;

5The City of Cape Town is ordered within three months of the date of this order to deliver a report or reports under oath, stating what steps it has taken to comply with its constitutional and statutory obligations as declared in this order, what future steps it will take in that regard, and when such future steps will be taken.

6The Respondents in the main application may within one month of delivery of that report, deliver commentary thereon, under oath.

7The City of Cape Town may within two weeks of delivery of that

commentary, deliver its reply to that commentary under oath.

8The case is postponed to a date to be fixed by the Registrar for consideration and determination of the aforesaid report, commentary and reply.

9Alternative relief;

10That the City of Cape Town is ordered to pay the costs of the counter-application.

During the course of the hearing prayers 2.3 and 3 were abandoned.

(In the interest of consistency the parties will continue to be referred to as in the main application.)

The Requirements of section 26 of the Constitution

Section 26(2) of the Constitution requires the state to '*take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation*' of the right which everyone has, of access to adequate housing.

This section 'establishes and delimits the scope of the positive obligation imposed upon the State to promote access to adequate housing'. (See: *Grootboom, supra,* para [21]).

Applicant is part of the State. (Sections 40 and 151(1) of the Constitution).

The focus of the counter-application is on whether the housing policy and programme of Applicant are '*reasonable*' within the meaning of sec 26(2)

of the Constitution.

This is the issue which was at the heart of *Grootboom*. In that case, the applicants were living in 'intolerable conditions' (at para [11]). The court found that what the State had done in execution of its housing programme was a major achievement. It had spent large amounts of money, and a significant number of houses had been built. Considerable thought, energy, resources and expertise had been devoted to the process of effective housing delivery. The programme was aimed at achieving the progressive realisation of the right of access to housing (at para [53]).

There was, however, a fundamental flaw in the programme: it did not make reasonable provision, within its available resources, for people in the Cape Metropolitan area with no access to land, no roof over their heads, and who were living in intolerable conditions or crisis situations. For this reason, it did not meet the constitutional requirement that the state take 'reasonable' measures to achieve the realisation of the right to housing. (See the paragraph 2(b) of the order at [99] - quoted below).

The reasons for this finding were explained at some length by the Constitutional Court:

> **"In determining whether a set of measures is reasonable, it will be necessary to consider housing problems in their social, economic and historical context and to consider the capacity of institutions responsible for implementing the programme. The programme must be balanced and flexible and make appropriate provision for attention to housing crises and to short, medium and long term needs. A programme that excludes a significant segment of society cannot be said to be reasonable. [43]**
>
> **A society must seek to ensure that the basic necessities of life are provided to all if it is to be a society based on human dignity, freedom and equality. To be reasonable, measures cannot leave out of account the degree and extent of the denial of the right they endeavour to realise. Those whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril, must not be ignored by the measures aimed at achieving realisation of the right. It may not be sufficient to meet the test of reasonableness to show that the measures are capable of achieving a statistical advance in the realisation of the right. Furthermore, the Constitution requires that everyone must be treated with care and concern. If the measures, though statistically successful, fail to respond to the needs of those most**

desperate, they may not pass the test. [44]

The definition of housing development as well as the general principles that are set out do not contemplate the provision of housing that falls short of the definition of housing development in the Act. In other words there is no express provision to facilitate access to temporary relief for people who have no access to land, no roof over their heads, for people who are living in intolerable conditions and for people who are in crisis because of natural disasters such as floods and fires, or because their homes are under threat of demolition. These are people in desperate need. Their immediate need can be met by relief short of housing which fulfils the requisite standards of durability, habitability and stability encompassed by the definition of housing development in the Act. [52]

This Court must decide whether the nationwide housing programme is sufficiently flexible to respond to those in desperate need in our society and to cater appropriately for immediate and short-term requirements. This must be done in the context of the scope of the housing problem that must be addressed. This case is concerned with the situation in the Cape Metro and the municipality and the circumstances that prevailed there are therefore presented. [56]

Counsel for the appellants supported the nationwide housing programme and resisted the notion that provision of relief for people in desperate need was appropriate in it. Counsel also submitted that section 26 did not require the provision of this relief. Indeed, the contention was that provision for people in desperate need would detract significantly from integrated housing development as defined in the Act. The housing development policy as set out in the Act is in itself laudable. It has medium and long term objectives that cannot be criticised. But the question is whether a housing programme that leaves out of account the immediate amelioration of the circumstances of those in crisis can meet the test of reasonableness established by the section. [64]

The absence of this component may have been acceptable if the nationwide housing programme would result in affordable houses for most people within a reasonably short time. However the scale of the problem is such that this simply cannot happen. Each individual housing project could be expected to take years and the provision of houses for all in the area of the municipality and in the Cape Metro is likely to take a long time indeed. The desperate will be consigned to their fate for the foreseeable future unless some temporary measures exist as an integral part of the nationwide housing programme. Housing authorities are understandably unable to say when housing will become available to these desperate people. The result is that people in desperate need are left without any form of assistance with no end in sight. Not only are the immediate crises not met. The consequent pressure on existing settlements inevitably results in land invasions by the desperate thereby frustrating the attainment of the medium and long term objectives of the nationwide housing programme. That is one of the main reasons why the Cape Metro land programme was adopted. [65]

The nationwide housing programme falls short of obligations imposed upon national government to the extent that it fails to recognise that the state must provide for relief for those in desperate need. They are not to be ignored in the interests of an

overall programme focussed on medium and long-term objectives. [66]

In conclusion it has been established in this case that as of the date of the launch of this application, the state was not meeting the obligation imposed upon it by section 26(2) of the Constitution in the area of the Cape Metro. In particular, the programmes adopted by the state fell short of the requirements of section 26(2) in that no provision was made for relief to the categories of people in desperate need identified earlier. [69]

In the light of the conclusions I have reached, it is necessary and appropriate to make a declaratory order. The order requires the state to act to meet the obligation imposed upon it by section 26(2) of the Constitution. This includes the obligation to devise, fund, implement and supervise measures to provide relief to those in desperate need. [96]

It is declared that:

(a) Section 26(2) of the Constitution requires the state to devise and implement within its available resources a comprehensive and coordinated programme progressively to realise the right of access to adequate housing.

(b) The programme must include reasonable measures such as, but not necessarily limited to, those contemplated in the Accelerated Managed Land Settlement Programme, to provide relief for people who have no access to land, no roof over their heads, and who are living in intolerable conditions or crisis situations.

(c) As at the date of the launch of this application, the state housing programme in the area of the Cape Metropolitan Council fell short of compliance with the requirements in paragraph (b), in that it failed to make reasonable provision within its available resources for people in the Cape Metropolitan area with no access to land, no roof over their heads, and who were living in intolerable conditions or crisis situations. [99]"

At the time of *Grootboom*, local government was divided into two: metropolitan and municipal government. These have now been combined. In the area of Valhalla Park, Applicant is the successor to the metropolitan and municipal governments which were Third and Fourth Appellants in *Grootboom*.

The issue in this counter-application, two and a half years after the judgment in the *Grootboom case*, is whether the Applicant has complied with its constitutional duties as declared by the Constitutional Court - and if not, what should be the appropriate

remedy.

In this context, the provisions of sec 237 of the Constitution are relevant:

"All constitutional obligations must be performed diligently and without delay."

Has Applicant failed to comply with the requirements of the Constitution and with the order made by the Constitutional Court?

The Respondents are people '*with no access to land, no roof over their heads, and who were living in intolerable conditions or crisis situations'*.

The affidavits before the Court disclose the following circumstances relating to the Respondents.

First and Second Respondents, and their five children, lived in a Council house with Second Respondent's parents and other members of the family. Eventually there were seventeen people living in a three bed-roomed council house. Some of the occupants had to sleep under the stairs at times. First and Second Respondents moved to a house in Valhalla Park, where they rented space in the backyard. The landlord required them to move. They then lived in another backyard in Valhalla Park. The owner of that property compelled them to leave. They then moved to another backyard. The owner of that property, too, required them to leave. It has not been suggested that there was another place where they could live at that stage.

Third and Fourth Respondents lived with Third Respondent's parents in Valhalla Park. It was a three-bedroomed house. It accommodated Third Respondent's six siblings, her parents, her husband and their children. They made two moves in an

unsuccessful attempt to obtain adequate housing, and then moved back to the home of Third Respondent's parents. They then occupied the park.

Fifth and Sixth respondents lived in the home of the Fifth respondent's mother. It has two bedrooms, a kitchen and a lounge. It accommodated three families and Fifth Respondent's mother, who was ill. The family asked Fifth and Sixth respondents to leave.

Ninth and Tenth Respondents, and their four children, have moved from place to place in an attempt to find housing. The sequence of these moves is not entirely clear but it includes the following. Before 1998, they rented a property in Valhalla Park. When Ninth Respondent was retrenched in 1998, they were 'literally thrown out of the property, together with their belongings', by the landlord. From 1998 to 2000 they 'lived in the bush in City Tramways, Montana'. This appears to be a reference to a makeshift shelter next to the sewerage dams at the back of the City Tramways property at Valhalla Park. They then moved to some open land at the back of the Applicant's rent office and then to some open property at a school. Wherever they put up their shelter, they were forced to move out.

Thirteenth Respondent, his partner and their minor child lived in a house in Valhalla Park. They were evicted from that house. They then stayed in the wreck of a motor vehicle at Bishop Lavis Police Station.

Fourteenth and Fifteenth Respondents slept wherever they could find shelter for the night. This went on for many years. From June 2001 until August 2001 they stayed with a Ms Smit at Valhalla Park. She then asked them to leave the premises. They have five children living with them.

Eighteenth Respondent and her three children stayed in a backyard at Valhalla Park. They were evicted in September 2001 for failing to pay rent of R50 per month. After the eviction, they 'slept at different places outside at night wherever we could find shelter'.

Nineteenth Respondent stayed with the Eighteenth respondent. She too was evicted for failure to pay the rent of R50 a month, and then slept wherever she could find shelter until she moved to the park 'because we were desperate and it was the only place where we could find accommodation without being harassed'.

Twentieth Respondent and her family lived in a house at Valhalla Park until February 2000. They were evicted because they could not afford to pay the monthly rent of R100. Once they were evicted 'we slept wherever we could until such time as we were forced to leave'.

Twenty-First Respondent and his wife and two children were literally thrown out of a property they had rented, because of their inability to pay rent. They were then sneaking into the Parkville School and sleeping under the stairs, until they were told by the teachers to leave. Before they moved to the park, they were 'strolling'. They would sleep in the school premises, at the back of the clinic, and near the dumping area. As a result their children were continuously sick.

Twenty-Third and Twenty-Fourth Respondents and their two children lived in a house in Valhalla Park. They were evicted because they were unable to pay the monthly rent of R100. After being evicted, they stayed in a motor vehicle which was located on the property.

Twenty-Fifth Respondent, her husband and their two children lived in a makeshift

shelter at the King David Golf Course in Montana.

Twenty-Eighth Respondent and her husband and their two minor children lived with a Ms Williams at Valhalla Park. She evicted them because they could not afford to pay the monthly rental of R170. They had nowhere they could go.

Thirty-Second and Thirty-Third Respondents and their three minor children lived on the streets in Salt River, where they were sleeping in a chicken cage. They then moved to the park.

Thirty-Fourth and Thirty-Fifth Respondents and their three children (the oldest, of whom, is ten years old) were 'strollers' with nowhere to stay. They slept in buses and under a bridge because they had nowhere to stay. They moved from place to place without any shelter. Wherever they put their shelter, they were forced to move out.

Thirty-Seventh and Thirty-Eighth Respondents and their six children lived on the street in Valhalla Park for the past three years, moving from people's backyards to the entrances of shops. They would sleep wherever there was shelter for the night and where they would not be harmed by other people.

Forty-Third and Forty-Fourth Respondents slept wherever they could find shelter. They would sleep in the backyard of people's houses either with or without their permission until they were forced to leave the premises. On other occasions they would sleep in
the bush or wherever they could find shelter from the elements at night.

Forty-Fifth, Forty-Sixth and Forty-Seventh Respondents lived in Kalksteenfontein for eight years. They were evicted from the house, and had no alternative

accommodation or any other place where they could stay or put up a shelter.

There is no material dispute as to these facts. Indeed, having regard to the nature of the facts deposed to by Respondents it would be well-nigh impossible for Applicant to have investigated and checked them. In the light of these facts, and the circumstances under which these people have been living, it is astonishing to find that Applicant's Head of Housing makes the assertion that none of the Respondents are '*persons in crisis'* as contemplated in *Grootboom*.

This statement is indicative of a state of denial on Applicant's part and a failure to recognise and acknowledge that there is, in fact, any category of persons to which it has any obligation beyond the obligation to put them on the waiting-list for housing in the medium to long term, because they are people 'with no access to land, no roof over their heads, and who were living in intolerable conditions or crisis situations'. It is, in my view, precisely the same failure as was held, in *Grootboom*, to constitute a breach of the Constitution.

During argument, Counsel for Applicant conceded that some of the Respondents were people in desperate circumstances. That concession was correctly made. However, Applicant has made no provision whatsoever for the short-term needs of such people, nor has it evidenced any intention to do so. That is, in my opinion, a direct breach of the Constitution and of the order made by the Constitutional Court in *Grootboom*.

In *Grootboom*, the Metropolitan Council had placed before the Court an Accelerated Managed Land Settlement Programme (AMSLP), which was designed for the rapid release of land for families in crisis, with the progressive provision of services. It had drafted this plan in June 1999, some months after the respondents in that case had

been evicted. The Cape Metro had realised that the desperate housing situation required a more flexible approach than the provision of formal housing units in terms of the national housing development policy. It accordingly formulated the AMSLP, which stated:

> **"From the above it is seen that there is a complete mismatch between demand and supply in the housing sector, resulting in a crisis in housing delivery.**
>
> **However, the existing housing situation cannot just be accepted, as there are many families living in crisis conditions, or alternatively, there are situations in the [Cape Metro] where local authorities need to undertake legal proceedings (evictions) in order to administer and implement housing projects. A new housing program needed (sic) to cater for the crisis housing conditions in the [Cape Metro]. The proposed program is called an "Accelerated Managed Land Settlement Program"...**
>
> **"The Accelerated Managed Land Settlement Program (AMSLP) can therefore be described as the rapid release of land for families in crisis, with the progressive provision of services.**
>
> **This program should benefit those families in situations of crisis. The program does not offer any benefits to queue jumpers, as it is the Metropolitan Local Council who determines when the progressive upgrading of services will be taken.**
>
> **The Accelerated Managed Land Settlement Program (AMSLP) includes the identification and purchase of land, planning, identification of the beneficiaries, township approval, pegging of the erven, construction of basic services, resettlement and the transfer of land to the beneficiaries." [60]**

The purpose of the AMLSP, as described by Yacoob J on behalf of the Court, was as follows:

> **"The Cape Metro land program was formulated by the Cape Metro specifically "assist the metropolitan local councils to manage the settlement of families in crisis". Important features of this program are its recognition of (i) the absence of provision for people living in crisis conditions; (ii) the unacceptability of having families living in crisis conditions; (iii) the consequent risk of land invasions; and (iv) the gap between the supply and demand of housing resulting in a delivery crisis. Crucially, the program acknowledges that its beneficiaries are families who are to be evicted, those who are in a crisis situation in an existing area such as in a flood-line, families located on**

strategic land and families from backyard shacks or on the waiting list who are in crisis situations. Its primary objective is the rapid release of land for these families in crisis, with services to be upgraded progressively." [61]

The Constitutional Court concluded that '*on the face of it*' the AMLSP met the constitutional obligations that the state had to provide access to housing to residents of the Cape Metro. However, it pointed out that the formulation of the programme was only a starting point. The Court stated that the AMLSP had to be implemented as a matter of urgency:

"What remains is the implementation of the program by taking all reasonable steps that are necessary to initiate and sustain it. And it must be implemented with due regard to the urgency of the situations it is intended to address." [67]

The facts in this case illustrate that despite that clear statement by the Constitutional Court, Applicant has still not implemented the AMLSP or any equivalent programme. Indeed, it is nowhere said that it has adopted it.

In the answering affidavits filed on their behalf, Respondents directly and explicitly raised this failure to comply with this requirement of the Constitution. Their witness George Rosenberg stated in terms that:

"It is apparent from the affidavits of the individual respondents that there are a large number of people in Valhalla Park who are in desperate need of housing, for whom the applicant does not make any special provision in its existing housing programme. That programme allocates houses purely on the basis of the length of time that people have been on the waiting list and without regard to their need for housing or individual circumstances. I submit that the applicant's policy is unconstitutional in that it fails to cater for people in desperate circumstances."

Applicant's reply, deposed to by its Head of Housing, is conspicuous by its failure to comprehend the requirements of the Constitution, despite the judgment in the *Grootboom case*:

"It is disputed that the Respondents are "in desperate need of housing or that their circumstances are desperate" and the Respondents are put to the proof thereof.... The only fair manner in which to progressively realise the right to housing, is to do so with the application date playing a key role. As soon as other criteria come into play, the allocation process becomes susceptible to corruptible practices.... The needs of the Respondents in the present circumstances are no greater than the need of the many other people who have applied for housing.... Should the Applicant make special provision for people such as the Respondents, it would probably have to make special provision for everyone else in similar positions who has applied for housing. There are thousands of them and this will make it impossible to allocate dwellings as the Applicant cannot provide 250 000 homes simultaneously... I deny that the Applicant's policy is unconstitutional and the Respondents are put to the proof thereof."

The Constitutional Court has pronounced upon the nature of Applicant's constitutional obligations. It declared that the housing programme in the area in question was inconsistent with the Constitution, for its failure to make reasonable provision for people with no access to land, no roof over their heads, and who are living in intolerable conditions or crisis situations. It held that the local authority is under a duty to implement a programme such as the AMLSP with due regard to the urgency of the situations it is intended to address. Applicant's response, more than a year later, is:

in effect to acknowledge that it has not implemented any such programme;

to give no indication that it has any intention of implementing such a programme;

to insist that it will continue to deal with applicants purely on the basis of when their name was placed on the waiting list; and

to deny that people who live in cars; in the streets; under the stairs at a school;

in the bushes; or at places outside wherever they can find shelter at night, and who have literally nowhere they may lawfully live, are living in intolerable conditions or that they are in a crisis situations.

I find, on the evidence before me, that Applicant has displayed and continues to display, an unacceptable disregard for the order of the Constitutional Court - and therefore for the Constitution itself.

The need for emergency provisions of the kind required by the Constitutional Court is underlined by the fact that the housing situation in Cape Town continues to deteriorate.

At the time when the *Grootboom case* was heard, the housing backlog in the metropolitan area was 206 000 houses. This was being reduced at the rate of 2000 units per year. (See: *Grootboom , supra* at paras [57] to [58]). As noted above, in November 2001, when Applicant's Head of Housing deposed to his replying affidavit, there was a shortfall of 250 000 houses, and the backlog was no longer being reduced, but was increasing at the rate of 15 000 houses per year. The yearly demand was growing by 25 000 units as against a supply of 10 000 units per year.

I readily acknowledge that the supply of houses is limited by the funds allocated to Applicant for housing. However, when funds are short the need for emergency provisions is exacerbated.

This growing backlog will inevitably result in further delay in addressing the need of those in desperate situations. This makes it all the more necessary that some interim short-term arrangements be made to deal with the situation while people in desperate circumstances are awaiting the provision of housing through the medium and long

term programme.

The procedural objections raised by Applicant

In the light of what is set out above it is hardly surprising that, in the heads of argument, submitted on its behalf, Applicant did not seek to deal at all with the merits of the counter-application, beyond four short paragraphs. Instead, Applicant has raised seven procedural objections to the counter-application. These will be considered in turn.

Fundamentally different issues

Applicant submits that the application and counter-application relate to fundamentally different issues, namely 'land-grabbing' versus compliance with constitutional obligations.

I do not agree. Firstly, the submission has no regard to the facts. It can hardly be disputed that as a matter of fact, it was the inability of Respondents to find another place where they could live that was the major cause of the occupation of the property in issue. This does not necessarily imply that the occupation was justified. But it can hardly be contended that if some provision had been made for Respondent they would nevertheless have occupied the property and put themselves at risk. There is certainly no evidence to that effect.

Secondly, the submission flies in the face of the conclusion of Applicant's predecessor, the Cape Metro, that the absence of provision for people living in crisis situations leads to a 'consequent risk of land invasions'. This is one of the reasons why it drafted the AMLSP. (See: *Grootboom, supra,* para [61]).

Thirdly, it has no regard to the finding of the Constitutional Court, which is a matter of common experience and common sense:

> **"The result is that people in desperate need are left without any form of assistance with no end in sight. Not only are the immediate crises not met. The consequent pressure on existing settlements inevitably results in land invasions by the desperate."**

(See: *Grootboom, supra,* para. [65]).

I do not wish to be understood as holding that each and every one of the Respondents is entitled, as of right, to emergency housing provision immediately. It is however, apparent that there is a direct causal link between, on the one hand, the deliberate and sustained failure by Applicant to make any provision at all for people in their situation, and particularly the most desperate, and, on the other hand, the occupation of the park. The occupation of the land is a manifestation of the frustration which is directly connected to Applicant's failure to recognise and to comply with its constitutional duties.

Factual disputes

Applicant contends that the Respondents, at the time they launched the counter-application, were aware of factual disputes which could not be resolved on the papers. There are, however, no real, genuine and *bona fide* factual dispute in relation to the issues raised by the cross-application. Respondents allege that Applicant has not made any provision for people in desperate situations. Applicant, in effect acknowledges that it has not done so, and indicates, through its Head of Housing that it does not intend to do so.

Although it is disputed that any of the Respondents is in a desperate situation, the factual allegations relating to their circumstances and upon which the inference rests are not disputed. Whether those facts constitute 'desperate' or 'intolerable' or 'crisis' conditions is a matter for this Court to determine in accordance with its evaluation of the facts.

Counter-application not competent because these are spoliation proceedings

Applicant contends that the counter-application is not competent because the application is 'in the main' for spoliatory relief.

Applicant has persisted throughout with its prayers for a range of other relief, including an interdict restraining the respondents from occupying the park (prayer 2.3); a declarator that '*Applicant, in its capacity as the legal owner and possessor of the park, has the right to retain possession thereof to the exclusion of anybody who wishes to occupy it unlawfully...*' (prayer 2.4); an interim eviction order in terms of section 5 of PIE (prayer 2.5) and an order declaring part, at least, of PIE to be unconstitutional (prayer 2.8)

The rationale underlying our Courts approach to an application for a spoliation order is that a spoliation application is a simple and effective remedy. The despoiled applicant should be entitled to restoration of the *status ante omnia* without having to become embroiled in complex legal debates relating to the merits of where the lawful possession may lie. Accordingly, where the applicant relies only upon the mandament, the respondent will not ordinarily be entitled to raise issues beyond the realm of the spoliation proceedings by means of a counter-application.

Where the *spoliatus* applies for a declaratory order as to its rights in addition to a

spoliation order, the respondent can, in my view, seek to enforce its rights by filing a counter-application. (Cf: *Scoop Industries (Pty) Ltd v Langlaagte Estate and GM Co Ltd (in voluntary liquidation)*, 1948 (1) SA 91 (W); *Burger v Van Rooyen*, 1961 (1) SA 159 (O) at p. 162A).

In this matter Applicant has introduced a wide range of issues and sought a variety if orders, albeit in the alternative, and included declaratory relief to define its rights. It has therefore put the merits of Respondents' occupation and their eviction 'on the table'. Applicant has persisted in pursuing all the varied forms of relief which it claimed and cannot, in my view, claim the benefits of an application limited to the mandament.

Abuse of process

The applicant contends that the launching of the counter-application is an abuse of process in that Respondents are seeking to cloud the issues in order to protract their occupation of the property.

The counter-application has not protracted Respondents' occupation of the property. It is being decided together with the main application. The counter-application is, in any event, inextricably linked with the main application.

Irregular proceeding

Applicant contends that counter-application is irregular in that the notice of motion was filed a day after the opposing affidavits.

It is apparent from Respondents' affidavits and the counter-application itself that the

affidavits were filed both in opposition to the relief sought by Applicant and in support of the counter-application. The failure to file the counter-application together with the opposing affidavit was clearly an oversight, which Respondents rectified by filing the counter-application the following day. Applicant does not suggest that it has suffered any prejudice - indeed, it has not - as a result of the oversight, which appears to have been of no consequence.

Having regard to the delay of one day, the importance of the issues to all the parties and the costs which have been saved by the application and counter-application being consolidated I have no difficulty in condoning the late filing of the counter-application.

I note, *en passant,* that I find it somewhat difficult to understand why Applicant wishes to raise and to pursue so inconsequential a technicality in an effort to non-suit its own residents who are living in desperate circumstances and who raise significant constitutional issues.

Ordinary course

Applicant submits that the counter-application should be heard on the ordinary roll in terms of the normal rules of court. The entire proceedings have effectively been heard in the normal course. The issues have been fully debated and no purpose would be served in further postponing the counter-application.

I find no merit in the procedural objections raised and pursued by Applicant.

The remedy must be effective

Section 38 of the Constitution contemplates that where a right in the Bill of Rights has been infringed, a court may grant 'appropriate' relief. Section 172(1)(b) states that when deciding a constitutional matter, a court may make *'any order that is just and equitable'.*

Appropriate or just and equitable relief is relief which will be effective. The relief must be chosen for its ability to protect the constitutional right which is infringed, and fashioned to meet the nature of the infringement. What will be effective, depends on the factual context of the case. If the relief is not effective, the right is not vindicated.

In *Fose v Minister of Safety and Security*, 1997 (3) SA 786 (CC) Ackermann J said that:

> **"[a]ppropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case the relief may be a declaration of rights, an interdict, a mandamus or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced." [19]**
>
> **"I have no doubt that this Court has a particular duty to ensure that, within the bounds of the Constitution, effective relief be granted for the infringement of any of the rights entrenched in it. In our context an appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the right entrenched in the Constitution cannot be properly upheld or enhanced. Particularly in a country where so few have the means to enforce their rights through the courts, it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated." [69]**

See also the remarks of Didcott J at [82] and Kriegler J at [104]).

What relief will be effective in this case?

In *Pretoria City Council v Walker*, 1998 (2) SA 363 (CC) at [96], the Constitutional Court recognised that in an appropriate case, the order should be a mandamus to

eliminate the breach, with an order to report back to the court in question. The court will then be in a position to give such further ancillary orders or directions as may be necessary to ensure the proper execution of its order.

In *Minister of Health and Others v Treatment Action Campaign and Others (No. 2),* 2002 (5) SA 713 the Constitutional Court stated, *en banc,* that:

> **"The order made by the High Court included a structural interdict requiring the appellants to revise their policy and to submit the revised policy to the court to enable it to satisfy itself that the policy was consistent with the Constitution.... In appropriate cases they [the courts] should exercise such a power if it is necessary to secure compliance with a court order. That may be because of a failure to heed declaratory orders or other relief granted by a court in a particular case. We do not consider, however, that orders should be made in those terms unless this is necessary." [129]**

I do not believe that a declaration, standing on its own, will suffice. There has already been such a declaration, made by the Constitutional Court. It has not induced Applicant to comply with its constitutional obligations. Something more is therefore necessary.

The circumstances and, in particular, the attitude of denial expressed by Applicant in failing to recognise the plight of Respondents as also its failure to have heeded the order in *Grootboom* makes this an appropriate situation in which an order, which is sometimes referred to as a structural interdict, is '*necessary*', '*appropriate*' and '*just and equitable*'.

In regard to the time to be allowed for Applicant to comply with the order which will be issued in the form of a structural interdict, Applicant sought a period of approximately six months for its initial report. Respondents contended that three months should suffice. Regard being had to the time that has already passed I consider a period of

four months to be reasonable and adequate for the preparation of the report.

Respondents will thereafter have a month in which to comment on the report.

Applicant is a very large institution with many departments which may need to consider the commentary and make an input to enable Applicant to prepare its reply. I will, accordingly, afford Applicant a month in which to respond to Respondents' commentary on the report.

Costs

On 15 October 2001, Binns-Ward AJ made an order in which he gave directions to enable Applicant to serve an application in terms of section 5 of PIE. The costs of that *ex parte* application stood over for decision. As Applicant has not succeeded in obtaining relief under section 5 it should pay its own costs of the application.

On 8 November 2001 the parties presented an agreed order containing a timetable for the further conduct of the matter to Comrie J who made the appropriate order. The costs stood over for later decision. These costs should form part of the costs in the cause in the main application.

As far as the costs of the main application are concerned they should follow the result. Applicant will have to pay them.

Mr Le Roux submitted that in the event of the counter-application succeeding as has been the outcome, then certain of the Respondents should be deprived of their costs as they have failed to make a sufficient case for relief.

Costs are awarded at the discretion of the court, exercised judicially and on a fair and just basis.

The counter-application was argued as a joint application of all the individual Respondents albeit that they were represented by three counsel each of whom represented his own group. The argument was divided up between the Respondents' counsel and there was little, if any, duplication.

Each of the Respondents is an impecunious person who was brought to court by Applicant in a futile effort to have then evicted from their homes. It is the impact of their multiple experiences in seeking to house themselves and their families that has driven the cross-application to success. At no time was the case for any of the Respondents separately made or argued before the court. Their cases were, at all times, treated as part of a single case although this is not a class action.

To seek to isolate the one or two Respondent's of whom it may be said that they individually failed to carry the counter-application is a technical exercise which has not been attempted and need not be undertaken. Indeed, I am not sure that any of the Respondents would fail.

Be that as it may, only one attorney acted for all the Respondent's and although they filed individual affidavits setting out their own unique facts, the gravamen of the counter-application was jointly presented through the affidavits of Mr George Rosenberg and Ms Gertrude Square.

In all these circumstances I am satisfied that the costs of the counter-application should follow the result and that Respondents should all be treated equally. The taxing Master will, in due course, be required to ensure that there is no undue

duplication of costs.

The Order

In the result, and for the reasons stated, I make the following order:

1In the Main Application:

1.1 the main application is dismissed;

1.2 Applicant is to pay the costs of the main application including the costs of the 8th November 2001;

1.3 Applicant will pay its own costs of the application (Case No: 8860/2001) before Binns-Ward AJ on 15 October 2001.

2In the Counter-Application:

2.1 It is declared that the housing programme of the City of Cape Town fails to comply with the constitutional and statutory obligations of the City of Cape Town in that:

2.1.1 it does not make short-term provision for people in Valhalla Park who are in a crisis or in a desperate situation;

2.1.2 it does not provide any form of relief for people in Valhalla Park who are in a crisis or in a desperate situation;

2.1.3 it fails to give adequate priority and resources to the needs of the people in Valhalla Park who have no access to a place where they may lawfully live;

2.1.4 in the allocation of housing, it fails to have any or adequate regard to relevant factors other than the length of time an applicant for housing has been on the waiting list, and in particular does not have regard to the degree and extent of the need of the applicants;

2.1.5 it has not been implemented in such a manner that the right to access to housing of residents of Valhalla Park is progressively realised

3The City of Cape Town is ordered to comply with its constitutional and statutory obligations as declared in this order;

4The City of Cape Town is ordered within four months of the date of this order to deliver a report or reports under oath, stating what steps it has taken to comply with its constitutional and statutory obligations as declared in this order, what future steps it will take in that regard, and when such future steps will be taken.

5The Respondents in the main application may within one month of delivery of that report or reports, deliver commentary thereon, under oath.

6The City of Cape Town may within one month of delivery of that commentary, deliver its reply to that commentary under oath.

7Thereafter, the matter is to be enrolled on a date to be fixed by the Registrar in consultation with the presiding Judge for consideration and determination of the aforesaid report, commentary and reply.

8The City of Cape Town is ordered to pay the costs of the counter-application.

.....

SELIKOWITZ J