REPORATBLE

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

CASE NO: 13189/07

In the matter between:

THUBELISHA HOMES	First Applicant
MINISTER OF HOUSING	Second Applicant
MINISTER OF LOCAL GOVERNMENT AND HOUSING, WESTERN CAPE	Third Applicant

and

VARIOUS OCCUPANTS	Respondents
THE CITY OF CAPE TOWN	Second Respondent
FIRSTRAND BANK LIMITED	Third Respondent

JUDGMENT delivered on this 10th day of MARCH 2008

Introduction

[1] This is an application for the eviction of various occupants, Respondents, from the informal settlement commonly known as Joe Slovo. The Applicants allege that the Respondents are occupying the property in question unlawfully inasmuch as no consent was given to them for such occupation. Within this main application, various other applications were brought.

[2] Firstly, as part of the main application, an application was brought for an order in terms of which the Applicants could be allowed to dispense with the forms and service provided by the Uniform Rules of the High Court, and enabling this matter to be treated as one of urgency in terms of Rule 6(12), and in accordance with the provisions of section 5 of the *Prevention of Illegal Eviction From and Unlawful Occupation of Land Act* 19 of 1998 [hereinafter referred to as PIE].

[3] Secondly, the essence of the main application, an application for the eviction of the various occupiers (Respondents) from the area known as Joe Slovo informal settlement, and in the event of their failure and/or refusal to vacate the said area, an order to authorize and direct the Sheriff of this Court to enter the premises occupied by the Respondents and to remove all the movable items in the premises to an identified place in the temporary relocation area in Delft and to eject such Respondents in accordance with the schedule which was handed in as annexure "XS31" to the principal founding affidavit. Furthermore, an order in terms of which the various occupiers would be interdicted from returning to the Joe Slovo area for purposes of erecting a new informal settlement or from taking up residence thereat in a manner that undermines the implementation of the national housing policy and the achievement of the N2 Gateway Housing Project.

[4] In response thereto, the Respondents brought an Interlocutory application for review of the various Land availability agreements and the decision taken to eject the occupants from the property. To counter this interlocutory application, applicants brought a Rule 30 Application to set aside same as being unprocedural and irregular.

The Parties and legal representation

[5] The First Applicant THUBELISHA HOMES, is a company duly registered in terms of section 21 of the *Companies Act* 61 of 1973. The First Applicant is charged with the responsibility to transform the Joe Slovo informal settlement in terms of the national housing policy and develop proper formal housing in the area. It was legally represented by Mr. Kirk-Cohen SC, Ms. Rabkin-Naicker and Mr. Masuku. The Second Applicant is the MINISTER OF HOUSING, The Honourable Ms. Lindiwe Nonceba Sisulu. She was represented in court by Mr. Donen SC, who was assisted by Ms. Pillay. The Third Applicant is the PROVINCIAL MINISTER OF THE WESTERN CAPE responsible for the DEPARTMENT OF LOCAL GOVERNMENT AND HOUSING. He was similarly legally represented by Mr. Kirk-Cohen SC, Ms. Rabkin-Naicker and Mr. Masuku.

[6] Respondents are the occupiers of the informal dwellings comprising the informal settlement known as "Joe Slovo". The respondents were represented by two committees, the Task Team, represented by Mr. Budlender and Mr. Kubukeli. The other committee chaired by Mr. Penze was legally represented by Mr. Hathorn. The CITY OF CAPE TOWN is the Second Respondent, which is a municipality established in terms of sections 12 and 14 of the *Local Government: Municipal Structures Act* 117 of 1998, read with the City of Cape Town Establishment Notice (Provincial Notice 479 of 22 September 2000, as amended by Provincial Notice 665 of 4th of December 2000). Second Respondent did not file any opposing papers and therefore there was no legal representation on its behalf. The Third Respondent is FIRSTRAND BANK LIMITED, a company duly registered under registration number 1929/001225/06, and a bank duly registered in terms of the *Banks Act* 94 of 1990. Similarly the Third Respondent did not file opposing papers in court. Accordingly no one legally represented Third Respondent in court.

Joe Slovo informal settlement

[7] Obtaining a precise or exact identification of the persons occupying the area is exceedingly difficult. The generally accepted description is that Joe Slovo is an informal settlement on the northern side of the N2 between the Langa Township turn off and Vanguard Drive turn off. Joe Slovo became occupied from December 1994. The settlement grew from an estimated dwelling count of 1 195 in 1996 to 4 571 in 2002. The size of Joe Slovo in total has been determined to be approximately 30.68Ha. It is situated approximately 10km from Cape Town City Centre, making it an attractive place to stay for thousands of people. It is one of Cape Town's biggest informal settlements with very high dwelling densities. There are approximately 4500 informal dwellings comprising Joe Slovo, and approximately 18 000 to 20 000 persons occupying these informal dwellings.

[8] Like other informal settlements, it is densely composed of self-built shacks constructed from odd assortments of wood, plastic and corrugated iron. The shacks are small, cramped and overcrowded, and built mostly of combustible materials. They pose a significant fire risk, and indeed in recent years the area has been devastated on more than one occasion by runaway fires, causing extensive damage to property and personal effects. Over the last 13 years the Joe Slovo community has suffered from some devastating fires, but has received some benefit from an increasing programme of basic services and emergency relief from the City of Cape Town and the Province.

[9] The area is hugely overcrowded. In winter the area floods intolerably and residents are compelled to live in unhealthy, wet conditions. Diseases are rife and crime is endemic. It is not an exaggeration that the men, women and children that live there live in squalor. Moreover, it is clear that if more people move into the area, the more the living conditions in Joe Slovo will worsen. All informal dwellings at Joe Slovo are illegal structures and are built in substantial non-compliance with building laws and related regulations.

[10] Joe Slovo informal settlement is one of the areas targeted by the Applicants for Roll Over upgrading envisaged in terms of the N2 Gateway

Housing Project. In situ upgrade techniques would not necessarily require a relocation of residents to Delft out of the land in Joe Slovo, while Roll Over upgrade technique requires the residents to relocate strategically from the land so that the land can be stabilised and serviced and thereafter houses built. It is just not possible to rehabilitate and develop the land without first strategically relocating the occupiers of the informal settlement.

[11] The obligation of the State to provide access to adequate housing is now constitutionally binding. Such obligation must include the upgrading of informal settlements in order to provide decent housing in terms of applicable and acceptable building standards and norms. In response to its constitutional obligations, particularly under section 26 of the Constitution, the national housing policy which informs the N2 Gateway housing project – (Breaking New Grounds: A Comprehensive Plan for the Development of Sustainable Human Settlement) – came into existence. The principal objective of the BNG national housing policy includes the creation of well-managed housing projects involving the upgrading or redevelopment of the informal settlements and the reversal of the conditions that millions of South Africans live under in the informal settlements. The BNG policy represents the boldest national housing policy ever undertaken in South Africa since the dispensation of democratic governance and reflects the State's attempt to meet its constitutional responsibilities in terms of section 26(2) to provide access to adequate housing on a progressive basis.

[12] The aim of the policy is to give effect to the right of access to adequate housing in a manner that promotes sustainable development, wealth creation, poverty alleviation and equity. Properly implemented, the sustainable human settlements so created would provide for a safe and secure environment, with adequate access to economic opportunities, a mix of safe and secure housing and tenure types, reliable and affordable basic services, educational, entertainment and cultural activities, social amenities and health, welfare and police services. The implementation of the N2 Gateway project in Joe Slovo informal settlement requires the relocation of residents to the temporary relocation areas (TRAs) to ensure the rehabilitation, the laying out of infrastructure and services and the building of houses. An essential ingredient for the redevelopment of Joe Slovo informal

settlement is vacant land. It is, however, envisaged that once the houses have been built and completed, a significant number of the residents will be offered the opportunity of returning to Joe Slovo, to occupy the houses in terms of the qualifying criteria. It was not seriously argued on behalf of the Respondents that those criteria are unreasonable or unlawful.

[13] The relocation of residents into TRAs at Delft and other areas on the N2 Gateway that may be made available is therefore an indispensable requirement of the redevelopment of Joe Slovo in accordance with the N2 Gateway housing project. Discussions with the residents have yielded limited success on voluntary relocation and since the formation of the Task Team there is a clear indication that some residents will not offer voluntary relocation without an order of Court. The clearest example of the resistance to voluntary relocations came with a very disruptive protest in September 2007 resulting in property damage on Phase 2, the intimidation of constructors on the vacant site of Phase 2 and the disruption of the N2 arterial. It was this protest in September that precipitated this application because it was the clearest indication of a breakdown in attempt to achieve a voluntary relocation. The structured removal and relocation order on the terms sought by the Applicants is designed to provide alternative suitable accommodation for the residents as required in terms of *Prevention of Illegal Eviction and Unlawful Occupation of Land Act* 19 of 1998 (PIE).

[14] In terms of the order sought by the applicants, the removal of residents will be coordinated and structured in such a manner that only a limited number of residents within a particular zone of Joe Slovo would be moved at one time and relocated into TRAs that are available. The applicant's intention is only to relocate persons if they can provide alternative access to other housing opportunities and – unlike some cases which have been dealt with by the Courts [*Unlawful Occupiers, School Site v City of Johannesburg* 2005 (4) SA 199 (SCA)] - no person so strategically relocated who qualifies to obtain a house under the government housing program will not be given access to adequate housing, whether it is in the TRAs or in the finished houses at Delft or elsewhere on the N2 Gateway. Applicants have taken great care to ensure that the implementation of the N2 Gateway Housing Project is done in a manner that affirms the human dignity of the people concerned, but unless it is given vacant land, an essential ingredient for the implementation of the housing program is missing.

[15] It is against this background of Joe Slovo informal settlement that the entire N2 Gateway Project must be assessed.

Reasons for and relief sought

[16] The relief sought by the applicants which includes periodic reporting to the Court on the progress of relocation to adequate shelter in the TRAs is a novel one, but certainly demonstrates that the State has become more sensitized to the constitutional values underpinning any development project. The court was assured that no one person relocated to any area on the N2 Gateway Project would be rendered homeless or without adequate access to shelter and such assurance was found in the relocation schedule provided to the court. I deal with this further on in the judgment suffice to point out that the relief sought in this application was crafted with due regard to the basic constitutional obligations on the State to affirm the dignity of those it sought to relocate in order to implement the goals of the national housing policy. The application was brought on an urgent basis which urgency was challenged by the Respondents. I am persuaded about the urgency of the matter. Firstly,

because of the eruption of violence orchestrated to bring any voluntary relocation efforts to an end, and secondly because the housing crisis in South Africa remains one of urgency to resolve so that the people may live in dignity and the security of homes. In this case, and notwithstanding extensive efforts over a protracted period of time to persuade the residents of Joe Slovo to cooperate with an orderly move to the housing provided, these efforts have been unsuccessful. On Monday 10 September 2007 tensions in Joe Slovo regarding the proposed move boiled over, resulting in an intolerable situation of violence, damage to property and the blockading of the major arterial road into the city of Cape Town, the N2, by those of the Respondents opposed to the project. This event led to this application as both urgent and inevitable.

[17] This is therefore an urgent application for an order for the orderly relocation of the Respondents, with observance of the requirements of PIE. Due to the scale involved in granting the relief, the application is for an eviction order, structured over a period of time, with provision made for Applicants to report back to this Court as to the progress of the matter and the implementation of the orders granted. This is not a normal eviction application. In fact it is a misnomer to refer to it as such. It is the application for a strategic relocation of the residents of Joe Slovo to temporary accommodation to enable the land to be rehabilitated in order that proper housing would be built for the benefit of the people living in such conditions. Furthermore, this application is also nothing close to what was done under the previous Apartheid-regime whereby Black people were forcibly moved from their traditional land so that the land would be developed for the benefit of and occupation by other race groups.

Notice Application (Section 5 of *Prevention of Illegal Eviction From and Unlawful Occupation of Land Act* 19 of 1998)

[18] The Applicants brought an application to this Court on 19 September 2007 for an order in terms of which the applicants would be allowed to dispense with the forms and service provided by the Uniform Rules of the High Court, and entertaining this matter as one of urgency in terms of Rule 6(12), and in accordance with the provisions of Section 5 of PIE. Such order was made by this Court on 20 September 2007, authorising the applicants to give notice to Respondents in specified languages and in a manner that would allow for proper service of the notice. On the day of the hearing more than 2000 people regarded as occupants of Joe Slovo informal settlement attended the court proceedings. Due to the limited space of the court room and the large crowd of interested persons in this matter, additional arrangements were made to set up a loud speaker system outside the court building to enable those who could not make it to the actual court room to be accommodated and to hear the court proceedings.

[19] It is clear that the order of court of 20 September 2007 was substantially complied with. How this order was effected may be seen from the Affidavit of Service, deposed to by Lister Gcinikaya Nuku, the applicants' attorney of record. According to Mr Nuku's affidavit the order caused approximately 5000 copies of the notice in the various languages to be made. Arrangements for service on the Second and Third Respondents had been made, as well as service on E Moosa, Waglay & Petersen, a firm of attorneys of Klipfontein Road, Rondebosch, Cape Town. There were also arrangements made to effect service by the offices of the Sheriff, Goodwood, in whose jurisdiction the Joe Slovo informal settlement is situated. Also copies of the notice were delivered to the South African Police Services, Langa Township.

[20] In order to serve the papers as best as would be possible additional arrangements were made to ask the community leaders of Joe Slovo to distribute the notices informally. Various methods were used to effect service of the notice. The order of court relating to service and eviction notices was

therefore substantially complied with. It is also clear from the attendance of the occupants, more than 2000 occupants of Joe Slovo were present outside and some in the court building on each court day, from the day that the order with regard to the manner of effecting notice of the application was granted up until the last court day of 13 December 2007. It is my judgment that no one can seriously contend that he/she was not aware of the eviction notices. That much is clear from the aforesaid.

Subsequent Developments

[21] Additional arrangements were made to assist those Respondents who wanted to deliver notices of opposition. Respondents filed in excess of 2000 notices. In his affidavit Mr. Nuku stated that he became aware of the fact that many of the Respondents wanted to file notices of opposition at his offices on 25 September 2007, and due to the logistics of serving and helping such a large group of persons as well as the need to file the notices within normal court hours, arrangements were made in order for the Respondents to serve and file such notices from the steps of the Cape High Court. The large number of persons wanting to serve and file notices necessitated the blocking off of a portion of Keerom Street in front of the High Court building as well as the deployment of a large number of police officers. Arrangements were made with the administration personnel at the High Court for the filing room to remain open until such time as all notices of opposition could be filed. The Cape High Court staff co-operated in this regard. Arrangements were also made to provide the Respondents with free transportation to and from Cape Town. These arrangements were made to facilitate their ability to serve and file the notices, as well as to facilitate their court presence at all the remaining court dates.

[22] Pursuant to the order of court of 20 September 2007 the court reconvened on 4 October 2007. On this occasion the Respondents were legally represented and indicated that they were represented in two groups as already indicated above. During this court hearing an order was essentially made by agreement between the parties to postpone the proceedings for hearing until 12 December 2007. The order by agreement also made provision for the filing of Court Papers – answering and replying affidavits and Heads of argument.

Proceedings on 12 DECEMBER 2007

[23] Respondents brought a counter Interlocutory application for the review and setting aside of the Land Availability Agreement(s). They contended that they were entitled to raise a collateral challenge to: the validity of the land availability agreement between the MEC and the City of Cape Town; the validity of the land availability agreement between the MEC and Thubelisha Homes; the validity of the agreement between the First Applicant and Firstrand Bank Ltd; and the decision of the Applicants to seek the eviction of the Respondents from the land. The interlocutory counter application seems to have been designed to result in the postponement of the main application, and, properly conceived, such a result was possible. I could not countenance an application which would result in a postponement in which the housing project would be stalled with the attendant delays in the provision of decent housing for the poor people. Even if I were to hold that the review application was good, such a finding would simply be corrected by the authorities by making the necessary adjustments to the documents on which this housing project was constructed.

[24] The main argument advanced by Mr. Budlender on behalf of the Task Team representing the Respondents, was that for a section 5 PIE application the applicant must be the owner or the person in control of the premises. It was also contended that some statutory regulations were not complied with in order to effect a valid transfer of the property. This was based on the proposition that the underlying contracts and agreements were contrary to the N2 Gateway Housing Project since they introduced bonded houses as opposed to BNGs – Breaking New Ground or free houses. Furthermore, that the transfer of land by the Second Applicant to the Third Applicant was contrary to the provisions of the *Local Government: Municipal Finance Management Act* 56 of 2003 and therefore, so ran the argument, that the applicants did not have standing to bring the application for eviction of Respondents since none were either owners of property or persons in charge of the land as required under PIE. Furthermore, he argued that the

Respondents had a legitimate expectation regarding the agreement that 70% of the houses built in Joe Slovo would be allocated to the existing occupants and the remaining 30% would go to the 'Backyarders'. The legitimate expectation, he argued, arose from promises and undertakings made by representatives of the City Council at various meetings convened to deal with problems and challenges facing the Joe Slovo residents. (This along with multiple averments in the court papers of meetings and/or consultations that were held with residents of Joe Slovo indicates that there was a sufficient amount of engagements between the applicants and the respondents regarding this matter. As such this will suffice and be in line with the recent, as yet unreported, Constitutional Court judgment of *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg, Rand Properties (Pty) Ltd, Minister of Trade and Industry, and the President of the Republic of South Africa with the Centre on Housing Rights and Evictions and the Community Law Centre, University of the Western Cape as amici curiae* CCT 24/07 [2008] ZACC 1 as given on 19 February 2008. See paragraphs [10] to [23], with specific reference to paragraphs [16], [22] and [23].) In amplification of his argument, Mr. Budlender submitted that the 70%:30% ratio would not be adhered to due to the problem already experienced with regard to Phase 1 already completed. It is common cause that Phase 1 consists of rented flats and Thubelisha Homes therefore acted for an unauthorised purpose. Therefore Mr. Budlender sought an order that 70% of the houses in Joe Slovo should be allocated to Joe Slovo residents. Such an order was, however, not necessary since none of the respondents sought to review the decisions made in relation to the allocation of Phase 1.

[25] Counsel on behalf of Second Applicant, Mr. Donen, SC, contended that the Respondents seek to review three contracts which do not constitute administrative action, and for that reason are not susceptible to judicial review. Furthermore, the contracts are not the outcome of decisions, but of a Memorandum of Understanding [annexure "XS18" to the founding affidavit of Prince Sigcawu] that was concluded between the three spheres of government. This primary agreement regulating the state of affairs in respect

of certain key elements regarding the N2 Housing Gateway Project would remain intact even if the agreements are susceptible to being set aside.

[26] The Court gave a ruling dismissing the Interlocutory Application. No order was made regarding costs. There were many reasons for this order. Firstly, it was not disputed that the Second and Third Applicants have *locus standi*. Therefore even if the court were to find that the First Applicant has no *locus standi*, that would not dispose of the matter as Second and Third Applicants certainly have *locus standi*. Secondly, the request for review was in essence a request for a review of contracts, the Land Availability Agreement(s). A contract cannot in itself be regarded as an administrative action which could be up for review. Its very nature does not allow for a contract to be reviewed, especially not by someone who is not even a party to the contract. Thirdly, there was an undue delay in bringing the review application. In March 2006 Thubelisha Homes became a known presence in Joe Slovo informal settlement. As can be seen from the affidavit deposed to by Bernard Gutman, the Respondents raised concerns about pressure on them to move to Delft. Some occupants moved voluntarily as early as August 2006. There was evidence that there were some Joe Slovo residents who visited the offices of E Moosa, Waglay & Petersen to obtain legal advice. This indicates that they were aware that an eviction was possible and/or imminent. By that time some other occupants moved voluntarily to the Temporary Relocation Areas (Hereinafter referred to as TRAs) housing, which made enough space available required for the development of Phase 1.

[27] In *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA) the Supreme Court of Appeal held that there are two ways in terms of which a party may challenge the validity of administrative action in proceedings which have been brought against it:

> - In certain cases, a collateral challenge is permitted. In such a case the affected party challenges in those proceedings the validity of the action which has been taken. This is done without bringing review proceedings;
> - In other cases the party challenging the validity of the administrative action is required to bring review proceedings to have the action set aside. (At paragraphs [35] and [36] of the judgment)

For the reasons given above, in my view the principles of law laid down by the SCA in the *Oudekraal Estates*-case do not apply *in casu*.

[28] Furthermore the Applicants brought an application to declare the counter-application proceedings launched by First Respondents on the 21 November 2007 to be an irregular proceeding in terms of Rule 30. The Rule 30 Application was granted by the Court. No order as to costs was made. Clearly the Interlocutory application was an irregular step in terms of Court Rules.

Main Application

[29] The Applicants allege that the persons who occupy Joe Slovo do so without the consent of the City which is the owner of the property and without the consent of Thubelisha Homes, a party in charge of the land in question. Furthermore, notwithstanding that there have been extensive efforts over a protracted period of time to persuade the residents of Joe Slovo to co-operate with an orderly move to housing provided, these efforts have been unsuccessful. And, moreover, that there has been compliance with the requisites for the grant of an eviction order in terms of sections 5 and 6 of PIE.

[30] The intervention of this Court has been sought in order to reconcile the duty of the Second and Third Applicants to achieve the progressive realisation of the constitutional right of access to adequate housing (through the relocation of the residents in a manner which is consistent with a valid national housing policy) with the right of the residents not to be evicted from their homes without an Order of Court (made after considering all the relevant circumstances). Applicants contend that despite meaningful consultation, consensus as to relocation cannot be reached between the spheres of the government responsible for housing and the residents of Joe Slovo informal settlement.

[31] The Applicants have instituted these proceedings on two bases: a)

section 5 of PIE; and b) section 6 of PIE. Section 5 of PIE provides as follows:

"(1) Notwithstanding the provisions of section 4, the owner or person in charge of land may institute urgent proceedings for the eviction of an unlawful occupier of that land pending the outcome of proceedings for a final order, and the court may grant such an order if it is satisfied that-

(a) 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;

(b) the likely hardship to the owner or any other affected person if an order for eviction is not granted, exceeds the likely hardship to the unlawful occupier against whom the order is sought, if an order for eviction is granted; and

(c) there is no other effective remedy available.

(2) Before the hearing of the proceedings contemplated in subsection (1), the court must give written and effective notice of the intention of the owner or person in charge to obtain an order for eviction of the unlawful occupier to the unlawful occupier and the municipality in whose area of jurisdiction the land is situated.

(3) The notice of proceedings contemplated in subsection (2) must-

(a) state that proceedings will be instituted in terms of subsection (1) for an order for the eviction of the unlawful occupier;

(b) indicate on what date and at what time the court will hear the proceedings;

(c) set out the grounds for the proposed eviction; and

(d) state that the unlawful occupier is entitled to appear before the court and defend the case and, where necessary, has the right to apply for legal aid."

[32] The Respondents contended that the Applicants misconceived their remedy in seeking relief in terms of section 5 of PIE. The essence of their primary objections is that section 5 makes provision for urgent interim relief pending the final determination of a party's rights under sections 4 and 6 of PIE. Therefore the Applicants should have sought a final eviction order on the basis of sections 4 and 6 of PIE. This argument is untenable. The applicants clearly complied with the procedure laid down in Section 5 of PIE. I have

already found that valid and proper eviction notices were issued and served on the respondents. Furthermore, the expedited hearing of this matter was agreed to between the parties in terms of the order by agreement referred to above. This argument does not merit further attention. It is simply devoid of substance.

[33] Section 6 of PIE regulates the eviction at the instance of an organ of state. It provides as follows:

> *"(1) An organ of state may institute proceedings for the eviction of an unlawful occupier from land which falls within its area of jurisdiction, except where the unlawful occupier is a mortgagor and the land in question is sold in a sale in execution pursuant to a mortgage, and the court may grant such an order if it is just and equitable to do so, after considering all the relevant circumstances, and if-*
>
> *(a) the consent of that organ of state is required for the erection of a building or structure on that land or for the occupation of the land, and the unlawful occupier is occupying a building or structure on that land without such consent having been obtained; or*
>
> *(b) it is in the public interest to grant such an order.*
>
> *(2) For the purposes of this section, 'public interest' includes the interest of the health and safety of those occupying the land and the public in general.*
>
> *(3) In deciding whether it is just and equitable to grant an order for eviction, the court must have regard to-*
>
> *(a) the circumstances under which the unlawful occupier occupied the land and erected the building or structure;*
>
> *(b) the period the unlawful occupier and his or her family have resided on the land in question; and*
>
> *(c) the availability to the unlawful occupier of suitable alternative accommodation or land.*
>
> *(4) An organ of state contemplated in subsection (1) may, before instituting such proceedings, give not less than 14 days' written notice to the owner or person in charge of the land to institute proceedings for the eviction of the unlawful occupier.*
>
> *(5) If an organ of state gives the owner or person in charge of*

land notice in terms of subsection (4) to institute proceedings for eviction, and the owner or person in charge fails to do so within the period stipulated in the notice, the court may, at the request of the organ of state, order the owner or person in charge of the land to pay the costs of the proceedings contemplated in subsection (1).

(6) The procedures set out in section 4 apply, with the necessary changes, to any proceedings in terms of subsection (1).”

[34] It is clear that section 6 applies only to an “Organ of State”.

Section 239 of the Constitution defines an “organ of state” as follows:

“(a) any department of state or administration in the national, provincial or local sphere of government; or

(b) any other functionary or institution-

(i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or

(ii) exercising a public power or performing a public function in terms of any legislation,

But does not include a court or a judicial officer.”

[35] As already stated these proceedings were brought by Thubelisha Homes being the First Applicant, the National Minister of Housing as Second Applicant, and the MEC for Housing, Western Cape, the Third Applicant. The Respondents contended that none of the Applicants met the requirements of section 6 of PIE. I agree with Applicant’s Counsel that there is no merit to any of the contentions raised by the Respondents regarding section 6 of PIE. The National Minister (who falls within the definition of an organ of state) has been cited as a co-Applicant and for that reason alone meets the requirements of sections 6(1) in respect of the institution of these proceedings. In any event the National Minister has deposed to an affidavit in which she states that she is fully aware of the application being made by the First Applicant for the relief set forth in the Notice of Motion, and that in her capacity as National Minister of Housing she fully aligns herself with the relief sought, and refers to the founding affidavit deposed to by Prince Sigcawu. Furthermore, it is self-evident and indeed a fact (and one which the Court can take judicial notice of) that the National Minister of Housing’s jurisdiction extends to a national level, within which the Joe Slovo informal

settlement is included.

[36] Accordingly, I agree with the applicants' submission that the first requirement of section 6 of PIE has been complied with. Thubelisha Homes is "an organ of state" within the meaning of the Promotion of Administrative Justice Act 3 of 2000 (PAJA), or alternatively a juristic person other than an organ of state exercising a public power or performing a public function in terms of the empowering provision. It is not without significance that both PAJA and PIE define an "organ of state" in section 1 of each of these Acts with reference to section 239 of the Constitution.

[37] One of the pre-requisites for the application of PIE is that the person sought to be evicted must be an "unlawful occupier" in terms of section 1. The residents of Joe Slovo contended that they are not unlawful occupiers as defined in PIE in that they have the express, alternatively tacit consent of the City to occupy the land and their structures. In support thereof, they contended that they have been issued with "red cards" which entitled them to remain in undisturbed possession of their houses, a fact which they averred was given further credence by the City's provision of certain services to them. Ms Mfeketo, the then Mayor of Cape Town, disputed such allegations. She stated that services were provided for "basic humanitarian reasons" and should not be construed as consent by the City or granting the residents any enforceable right to remain in the area. It was always intended that informal settlements in general would be upgraded, moved or redeveloped in conformity with government's constitutional imperative to provide access to adequate housing on a progressive basis.

[38] Thus the respondents have failed to demonstrate any basis for having obtained consent to occupy the property in question. In any event and to the extent that the provision of services may have been construed as such consent (which the Applicants do not accept), it was submitted that by virtue of the institution of these proceedings the residents no longer have such consent. Not only did the residents of Joe Slovo not have a right in law to occupy the said properties, but insofar as they constructed their informal

structures on such property they did so in contravention of the law. All informal dwellings at Joe Slovo are “illegal structures and are built in substantial non-compliance with building laws and related regulations”. In answer thereto, Sopaqa stated on oath that he had no knowledge of the building laws and regulations and accordingly denied the averment that informal dwellings were built in violation of building regulations. However, the chairperson of one of the committees representing the residents (Penze) stated that he “confirms” that no building plans were submitted for the erection of the dwellings but that notwithstanding contended that their structures are not illegal because government provided the residents with the land. This argument is, of course, nonsensical. It cannot seriously be argued that the shacks complied with building regulations. The mere fact that Joe Slovo land is approximately 30 hectares and has about 20 000 residents bears testimony to the fact that the informal dwellings in question do not comply with the building regulations.

The South African Housing Crisis and PIE

[39] The nature of the South African housing crisis is recorded in numerous cases and is a well-known historical fact. However it is necessary background to appreciate and understand the nature of the constitutional obligations imposed on the State in terms of Section 26 of the Constitution. The problem of access to adequate housing in South Africa is acute and critical, and arises largely as a direct consequence of the apartheid land and housing policies and planning. The democratic state accordingly inherited a very complex and extensive housing problem. This necessitated the drafting of legislative measures and policy frameworks on the provision of housing. The recognition of the State’s obligation to provide access to adequate housing in section 26 of the Constitution must be understood from these basic historical facts. The right to adequate housing as one of the most important of all basic human rights is recognised in a number of international human rights instruments and treaties. [Universal Declaration of Human Rights, 1948, Art 25; European Convention on Human Rights and Fundamental Freedoms, 1950, Art 8(1)]

[40] The law envisaged in section 26(3) of the Constitution is the PIE Act and in it are procedural requirements that act as safeguards against arbitrary evictions. A particular striking feature of this application is that, firstly, it seeks the eviction of residents only in circumstances where it is able to provide alternative accommodation in the TRAs. Secondly, it seeks to evict residents in order to provide them with access to adequate accommodation. It follows, therefore, that the strategic removal of the residents of Joe Slovo will not result in homelessness. It is undoubtedly for the benefit of the residents of the informal settlement and in line with the constitutional values. The protection against arbitrary evictions finds expression in sections 4, 5 and 6 of PIE. These circumstances are, in effect, jurisdictional prerequisites for the consideration of the merits of an eviction application. The key requirement for a successful eviction application is that the residents are notified before a Court can grant an eviction order. The Applicants have complied with the notice requirement of section 5. The effect of the section 5 notice was that it elicited over 2000 individual notices of intention to defend and a subsequent arrangement regarding legal representation that would cover all the residents affected by the relief sought.

[41] The substantive requirements for an eviction under PIE Act are all based on the unlawfulness of the occupation. It follows therefore that where a person resides lawfully, no eviction order can successfully be obtained under PIE. The residents of Joe Slovo are unlawful occupants as envisaged in the PIE Act. They occupy the land without the consent of the City or the person in charge of the land. I have already made a positive finding to that effect above. The "land" referred to in the Section 2(1) of ESTA is essentially rural land which has not been proclaimed as a township. PIE applies to persons who are occupying land unlawfully, i.e. "*unlawful occupiers*". They are those "*who have for historic or other reasons and without the permission of the owner moved onto an owner's land and created an informal settlement.*" As we shall see below, the Respondents have failed to establish any rights under IPILRA or ESTA which entitle them to frustrate a lawful housing project designed to improve the conditions of informal settlements. The Joe Slovo residents fall into the class of unlawful occupiers in terms of the PIE Act.

Breaking New Ground Policy and the N2 Gateway Project

[42] The *Housing Act* 107 of 1997 is one of the central pieces of housing legislation that provides for the State to give effect to its obligations under the Constitution on the right of access to adequate housing. The N2 Gateway Housing Project is a project as envisaged in the definition of national housing programme in the Act and it is critical to assess it against the principles set out in the Housing Act. The government's "Breaking New Ground: A Comprehensive Plan for the Development of Sustainable Human Settlements" (August 2004) is the central policy guiding the implementation of the N2 Gateway project. The respondents do not contend that the national housing policy is unreasonable. They also do not contend that the N2 Gateway Housing Project is unreasonable or that it is being implemented unreasonably.

[43] The national housing policy follows the guidance of the Constitutional Court case of *Government of the RSA and Others v Grootboom and Others* 2001 (1) SA 46 (CC), which I extensively quote below:

> *"[35] ...housing entails more than bricks and mortar. It requires available land, appropriate services such as the provision of water and the removal of sewage and the financing of all of these, including the building of the house itself. For a person to have access to adequate housing all of these conditions need to be met: there must be land, there must be services, there must be a dwelling. Access to land for the purpose of housing is therefore included in the right of access to adequate housing in s 26. A right of access to adequate housing also suggests that it is not only the State who is responsible for the provision of houses, but that other agents within our society, including individuals themselves, must be enabled by legislative and other measures to provide housing. The State must create the conditions*

for access to adequate housing for people at all economic levels of our society. State policy dealing with housing must therefore take account of different economic levels in our society.

[36] In this regard, there is a difference between the position of those who can afford to pay for housing, even if it is only basic though adequate housing, and those who cannot. For those who can afford to pay for adequate housing, the State's primary obligation lies in unlocking the system, providing access to housing stock and a legislative framework to facilitate self-built houses through planning laws and access to finance. Issues of development and social welfare are raised in respect of those who cannot afford to provide themselves with housing. State policy needs to address both these groups. The poor are particularly vulnerable and their needs require special attention. It is in this context that the relationship between ss 26 and 27 and the other socio-economic rights is most apparent. If under s 27 the State has in place programs to provide adequate social assistance to those who are otherwise unable to support themselves and their dependants, that would be relevant to the State's obligations in respect of other socio-economic rights.

[37] The State's obligation to provide access to adequate housing depends on context, and may differ from province to province, from city to city, from rural to urban areas and from person to person. Some may need access to land and no more; some may need access to land and building materials; some may need access to finance; some may need access to services such as water, sewage, electricity and roads. What might be appropriate in a rural area where people live together in communities engaging in subsistence farming may not be appropriate in an urban area where people are looking for employment and a place to live.

[38] Subsection (2) speaks to the positive obligation imposed upon the State. It requires the State to devise a comprehensive and workable plan to meet its obligations in terms of the subsection. However ss (2) also makes it clear that the obligation imposed upon the State is not an absolute or unqualified one. The extent of the State's obligation is defined by three key elements that are considered separately: (a) the obligation to 'take reasonable legislative and other measures'; (b) 'to achieve the progressive realisation' of the right; and (c) 'within available resources'. “

Judicial Powers to Interfere with the Project

[44] The Court in exercising its powers to decide whether or not to grant the relief sought, taking all factors into account, must also be guided by the principle of the separation of powers. The N2 Gateway Housing Project is a pilot project and in the nature will not have all the attributes of perfection. It will be adjusted as the circumstances permit and be refined as it goes along. The basics of a reasonable housing project however remain intact. In that regard it is important to heed the words of the Constitutional Court. In dealing with the State's duty under the Constitution to give effect to health rights, in *Soobramoney v Minister of Health, Kwazulu-Natal* 1998 (1) SA 765 (CC) para [42] Madala J stated:

> "*[42] The Constitution is forward-looking and guarantees to every citizen fundamental rights in such a manner that the ordinary person-in-the-street, who is aware of these guarantees, immediately claims them without further ado - and assumes that every right so guaranteed is available to him or her on demand. Some rights in the Constitution are the ideal and something to be strived for. They amount to a promise, in some cases, and an indication of what a democratic society aiming to salvage lost dignity, freedom and equality should embark upon. They are values which the Constitution seeks to provide, nurture and protect for a future South Africa.* "

And further

> *"[43] ...In its language, the Constitution accepts that it cannot solve all of our society's woes overnight, but must go on trying to resolve these problems. One of the limiting factors to the attainment of the Constitution's guarantees is that of limited or scarce resources..."*

[45] It is clear from the jurisprudence and leading case law that the Courts correctly adopt a cautious approach when assessing socio-economic policies because in the first place they are ill-equipped to make choices on which policies the executive must follow; secondly, courts are obliged to ensure that there is separation of powers and will not unduly interfere with the choices of the executive as long as they pass the rationality or reasonableness test; and finally, courts are obliged to ensure that institutions best equipped to make the policy choices are not paralyzed by indiscriminant challenges to government socio-economic policies. (See also *Minister of Health and Others v Treatment Action Campaign and Others (No 2)* 2002 (5) SA 721 (CC) where the court decided that courts are ill-equipped to adjudicate upon socio-economic policies).

[46] Furthermore, in the *Grootboom*-case the following was stated at paragraph 6:

> "[6] The cause of the acute housing shortage lies in apartheid. A central feature of that policy was a system of influx control that sought to limit African occupation of urban areas. Influx control was rigorously *enforced in the Western Cape, where government policy favoured the exclusion of African people in order to accord preference to the coloured community: a policy adopted in 1954 and referred to as the 'coloured labour preference policy'. In consequence, the provision of family housing for African people in the Cape Peninsula was frozen in 1962. This freeze was extended to other urban areas in the Western Cape in 1968. Despite the harsh application of influx control in the Western Cape, African people continued to move to the area in search of jobs. Colonial dispossession and a rigidly enforced racial distribution of land in the rural areas had dislocated the rural economy and rendered sustainable and independent African farming increasingly precarious. Given the absence of formal housing, large numbers of people moved into informal settlements throughout the Cape Peninsula. The cycle of the*

apartheid era, therefore, was one of untenable restrictions on the movement of African people into urban areas, the inexorable tide of the rural poor to the cities, inadequate housing, resultant overcrowding, mushrooming squatter settlements, constant harassment by officials and intermittent forced removals. The legacy of influx control in the Western Cape is the acute housing shortage that exists there now. Although the precise extent is uncertain, the shortage stood at more than 100 000 units in the Cape Metro at the time of the inception of the Constitution of the Republic of South Africa Act 200 of 1993 (interim Constitution) in 1994. Hundreds of thousands of people in need of housing occupied rudimentary informal settlements providing for minimal shelter, but little else."

[47] Government at every level and in varying degrees is constitutionally obliged to realise the right of every person to have access to adequate housing. Due to limited resources and the large number of persons in need of housing, this obligation can only be realised progressively. It is beyond dispute that there is a crisis with formal housing in South Africa, a fact to which this court cannot turn a blind eye.

The Constitution of the Republic of South Africa, 1996

[48] The advent of the Constitution ushered with it new and very demanding obligations for the constitutional state to recognise the socio-political and economic landscape of the country. The preamble to the Constitution clearly indicates the broad objectives of the constitutional state, which is to "*improve the quality of life of all citizens and to free the potential of each person*". The State is shouldered with demanding constitutional obligations to "*heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights; lay the foundations for a democratic and open society in which government is based on the will of*

the people and every citizen is equally protected by law…and build a united and democratic South Africa able to take its place as a sovereign state in the family of nations". The use and reference to the preamble in the interpretation of state obligations under the Constitution has been accepted as important not just to create an atmosphere, but to understand the nature and extent of the obligation.

[49] Section 26 of the Constitution reads as follows:

> "*(1) Everyone has the right to have access to adequate housing.*
> *(2) The State must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.*
> *(3) No one may be evicted from their home, or have their home demolished, without an order of Court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions*."

[50] In order to appreciate the policy underpinning the N2 Gateway Housing Project and the relief sought by the Applicants, it is important to assess the ambit of the section 26 right. Section 26 provides everyone with the right of access to adequate housing. The State has an obligation progressively to realise the right of adequate housing by taking meaningful steps or measures towards the goal of achieving the full enjoyment of housing rights for all. The Constitutional Court stated this duty to take measures as follows (*Government of the RSA and Others v Grootboom and Others* 2001 (1) SA 46 (CC) at para 42B-43E):

> "*[42] The State is required to take reasonable legislative and other measures. Legislative measures by themselves are not likely to constitute constitutional compliance. Mere legislation is not enough. The State is obliged to act to achieve the intended result, and the legislative measures will invariably have to be supported by appropriate, well-directed policies and programs implemented by the Executive. These policies and programs*

must be reasonable both in their conception and their implementation. The formulation of a program is only the first stage in meeting the State's obligations. The program must also be reasonably implemented. An otherwise reasonable program that is not implemented reasonably will not constitute compliance with the State's obligations.

[43] 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 program. The program must be balanced and flexible and make appropriate provision for attention to housing crises and to short, medium and long term needs. A program that excludes a significant segment of society cannot be said to be reasonable. Conditions do not remain static and therefore the program will require continuous review. "

[51] The Constitutional Court went further to hold that the section 26(2) speaks to the positive obligation imposed upon the State. It requires the State to devise a comprehensive policy and workable plan to meet its obligations in terms of the constitution. Section 26(3) requires the Court to order an eviction "after considering all the relevant circumstances". The PIE Act describes the circumstances which will be "relevant" where that Act is applicable. The overarching test is whether the eviction will be "just and equitable" (sections 4(6) and (7), and 6(1) of PIE). In essence this amounts to asking whether the eviction will be fair. The Constitutional Court put it succinctly in *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC):

"[28] Section 6(3) states that the availability of a suitable alternative place to go to is something to which regard must be had, not an inflexible requirement. There is therefore no unqualified constitutional duty on local authorities to ensure that in no circumstances should a home be destroyed unless alternative accommodation or land is made available. In general terms, however, a court should be reluctant to

grant an eviction against relatively settled occupiers unless it is satisfied that a reasonable alternative is available, even if only as an interim measure pending ultimate access to housing in the formal housing programme...

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

[52] Professor Van der Walt (AJ Van der Walt Constitutional Property Law p 426) sums up the requirements of section 26(3), as set out in the *Port Elizabeth Municipality*-judgment, as follows:

> "*...in line with section 26(3), the order can only be granted if eviction is justifiable in view of all the circumstances. Secondly, consideration of the order in view of the circumstances amounts to a balancing exercise...Thirdly, this balancing exercise takes place against the background of the history of eviction in the apartheid era and its lasting and enduring effects on the distribution of land and access to housing today.*"

[53] Another important aspect of the national housing obligation on the State to consider is that which was raised in the recent Supreme Court of Appeal judgment of *City of Johannesburg v Rand Properties (Pty) Ltd and Others* 2007 (6) SA 417. Harms ADP at paragraph 44 stated as follows:

> *'...the Constitution does not give a person a right to housing at State expense at a locality of that person's choice. Obviously,*

the State would be failing in its duty if it were to ignore or fail to give due regard to the relationship between location of residence and the place where persons earn or try to earn their living…'

Furthermore, he added:

'Where housing is to be provided for any particular economic group is a matter that lies within the province of the policy-making functions of the city and I do not think a Court can usurp that function.' [at paragraph 75 of the judgment]

Evidence

[54] The evidence of Prince Sigcawu who deposed to the founding affidavit was largely undisputed in so far as it relates to the N2 Gateway Project and its rationale. His evidence was that informal settlements must urgently be integrated into the broader urban fabric to overcome spatial, social and economic exclusion. The Department will accordingly introduce a new informal settlement upgrading instrument to support the focused eradication of informal settlements. The new human settlements plan adopts a phased in-situ upgrading approach to informal settlements. Thus the plan supports the eradication of informal settlements through in-situ upgrading in desired locations, coupled with the relocation of households where development is not possible or desirable. The upgrading process is not prescriptive, but rather supports a range of tenure options and housing typologies. Where informal settlements are upgraded on well-located land, mechanisms will be introduced to optimise the locational value and preference will generally be given to social housing (medium-density) solutions. Upgrading projects will be implemented by municipalities and will commence with nine pilot projects, one in each province building up to full programme implementation status by 2007/8. In addition, he testified that a joint programme by the National Department, the Western Cape Provincial Government and Cape Town Metropolitan Council has already initiated the N2 upgrading project from the Airport to Cape Town, covering the informal settlement in Gugulethu, Cross Roads, Khayelitsha and Langa as a lead pilot project.

[55] The attainment of the constitutional imperative to provide access to adequate housing necessitated the formulation of a policy which would halt the growth of informal settlements, and where appropriate upgrade existing informal settlements by the construction of adequate housing. The N2 Gateway Project is a joint initiative of all three spheres of Government, namely the national Department of Housing, the provincial Department of Housing and Local Government and the City of Cape Town. The scale of the project can only be described as immense, envisaging the provision of between 25 000 and 30 000 housing opportunities.

[56] Prince Sigcawu further testified that the end goal is to deliver adequate housing to each household, and such houses are currently being constructed at Delft, an area approximately 15 kilometres from Joe Slovo. The houses in question are mostly semi-detached (two to a unit) and are in extent 40 square metres per house. They are of brick and mortar construction on solid concrete foundations, with a tiled roof. The floor is a slab of concrete, with wooden doors. The roof is insulated with a fire-resistant polystyrene product. Furthermore, he said, the houses comprise two separate bedrooms; a bathroom equipped with a bath and toilet where there is room for the installation of a hand-basin; an open plan living area with a hand-basin near the door - the intention is for this portion of the living area to serve as a kitchenette; the house has two doors (front and back) and windows in each room. Furthermore, he said, the house is fully serviced with water-borne sewerage as well as running water and electricity (pre-paid meters). The layout of the houses is designed to ensure that the area is not over-densified. The plot size for each house is between 90 and 100 square metres. A tarred road infrastructure is in place connecting the area to the arterial roads. The aforesaid is partially evident from a series of photographs.

[57] As regards Joe Slovo, the end goal is to construct such houses on the area which currently comprises Joe Slovo. As this area is currently hopelessly too densely inhabited, it will not be possible to re-house all the current occupants of Joe Slovo in the same area. Completed housing is transferred

into the names of the beneficiaries at the deeds office. The terms upon which the beneficiaries acquire ownership of the houses are the following:

- The house is provided free of charge if the income of a household is below R1 500 per month. The cost is borne entirely by the State;
- If the income of the household falls between R1 501 and R3 500 per month, the house is transferred to the beneficiary as against a once-off payment of R2 479.00;
- In approximately 80% of all cases, Respondents will qualify for one of the above two. However, if the income of the household is in excess of R3 500 that household does not qualify for housing of this sort (referred to as "BNG" housing) but will be expected to buy other housing on the open market. The N2 Gateway Project involves the construction of such accommodation, which is referred to as "affordable housing" or "credit linked housing". In this regard, agreement has been reached with the Third Respondent regarding their participation in the project. They take transfer of the land and sell the houses to first-time owners at a price which is dependant upon the unit construction. There is a subsidy provided by government to assist purchasers whose income falls between R3 501 and R7 500 per month.

[58] In order to achieve the goals described above, Applicants intend using what they refer to as a "roll-over development" of Joe Slovo. Because of the dense population of the area, the absence of services and infrastructure therefrom and because of the condition of the land itself, it is necessary to clear the area, rehabilitate the ground, lay down services and infrastructure, and thereafter to build housing. The in-situ development is simply not feasible in Joe Slovo. The area is too densely populated and there is woefully too little free space onto which to move occupants on a temporary basis. As a simple example, there is no water-borne sewerage in Joe Slovo, and it is necessary – as part of the upgrading – to lay in a large sewerage pipe over the length of the area. This cannot be done until the area is cleared and housing cannot be built until the sewer is in place. By virtue of the foregoing, it will be necessary to move occupants to temporary accommodation,

pending the construction of permanent housing as discussed above.

[59] Importantly, and while recognising the shortcomings of the TRAs, Applicants averred that:

- The TRA is a marked improvement on the quality of accommodation at Joe Slovo. Fire risks are all but eliminated (there have been no fires at all at TRA areas, whereas informal settlements are notoriously plagued by runaway fires), services are provided with obvious positive consequence as regards health and the absence of diseases, and the ground drains adequate whereas Joe Slovo is characterised by continual flooding during winter;
- The TRA itself, Applicants averred, qualifies as adequate housing (as contemplated by the Constitution and as further dealt with in the Housing Act 107 of 1997 as amended) whereas the shacks at Joe Slovo do not so qualify;
- The TRAs have a sound infrastructure, entirely lacking in Joe Slovo.

[60] The provision of access to adequate housing (whether temporary or permanent) cannot be viewed in a vacuum. Applicants are mindful of the disruptive effect on the lives of the persons moved, and the need to provide related facilities (other than housing) to provide continuity in the lives of those relocated. He added that via the Department of Education, provision has been made for school buses to leave Delft and take children to and from existing schools, principally in Langa. The transport is provided free of charge. Provision has also been made for schools to be set up and in the long term residents will probably move their children to schools in Delft. Furthermore, there is an established clinic in Delft and provision has been made for the establishment of more. Pensioners are given the option of continuing to receive their pension payouts in Langa, or of receiving their pension at established pay-points in Delft. The pay-points in Delft are open five days per month, in contrast to the two days per month at most other pay-points. There is also a police station servicing the whole area. Second Respondent and various provincial departments will provide sporting facilities and public amenities.

[61] The evidence of Prince Sigcawu in this regard was by and large undisputed. There is no reason to reject it. Therefore the court accepts that the TRAs in Delft are far better than the undesirable living conditions in the Joe Slovo informal settlement. It is my view that in so far as the Delft TRAs are concerned, the State has certainly discharged its obligation to provide access to adequate housing in terms of section 26 of the Constitution. The contrary is untenable. (This is in line with the recent, as yet unreported, Constitutional Court judgment of *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg, Rand Properties (Pty) Ltd, Minister of Trade and Industry, and the President of the Republic of South Africa with the Centre on Housing Rights and Evictions and the Community Law Centre, University of the Western Cape as amici curiae* CCT 24/07 [2008] ZACC 1 as given on 19 February 2008. Here the court decided that while the City has obligations to eliminate unsafe and unhealthy buildings, its constitutional duty to provide access to adequate housing means that potential homelessness must be considered. See paragraphs [44] and [46].)

Arguments and Evaluation of Evidence

(i) Locus standi of Thubelisha

[62] The *locus standi* of Thubelisha comes, in the first instance from its position as implementing agent of the Project in terms of the Amendment to the Memorandum of Understanding between the three spheres of government read together with the land availability agreements. When the N2 Gateway Project was conceived, it was appreciated from the outset that it was an inter-governmental project which would involve governmental cooperation across all three spheres of government. Although it was a project of the national department of Second Applicant, by agreement between all parties Second Respondent was initially the implementing agent in regard to the project, with the necessary rights being accorded to it by the other parties. This much is evident from a memorandum of understanding of

February 2005. Second Respondent's role as implementing agent is recorded in clause 4 thereof.

[63] By February 2006, Second Applicant had become the de facto implementing agent, the provisions of the above agreement notwithstanding. Circumstances had arisen which made it appropriate for Second Applicant, Third Applicant, and Second Respondent to appoint a project manager as implementing agent, and for that project manager to assume overall control of the project, removing implementation obligations from both Third Applicant and from Second Respondent. A copy of the agreement "XS19" was annexed to court papers and is dated February 2006, and the following is important regarding standing:

- First Applicant was duly appointed project manager in paragraph 2.1.1;
- The three tiers of government all undertook to conclude separate agreements with First Applicant in the above regard;
- First Applicant is not a party to this agreement.

[64] To the extent that the above agreement comprises a contract which creates a benefit for a third party which is not a party to the agreement (being First Applicant), First Applicant recorded that it had adopted the benefit conferred upon it, and had at all times since the conclusion of this agreement acted as implementing agent in respect of the project. First Applicant had reached agreement with the three tiers of government regarding its role as implementing agent. In February 2006, First Applicant concluded an agreement with Third Applicant (A copy thereof marked "XS20" annexed to court papers). First Applicant came to be in dispute with Third Applicant regarding this contract. These disputes were resolved by the conclusion of a subsequent agreement in May 2007. In February 2006, First Applicant concluded an agreement with Second Respondent (Annexed to court papers as "XS21"). In this agreement the following is important to note: The preamble is reflective of the change in implementing authority; Clause 3.3 mentions the conclusion of land availability agreements as between Second Respondent and Third Applicant, as also a broader assistance in

handing over responsibilities to First Applicant; First Applicant's role as implementing agent is referred to in clause 4.1.

[65] First Applicant had reached agreement with Second Applicant that it is to proceed as implementing agent in terms of the above two agreements. The matter was taken further with the conclusion, in March 2007, of a land availability agreement as between Third Applicant and Second Respondent (Annexed to court papers as "XS23"). The following appears therefrom: The "N2 Gateway Project" is defined such as to include Joe Slovo phase 2; The "properties" are defined so as to include Joe Slovo informal settlement; Clause 2 and 3 provide for Second Respondent to make the property (as defined) available to Third Applicant for the development of housing thereon; Second Respondent granted Third Applicant the right to take possession and occupation of the properties. Third Applicant in turn duly contracted with First Applicant in regard to this land. Pursuant to all the foregoing, First Applicant took possession of the land comprising Joe Slovo, and intends carrying out its development rights and responsibilities thereon. In the circumstances, First Applicant averred that it is the party which is "in charge" of the land as contemplated by Section 5(1) of PIE and that therefore it has standing to move for the relief in the notice of motion. To the extent that there may be any dispute in this regard, First Applicant averred in the alternative that Third Applicant has such standing. I have already determined above that anyone of the three applicants has *locus standi*. I am also of the view that the Respondents' argument relating to standing is not borne out by evidence.

(ii) Availability of alternative accommodation

[66] In *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) the Constitutional Court observed that section 6(3) of PIE states that the availability of a suitable alternative place to go to is something to which regard must be had. It is not an inflexible requirement. There is therefore no unqualified constitutional duty on local authorities to ensure that in no circumstances should a home be destroyed unless alternative accommodation or land is made available. Generally a court should be

reluctant to grant an eviction against relatively settled occupiers unless it is satisfied that a reasonable alternative is available, even if only as an interim measure pending ultimate access to housing in the formal housing programme.

[67] In the same matter the Court observed that the availability of suitable alternative accommodation will vary from municipality to municipality and be affected by the number of people facing eviction in each case. In the circumstances, Applicants submitted that even though not a pre-requisite for the grant of an eviction order, alternative accommodation is being made available to all residents evicted from Joe Slovo. No person will be rendered homeless on account of the relief sought in this application. (Once again, as referred to above in paragraph [61] this is in line with the recent, as yet unreported, Constitutional Court judgment of *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg, Rand Properties (Pty) Ltd, Minister of Trade and Industry, and the President of the Republic of South Africa with the Centre on Housing Rights and Evictions and the Community Law Centre, University of the Western Cape as amici curiae* CCT 24/07 [2008] ZACC 1 as given on 19 February 2008. See specifically paragraph [46] which deals with the consideration that the court must have in ordering an eviction that may lead to homelessness.) Regarding the suitability or otherwise of the TRAs, applicants submitted that the following factors were important, namely:

- The nature of the informal structures that residents are currently residing in. Whilst there is a fair degree of dispute as to the exact nature of the conditions at Joe Slovo, it appears to be accepted by the residents that Joe Slovo informal settlement is densely composed of “self built shacks” constructed from an assortment of wood, plastic and corrugated iron;
- The fact that the TRAs constitute temporary accommodation, from which the residents will in due course be moved to permanent housing;
- The suitability or otherwise of these structures in terms of feedback received from Joe Slovo residents who have already relocated to the TRAs in Delft;
- The basis upon which the residents contend that the TRAs are not suitable.

As was highlighted in paragraphs [56] and [59] above, the TRAs are far better

than the shacks in Joe Slovo. The respondents did not seriously contend otherwise, other than to raise concerns that the TRAs have asbestos, which argument was not seriously pursued in Court. In any event it seems that the concerns relating to the presence of asbestos were without substance. And, moreover, the Minister of Housing, Second Applicant, pointed out in her replying affidavit, tents could be provided forthwith and in the longer term the TRAs will be built of wood.

[68] Applicants further drew attention to the matter of *Unlawful Occupiers, School Site v City of Johannesburg* 2005 (4) SA 199 (SCA) [at para 10] ("the School Site case"). In that case in the Court *a quo* the appellant's central argument why the eviction order sought would not be just and equitable was that Bramfischerville (the area where they were to be located to) was too far from the Alexandra area where many of them were gainfully employed and where their children were at school. The municipality did not deny that the relocation over a distance of some 37 kilometres would be the cause of inconvenience and in many cases even hardship to the appellants. Its answer was that this could not be avoided since it was simply impossible, both financially and practically, to find an area for relocation closer to Alexandra (a fact which appellants submitted is no different from the present matter). The Court a quo devoted a considerable part of its judgment to the weighing up of all the arguments and counter-arguments on the merits. In the end, according to the Supreme Court of Appeal, it came to the well-reasoned conclusion that in all the circumstances it was in fact just and equitable within the meaning of section 6 of PIE, to grant the eviction order sought.

(iii) Legitimate Expectation

[69] Mr Sopaqa deposed to an affidavit stating that the residents of Joe Slovo have a substantive legitimate expectation that the housing to be developed at Joe Slovo, or at least 70% of it, would be made available to members of the community. The applicants now seek to make the overwhelming bulk of that housing available to other persons, and to have the Respondents evicted from the land in order to achieve that unlawful purpose. Furthermore, he said

the Respondents have a legitimate expectation that the authorities will not make the housing to be provided at Joe Slovo available to other persons such that less than 70% of the housing will be made available to the residents of Joe Slovo, without first giving them a hearing in accordance with the common law rules of natural justice. The Applicants, he said, have abandoned their undertaking – which was a condition of the agreement in terms of which the City made the land available to the MEC – that 70% of the housing opportunities at Joe Slovo would be made available to residents of Joe Slovo. The Respondents further claim a legitimate expectation in respect of a right of all residents to return to Joe Slovo and be accommodated in the permanent housing thereat. In this regard, he pointed out that the people who moved out of Phase 1 did so on the basis that they were assured of housing on their return to Phase 1.

[70] It cannot be denied that the first respondents had an expectation that at least 70% of the housing opportunities at Joe Slovo would be made available to residents of Joe Slovo. The legal question however is whether that expectation was legitimate? English and South African decisions show that a legitimate expectation "*may arise from a variety of circumstances",* and that *"it is essential not to close the list of possible sources of a legitimate expectation. To do so would hinder the inherent flexibility and further development of the doctrine to meet the needs of modern societies*". [J.M. Hlophe "The Doctrine of Legitimate Expectation and the Appellate Division" (1990) 107 SALJ 197 at p.200-201.]

[71] The requirements for a legitimate expectation were set out by Heher J in *National Director of Public Prosecutions v Phillips and Others* 2002 (4) SA 60 (W) para 28. He said that the law does not protect every expectation but only those which are "legitimate". The requirements for legitimacy of the expectation, he noted, include the following:

- The representation underlying the expectation must be "clear, unambiguous and devoid of relevant qualification". The requirement is a sensible one. It accords with the principle of fairness in public administration, fairness both to the administration and the subject. It protects public officials against the risk that their unwritten ambiguous statements may create legitimate expectations. It is also not unfair to those who choose to rely on such statements. It is always open to them to seek clarification before they do so, failing which they act at their peril;
- The expectation must be reasonable;
- The representation must have been induced by the decision-maker;
- The representation must be one which it was competent and lawful for the decision-maker to make without which the reliance cannot be legitimate.

[72] Mr Budlender further submitted that it was clear that, with regard to Phase 1 in Joe Slovo consisting of the flats, that Phase 1 has been completed and that there are 705 units, few of those units are occupied by the residents of Joe Slovo. The Applicants were silent with regard to how many Joe Slovo residents were accommodated in the Phase 1 flats. Similarly, he argued, with regard to the proposed development in Phase 2, which will consist of 35 housing units, the applicants were also quiet as to how many of those units would be allocated to the residents of Joe Slovo in line with the undertaking made previously. This, Mr Budlender argued, was a clear violation of the Respondents' substantive legitimate expectation to have the houses allocated to them as residents of Joe Slovo. In any event, Mr. Budlender further submitted, First Respondents have a legitimate expectation that the authorities will not make the housing to be provided at Joe Slovo available to other persons, such that less than 70% of the housing would be made available to the residents of Joe Slovo, without first giving them a hearing in

accordance with the common law rules of natural justice.

[73] Mr Kirk-Cohen argued on behalf of First and Third Applicants that it was common cause that there were utterances and undertakings made regarding the 70:30 % allocation ratio between Joe Slovo residents and "backyarders" of Langa Township respectively. Furthermore, he argued, Phase 1 has been completed and cannot be done away with. Joe Slovo and the entire N2 Gateway Project is a pilot project and as such it will not have the attributes of perfection. The 70:30% ratio related to the entire area of Joe Slovo as opposed to just Phase 1 or 2 thereof. He further submitted that the 70:30% ratio and undertakings made in relation thereto would be accommodated when Phase 3 is developed, or in other parts of the N2 Gateway Project. I agree with Mr. Kirk-Cohen. The evidence of Prince Sigcawu in this regard was not contradicted nor seriously challenged, namely that undertakings and promises related to the entire Joe Slovo informal settlement in the context of the N2 Gateway Project.

[74] In *University of the Western Cape v MEC for Health and Social Services* 1998 (3) SA 124, the court held that:

> " …no one can have a legitimate expectation of doing something contrary to the law, or of preventing a functionary from discharging his statutory duty."[at 134C-D]

(See also JM Hlophe *"Legitimate Expectation and Natural Justice, English, Australian and South African Law"* (1987) 104 SALJ p. 165).

[75] The difficulty with Mr Budlenders' argument relating to legitimate expectation is that it is based on the assumption that the residents of Joe Slovo had the consent of the City Council of Cape Town to reside in Joe Slovo. The argument about to consent has already been rejected by this court in the discussion above. Quite clearly the residents had no consent to reside in Joe Slovo; therefore they are occupying the area unlawfully. Unlawful conduct, it has been held, cannot give rise to a legitimate expectation. Furthermore the applicants are under a constitutional obligation to provide housing *vide*

Section 26 of the Constitution. Clearly to hold that the respondents have a legitimate expectation would have an effect of frustrating the applicants in an attempt to comply with a statutory/constitutional obligation to provide housing. That, in my view, cannot be. The respondents had no substantive nor procedural legitimate expectation because they are occupying Joe Slovo unlawfully. Such unlawful conduct, irrespective of utterances and/or undertakings, cannot give rise to a legitimate expectation capable of being enforced and/or protected in law. In my view there is no merit in Mr Budlenders argument that Respondents had a legitimate expectation.

[76] To conclude this aspect of the judgment, Mr. Budlender's argument also loses sight of what was authoritatively laid down by the Supreme Court of Appeal in *City of Johannesburg v Rand Properties (Pty) Ltd and Others* 2007 (6) SA 417 referred to in paragraph [53] supra, where the court held "*...the Constitution does not give a person a right to housing at State expense at a locality of that person's choice...*". Ironically Mr. Budlender was one of the counsel involved in the *Rand Properties*-case, yet he made no reference to the case at all. It is my judgment that the residents of Joe Slovo had no legitimate expectation nor any right to remain at Joe Slovo. The right is the right of access to adequate housing. It is not the right to remain at the locality of their choice, namely Joe Slovo.

(iv) ESTA and IPILRA

[77] Mr. Hathorn contended on behalf of Respondents that the residents of Joe Slovo Informal Settlement have acquired tenure rights in terms of the *Interim Protection of Informal Rights Act* 31 of 1996 (IPILRA) and the *Extension of Security of Tenure Act* 62 of 1997 (ESTA). Respondents, he argued, had consent of the City of Cape Town to occupy the informal settlement in question. PIE regulates the eviction of unlawful occupiers (as defined in section 1 of the Act) from land. The term "unlawful occupier" is defined as excluding a person who is an occupier in terms of the *Extension of Security of Tenure Act* 62 of 1997 ("ESTA").

[78] In amplification of his argument, Mr. Hathorn submitted that it is not in dispute that a number of the Residents have been in occupation of Joe Slovo since the early 1990s and that many Joe Slovo residents are poor people earning less than R5 000 per month. An unlawful occupier is defined in section 1 of PIE as 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*.' Mr Sopaqa in his opposing affidavit raised the defence that a number of Respondents are holders of informal land rights in terms of the *Interim Protection of Informal Land Rights Act* 31 of 1996 (IPILRA). In terms of section 1 of IPILRA an informal right to land is defined as *inter alia* "beneficial occupation of land for a continuous period of not less than five years prior to 31 December 1997." Section 2(1) of IPILRA states that subject to certain exceptions which are not applicable:

> "*No person may be deprived of any informal right to land without his or her consent."*

Thus the Respondents were not consenting to evictions.

[79] Mr. Hathorn relied heavily on the decision of *Rademeyer and Others v Western District Council and Others* 1998 (3) SA 1011 (SE) at 1017B. He submitted that the *Rademeyer*-decision is authority for the view that where the City Council permits people to remain on its property and provides them with water and sanitation (and other services) it consents tacitly to them residing on that property. This submission is flawed. It flies in the face of the evidence of former Mayor of Cape Town, Ms Mfeketo that services were provided to the Joe Slovo residents for humanitarian reasons and that it was always the intention to build proper houses thereby eliminating informal settlements. She further gave evidence that the Red Cards issued to Respondents were proof of applying for housing and served as recognition of receipt of basic services, not giving the bearer thereof entitlement to occupy property legally. In any event the *Rademeyer*-decision was before the PIE Act came into operation and prior to the *Grootboom*-decision which affirmed the Department of Housing's obligation under the Constitution to provide adequate housing. Furthermore, the ESTA argument is misconceived as Joe

Slovo is not rural land.

(v) Allied Relief

[80] The argument that the Second and Third Applicants did not ask for the eviction of Joe Slovo residents, but merely aligned themselves with the relief sought by the First Applicant is devoid of substance. Mr. Budlender was asked to cite authority for this argument that it is not enough to merely align with relief, but that Second and Third Applicants should ask for the eviction order specifically on the papers. He conceded, properly in my view, that there is no such authority. This argument does not merit any further consideration. All applicants have standing and are seeking the same relief.

Conclusion

[81] In the light of the conclusion to which this court has come, it is not necessary to deal with other arguments advanced by the respondents' counsel. This case is not about normal eviction. It is a strategic relocation of Joe Slovo residents and although this is not required of the Applicants, they subject themselves to judicial supervision and to report back on the progress and faults experienced during the implementation and fulfilment of this pilot project. No pilot project can exist without obstacles. Mistakes are expected, corrections to mistakes are inevitable, and from here the persons responsible for the implementation of the project and similar ones at a later stage must learn. Neither the reasonableness of the housing policy relating to the N2 Gateway project nor the implementation thereof was seriously challenged by the Respondents. Respondents, furthermore, did not challenge Applicants' evidence concerning factors to be taken into account to decide whether it is just and equitable to order eviction.

[82] Joe Slovo informal settlement is defined sufficiently to give effect to an eviction order against various occupants. Respondents are presently occupying the land unlawfully and without consent of the owner thereof. Alternative adequate accommodation (in such a manner that it is more than

adequate) is provided at State's expense. Transport, safety, educational, health and even pension needs have been catered for at State's expense in order to be of some help in alleviating difficulties that are inevitable in the circumstances of the Respondents.

[83] The occupants of Joe Slovo Informal Settlement have an opportunity to live in better accommodation than they reside in presently. This accommodation is merely temporary, until such time as the restructuring, soil treatment, and building of permanent housing in Phase 2 and Phase 3 of Joe Slovo have been completed in terms of the government's Housing Policy, the N2 Gateway Housing Project and in line with the State's obligation to provide housing within its available resources. The TRAs in comparison to the present informal dwellings can be regarded as being safer, asbestos free and relatively more fire-resistant accommodation. Almost 70% of the present occupants of the area and 30% of the "backyarders" of Langa Township will be able to return to Joe Slovo to newly built, better equipped and safer permanent homes. Homes and a community where overcrowding is a thing of the past, where fire dangers are much less, where proper water facilities are led to the houses, sewerage facilities are in place, and where floods could leave lesser damage if any at all after the soil has been rehabilitated and stronger more steady houses have been built.

[84] In terms of the National Housing Policy, the State is in no way attempting to re-enact the apartheid ghost of forced removals from the past. The Department of Housing is merely complying with a constitutional obligation to provide adequate housing. This is not a mass eviction, but a strategic relocation, working in phases according to availability of TRAs and even with assistance for the moving of residents. Respondents are not evicted and on the streets to fend for themselves, but moved to much better accommodation at State's expense and assistance. The majority of them will be able to return to Joe Slovo to live in newly built permanent houses. They will be able to return to the area they know well and enjoy fairly decent accommodation.

Order

[85] In the event it is ordered that:

1. 1.1 The various occupiers of the area known as Joe Slovo informal settlement are directed to vacate the area in accordance with the schedule annexed to the order and marked "X", more particularly:

    1.1.1 They are directed to move from the blocks (in the zones) set forth in the third (and in the second) columns set forth on annexure "X" to the order;

    1.1.2 They are directed to move on the dates set forth in the column styled "Target Date" on annexure "X" to the order.

2. Those who are subject to this order are interdicted and restrained – once they have vacated or been ejected from the area known as Joe Slovo informal settlement – from returning thereto for the purpose of erecting or taking up residence in informal dwellings.

3. 3.1 Those affected by this order shall be entitled to remove their informal structures upon leaving the Joe Slovo informal settlement;

    3.2 After the dwellings situate at Joe Slovo informal settlement have been vacated in accordance with this order, Applicants are authorized to demolish such informal housing as remains in the areas vacated.

4. First Applicant is directed – in accordance with its tender to do so – to render assistance to the parties affected to move their possessions to the extent that it is able to do so.

5. In the event of the failure and/or refusal of the residents of Joe Slovo informal settlement to vacate their dwellings as set forth above, the Sheriff of this Court is authorized and directed to carry into execution this order in accordance with "X" to the order, and:

5.1 In the event of the refusal of the occupants to move their movable possessions, the Sheriff is authorized to move all the movable items in the premises to an identified place in the temporary relocation area in Delft for safekeeping;

5.2 To eject such Respondents from their dwellings at the times indicated on annexure “X” to the order.

6. Applicants are directed:

6.1 To report on affidavit at intervals of no less than 8 weeks (but at more frequent intervals should they deem it necessary) to report back to this Court as to:

6.1.1 The implementation of this order;

6.1.2 The allocation of permanent housing opportunities to those affected by this order.

6.2 To furnish copies of the affidavits comprising its reporting to the Legal Resources Centre, or to such other address as may be directed from time to time.

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HLOPHE, JP