Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

Before The Hon. Mr Justice Binns-Ward

Case no: 10334/2011

In the matter between:

CITY OF CAPE TOWN	Applicant
and	
RUWAYA HOOSAIN N.O	1st Respondent
SELWYN HOCKEY N.O	2nd Respondent
EDWIN JOHN PETERSEN N.O	3rd Respondent
ABDURAZAK OSMAN N.O	4th Respondent
ALL THOSE ADULT PERSONS OCCUPYING ERF 9967 GUGULETHU, ALSO KNOWN AS SCHEME SS MASONWABE PARK, SCHEME NUMBER 9/1992, SITUATE DR. MOERAT RD, GUGULETHU	5th Respondent
WESTERN CAPE PROVINCIAL GOVERNMENT	6th Respondent
THE MINISTER OF TRADE AND INDUSTRY	7th Respondent

JUDGMENT DELIVERED: 21 OCTOBER 2011

BINNS-WARD, J

1] In this matter the City of Cape Town has applied for an order authorising the eviction of the occupants of certain premises in Gugulethu (Masonwabe Park) which had been determined by the municipality to be unsafe for human occupation. The relevant determination was made in terms of section 12 of the National Building Regulations and Building Standards Act 103 of 1977. The application became necessary when the residents failed to comply with a notice given under section 12(4) of the Act requiring them to vacate the premises, or with the request of the registered owners of the property that they should do so.

2] It is not in dispute that the premises are in such a state of dilapidation that habitation there is dangerous. The vacation of the premises has been delayed because the residents (collectively cited as the fifth respondent in these proceedings) were unwilling to accept the alternative accommodation offered to them by the City in 40 (subsequently increased to 56) temporary housing units at a temporary relocation area, commonly known locally as 'Blikkiesdorp'.

3] When the application first came before court on 14 September, I indicated to the parties that I was not satisfied that there had been sufficient engagement between them in respect of the question of the adequacy or the appropriateness of the alternative accommodation offered by the City

(cf. *Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg v City of Johannesburg and Others* 2008 (3) SA 208 (CC) (2008 (5) BCLR 475), at para 21). It was plain on the papers that this had been due to various factors, some of them being matters in dispute on the facts which I found unnecessary to determine. It was clear that it was necessary for the court to give directions to facilitate a process of meaningful engagement. These directions were duly given and the application was postponed to allow the envisaged process of engagement to take place.

4] It is apparent from the reports on the process of engagement filed by the City and by the fifth respondent that fruitful exchanges have occurred between the parties in the interim, and that the co-operation of the provincial government (the seventh respondent) has also been obtained. When the hearing of the matter resumed on 19 October I was requested by the parties to grant a further postponement of the matter for approximately one month to allow the engagement process to be pursued further. In this regard it seems possible that vacant ground in a situation more convenient to the persons comprising the fifth respondent than accommodation at any of the established temporary relocation areas established in terms of the City's housing policy may be able to be made available by the authorities for the purposes of temporarily housing them. (It is apparent on the evidence that the existing temporary relocation areas are in any event stretched to capacity.) The pursuit of this possible alternative as a viable settlement of the alternative accommodation issue is complicated however by a matter in dispute between the parties: that is whether it would be reasonable for the City to provide 80 temporary housing

units for the accommodation of the fifth respondent at such alternative site, or 107 units, as contended for by the fifth respondent community.

5] The parties (that is the City, the Province and the fifth respondent) have requested the court's assistance in resolving the issue of the number of housing units that should be provided if an alternative site indeed can be made available, as currently being considered. I received this request with some diffidence. After all it is well established that it is not the function of the court to give advice and it was furthermore initially by no means clear what the status of any pronouncement by the court of the nature sought by the parties would be in the circumstances.

6] Counsel for all three of the aforementioned parties addressed argument in support of the contention that it would be appropriate for the court to accede to the request. All the parties indicated in the course of their submissions that what was variously described by them as an 'order' or a 'ruling' (I prefer to call it a 'declaration') was needed from the court in order to provide 'the parameters' for the intended further engagement between the parties on the issue. They argued that the source of the court's power to give the direction sought lay in the Constitution. In this regard counsel for the City invoked s 172(1)(b) of the Constitution. This argument was supported by counsel for the Province, who, in addition, also referred to the 'appropriate relief' provision in s 38 of the Constitution and also by counsel for the residents.

7] Ms *Karrisha Pillay*, who appeared for the Province, supported in this respect by Mr *Hathorn*, who appeared for the fifth respondent, buttressed the

argument based on the aforementioned provisions of the Constitution with reliance on various passages in the judgment of the Constitutional Court's judgment in *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) (2004 (12) BCLR 1268),[1] which emphatically suggest a deliberate intention in the drafting of the Constitution to leave the way open in which the courts are to manage eviction proceedings within the ambit of s 26 of the Constitution 'as wide open as constitutional language could achieve'. In paragraph 36 of that judgment, Sachs J, writing for the Court, expressed himself as follows: '*The court is thus called upon to go beyond its normal functions and to engage in active judicial management according to equitable principles of an ongoing, stressful and law-governed social process. This has major implications for the manner in which it must deal with the issues before it, how it should approach questions of evidence, the procedures it may adopt, the way in which it exercises its powers and the orders it might make. The Constitution and PIE*[2] *require that, in addition to considering the lawfulness of the occupation, the court must have regard to the interests and circumstances of the occupier and pay due regard to broader considerations of fairness and other constitutional values, so as to produce a just and equitable result.*'

8] The eviction component of the current application falls full square for determination in terms of PIE read with the provisions of s 26(3) of the Constitution and is plainly a 'constitutional matter'. I am persuaded by the arguments addressed to me by counsel that, my initial diffidence

1 Counsel referred to paragraphs 22-23, 32, 36 (with special reference to fn 35) and 39.
2 The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998.

notwithstanding – informed, as it was, by what might be described as a traditional common law approach to the judicial function, the court should indeed make a declaration, as requested, by the parties. A material consideration in arriving at this conclusion was the intimation by counsel that any such declaration would be accepted as binding by the parties within the context of the determination of the application as a whole. (Its acceptance as binding in the manner just mentioned would not, of course, affect the right of any of the parties to seek to challenge it on appeal in the context of its effect on the judgment of the court - should one be required - in what I might refer to as 'the principal proceedings'.)

9] Turning then to the substantive issue. The matter of the provision of alternative accommodation in this case arises not out of the state's obligation to promote the access by everyone to *adequate* housing by taking reasonable measures, within its available resources, to achieve the progressive realisation of the right as understood by the concept of 'housing development' as defined in s 1 of the Housing Act 107 of 1997[3], but rather out of the related and incidental obligation within any state housing programme to provide for the needs of people for basic shelter occurring in situations of crisis because of natural or manmade emergency or because their homes are under threat of demolition as in the current case. Thus the state's obligation in the current context can be met by 'relief short of housing which fulfils the requisite

3 In terms of that definition 'housing development' means the establishment and maintenance of habitable, stable and sustainable public and private residential environments to ensure viable households and communities in areas allowing convenient access to economic opportunities, and to health, educational and social amenities in which all citizens and permanent residents of the Republic will, on a progressive basis, have access to-
(a) permanent residential structures with secure tenure, ensuring internal and external privacy and providing adequate protection against the elements; and
(b) potable water, adequate sanitary facilities and domestic energy supply'

standards of durability, habitability and stability encompassed by the definition of housing development in the Act' (see *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) (2000 (11) BCLR 1169) at para 52). How far short of the requisite standards of permanent housing the relief offered by the state can be allowed to fall is a question not easily answered. The answer has to be informed in the main by the striking of a reasonable balance between available resources and the extent, in the given context, of the overall demands on those resources, not just by the persons immediately under consideration, but the population in general. In the consideration of available resources account has to be taken of the need for a proportionate allocation of resources so as to avoid the demands of the provision of emergency shelter becoming an undue impediment to the state's ability in the ordinary course to progressively provide permanent housing to those in need.

10] The community that comprises the fifth respondent currently lives in insanitary and unsafe conditions in a building complex comprised of 40 apartments. These apartments have been informally partitioned into smaller compartments (referred to in the papers as 'rooms' or 'partitioned areas') which separately accommodate more than 80 separate family units. The family units vary in size between a single person and nine persons. Some of the families housed in the building appear, from the information in the schedule of occupants attached to the affidavit of Ms Ellen Leputing, deposed to on 17 October 2011, to be have some of their members living in housing erected in the adjoining Sandile Park. Indeed the papers suggest that many of the original occupiers

of the complex after it had been abandoned as a workers' hostel by its previous owners subsequently moved to housing built in Sandile Park giving their vacated space in the building to close relatives. The ability of some families in Sandile Park to accommodate those who will be displaced upon the envisaged demolition of Mosanwabi Park has been one of the matters discussed in the engagement process between the parties. The reports on that process however do not suggest that much, if any, meaningful relief could be afforded by that avenue. The ages of those living together in the various family units varies considerably. Some households are comprised mainly of adults (Flat B6A for example houses six adults ranging in age from 48 to 21 years of age and a child of 16 months), while others contain a majority of children (Flat A29B for example appears to house two adults and five children, including one born only in 2010). Ms Leputing states that there are 317 persons in total living in the building complex, of whom 'about 136' are children.

11] The City's offer of 80 temporary housing units is based to some extent, at any rate as a point of departure, on giving one unit to the occupiers of each of the housing compartments or rooms in the existing housing complex. Fifty of those compartments or rooms currently house four or fewer persons and there is no dispute between the parties that in respect of those persons the offer is adequate. There is also no dispute about housing five other family units each comprising between five and seven members, including in some cases an uncle or an aunt, in five temporary housing units. In dispute is the reasonableness of the provision of just 25 units for the remaining persons

currently housed in 25 compartments in Masonwabi Park. In two of these compartments there are nine residents, in each case being made up of persons from 'at least three distinct family units'; and in each of the other 23 there are five to seven residents comprised in each case of the members of 'at least two distinct family units' per compartment. The fifth respondent contends that it would be reasonable that in respect of each of the two compartments, each housing nine persons, three temporary housing units should be made available (a total of six) and in respect of each of the other 23 compartments two temporary housing units (a total of 46). That explains how the figure of 107 temporary housing units mentioned earlier is arrived at. (In view of various averments on the papers, apparently made in the context of certain exchanges during the engagement process meetings, it is as well that I record that Mr *Hathorn* made it clear at the hearing that the fifth respondent was not relying on the minimum spatial standards of a floor area of 5m² per person posited by the UN Human Settlements Programme (UN-Habitat) in its report entitled *The Challenge of Slums: Global Report on Human Settlements 2003* for its contention that 107 housing units should be provided. That clarification makes it unnecessary to deal with the arguments addressed to me by Mr *Katz SC* (for the City) and Ms *Pillay* on the inappropriateness of attempting to attribute a 'minimum core' content to the housing and related socio-economic rights in the Bill of Rights.[4])

12] I mentioned earlier that the City's offer was premised to some extent on one temporary housing unit per occupied compartment in the condemned

4 See e.g. *Mazibuko and Others v City of Johannesburg and others* 2010 (4) SA 1 (CC) at para 51-57; *Grootboom* supra, at para 32 and *Minister of Health and Others v Treatment Action Campaign and Others (No 2)* 2002 (5) SA 721 (CC) (2002 (10) BCLR 1075 at para 33-37.

premises. But it is clear that to look at the position that way is to over simplify matters. It was made evident in argument, especially by Ms *Pillay*, that the state's assessment of the reasonableness of the extent of the alternative accommodation offered takes into account a balance between the total amount of the space on offer with the total number of the persons in need of accommodation. In this regard Ms *Pillay* made some illustrative calculations. She asked that it be postulated that there were 50 compartments in the complex each housing four persons (that is more than are actually accommodated there in households of four or less), two compartments housing nine persons each and 28 compartments housing seven persons each. That would give a notional population of 414 persons to be given emergency accommodation. Assuming a given of six persons per household that would require 69 temporary housing units as emergency accommodation. Accepting that 317 persons need accommodation, only 53 temporary housing units would be required if six persons were to be housed in each unit. The purpose of these illustrations, if I understood the argument correctly, was to demonstrate how relatively generous (on a numerical approach) the provision of 80 units to house a total of 317 persons on an emergency basis actually is, considering it allows for four persons per unit on average.

13] The difference between the 53 units postulated in the illustrative calculation by counsel and the 80 units that the City will offer if vacant land becomes available is, of course, explained by its attempt to afford a measure of provision for the retention of family cohesion. This approach would be consistent with the provisions of the emergency housing provisions in the

National Housing Code published in terms of s 4 of the Housing Act which according to its tenor makes discrete provision for the provision of temporary shelters on an indiscriminate basis determined by floor area (24m²-30m²) and the provision of services such as water and sanitation on a per family basis (e.g. 'access to a water point or tap for every 25 *families* must be provided'). Having regard to the evident purpose of the provision of housing assistance in emergency circumstances, it would not seem consistent with the objects of the scheme, judged in the context of 'housing development' (as defined) under the Housing Act, to accept that a displaced community could reasonably expect necessarily to be temporarily re-accommodated in the same, or even in a more optimal disposition per living unit than it had enjoyed before the intervention of the emergency giving rise to its displacement. Thus, in a case like the present, a person who is the single occupant of a dwelling unit cannot reasonably expect to be accommodated on an emergency housing basis as the single occupant of a replacement shelter of the same dimensions as that deemed acceptable (as the fifth respondent is prepared to do) for six or seven persons. Something of a redistribution of living accommodation amongst those displaced might be required to afford a reasonable utilisation of the total area of emergency shelter that can be made available. The reality, presumably because of shortage of accommodation, is that a number of families living in Moswanabi Park already have to live spread between reasonable closely proximate, but nevertheless separate living units.

14] Once it is recognised that emergency accommodation by its nature will invariably fall short of the standards reasonably expected of permanent

housing accommodation, it follows that those who need to occupy such accommodation must accept less than what would ordinarily be acceptable. The apparent harshness of an acceptance of this recognition has to be seen against the realities imposed by the vast scale of the housing backlogs with which the state, in general, and the City, in particular, are having to engage. Statistics in this regard are set out in the City's papers. It is unnecessary to quote them; suffice it to say that the picture they paint indicates that the overwhelming breadth of the socio-economic challenges faced by the nation today do not differ materially from those so graphically described by Yacoob J in *Grootboom* more than 10 years ago.

15] It is not the function of the court, in determining upon the declaration that the parties have asked it to make, to itself assume the role given by the Constitution to the legislative and executive arms of government. As pointed out, for example, in *Minister of Health and Others v Treatment Action Campaign and Others (No 2)* 2002 (5) SA 721 (CC) (2002 (10) BCLR 1075, at para 38, '*Courts are ill-suited to adjudicate upon issues where Court orders could have multiple social and economic consequences for the community. The Constitution contemplates rather a restrained and focused role for the Courts, namely, to require the State to take measures to meet its constitutional obligations and to subject the reasonableness of these measures to evaluation.*' It is therefore not the court's function to decide how many units should be provided or what their dimensions should be. The court's function in the context of the question under consideration is to decide whether what the applicant and the seventh respondent are willing to work

towards providing falls within the bounds of reasonableness. The determination of reasonableness is context bound; it would be a supererogation in this regard to retraverse here the relevant discussion so eloquently expressed in the *Grootboom* judgment. This consideration explains this court's inability to accede to the argument of Mr *Hathorn* that were the court unable to hold that the City's offer of 80 units was unreasonable it should direct that at least some of those units should be of 30m², rather than 24m², dimensions.

16] Having regard to the housing demands on the provincial government and the City, including the demands to provide emergency housing in context of the broad spectrum of emergency housing situations contemplated in terms of the National Housing Code, I am unable to find that the provision of 80 temporary housing units of 24m² in floor area each as alternative emergency shelter to house the displaced community that is the fifth respondent would be unreasonable. I do, however, consider that having regard to the requirements of each family unit involved it is necessary in order to sustain the reasonableness of the provision of that number of units that the allocation of the units to the fifth respondent be regulated by prior agreement between the community members determining the distribution of the allocated units in a manner that promotes family unit cohesion and provides for an equitable distribution within the community of the total available floor space and failing the ability of the community within a reasonable time to arrive at such agreement, an allocation determination by the applicant directed at achieving such effect.

17] The following order is made:

1. It is declared that the provision by the applicant and or the seventh respondent of 80 temporary housing units of 24m² in floor area each, serviced consistently with the guidelines provided under the norms and standards for municipal engineering services in temporary settlement areas, as emergency housing to the community comprising the fifth respondent consequent upon the execution of any order of eviction that may be granted against the fifth respondent would fall within the bounds of reasonableness, provided that the allocation of the units to the fifth respondent is regulated by prior agreement between the members of the fifth respondent determining the distribution of the allocated units in a manner that (i) promotes family unit cohesion and (ii) provides for an equitable distribution within the community of the total available floor space; alternatively, failing the ability of the members of the fifth respondent within a reasonable time to arrive at such agreement, an allocation determination by the applicant directed at achieving such effect..

2. The further hearing of the application is postponed to 23 November 2011 to enable the process of engagement between the parties to continue with the object of achieving the settlement of as many of the issues in the case as possible before then.

3. The provisions of paragraphs 6 and 7 of the order made by this court on 14 September 2011 shall apply mutatis mutandis to the continued process of engagement contemplated in terms of paragraph 2 hereof.

4. The applicant and the first to fifth respondents are directed to report to this court on affidavit on the manner and progress of their further engagement by Thursday, 17 November 2011.

5. The applicant and the fifth respondent, as well as the seventh respondent if so advised, are directed to deliver supplementary heads of argument by Monday, 21 November 2011 at 13h00.

6. Delivery of all further papers, including heads of argument, must occur in the manner directed in terms of paragraph 10 of the order made on 14 September 2011.

7. All matters as to costs are reserved.

A.G. BINNS-WARD
Judge of the High Court