IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case Number: 13782/09

In the matter between:

Annenprop 5 (Pty) Limited **(Reg. No. 2003/030226/07)**	**Applicant**
and	
The Respondents listed on Annexure "A"	**1st to 63rd Respondents**
The Respondents listed on Annexure "B"	**64th to 175th Respondents**
The Remaining Persons who are presently unlawfully occupying Erf 5315 Macassar	**The Remaining Respondents**
The City of Cape Town Helderberg Administration	**The Further Respondent**

JUDGMENT DELIVERED ON 14 APRIL 2011

Baartman J

[1] This was an application in terms of Section 4 (2) and Section 4 (5) of the Prevention of Illegal Evictions Act 19 of 1998 (**PIE**) in which the applicant sought the eviction of the respondents listed in annexures A and B as well as those referred to as the "Remaining Respondents" from the premises situated at Erf 5315 Macassar (**the property**). I deal below with the categories of respondents but any reference to the respondents is reference to the three categories collectively.

THE RESPONDENTS LISTED IN ANNEXURE A

[2] The original accommodation on the property was an army barracks erected during World War II, which was later converted into housing units to accommodate the employees of the adjacent Mustard Gas Factory. Subsequent thereto, the housing units were occupied by the employees of Deepfreeze/Donald Cook and Del Mont, the new owners of the property (**Donald Cook**). It is the respondents' case that when Donald Cook ceased its operations at the property, it donated the property to the respondents listed in annexure A, who were either employees of Donald Cook or had received the benefit through inheritance. It was further the respondents' case that Donald Cook intended with the donation that the property be developed for the benefit of its employees, the respondents mentioned in annexure A.

[3] It appears from the papers that instead of a donation, on 24 June 1996, Donald Cook sold the property to Cape Utility Homes (**CUH**) for R387 600. CUH was a section 21 not for profit company. It further appears from the papers that CUH intended to develop the property for the benefit of at least the respondents listed in annexure A. Donald Cook supported that ideal and had through a company in its group, namely Del Mont International Ltd, donated R110 000 to be utilised for the benefit of the Donald Cook employees who were living

on the property at the time of the sale. Some of them attested to affidavits in these proceedings and confirmed that they had received a cash pay-out as their share of the Donald Cook donation.

[4] It is further common cause that CUH went into liquidation and that the liquidator sold the property to the applicant's predecessor-in-title. No restriction in respect of any of the respondents was registered against the title deed at the time of transfer. However, the liquidator indicated that there were people living on the property and therefore that the new owner would have to evict them. It follows that the applicant acquired the property free of any restriction registered against the title deed although with full knowledge of the respondents' presence.

[5] The respondents have asserted the right to live on the property either pursuant to the Donald Cook donation or as occupiers in terms of the Interim Protection of Informal Land Rights Act 31 of 1996 (**IPILRA**).

The respondents listed in annexure B

[6] The respondents listed in annexure "B" are those occupants who occupy informal structures on the premises. It was common cause in these proceedings that they were the children and/or second generation of the original occupants of the structures on the property. In these papers, they are referred to as "back yard dwellers".

The remaining respondents

[7] The applicant has cited as "the remaining respondents" that group of occupants whom it alleged were "various other unlawful occupiers of property," who "occupy the various informal structures/ make-shift shelters erected in the vicinity of the barracks..."

The further respondent

[8] The applicant cited the City of Cape Town Helderberg Administration as the further respondent. In this judgment, any reference to the respondents is reference to the first three categories referred to above; I refer to the further respondent as "the City" herein.

TWO-STAGE PROCEEDINGS

[9] The respondents have asserted the right to live on the property either pursuant to the Donald Cook donation or as occupiers in terms of IPILRA. Therefore, negotiations between the respondents and the applicant, to which I shall return, were doomed to failure. Consequently, it is necessary to first determine the respondents' status on the property.

[10] It was understood by the parties that these proceedings would be a two-stage process. Therefore, the parties agreed to an outline of the issues to be determined at each stage. I was persuaded that the outline presented a common sense approach to this matter and agreed to deal with the matter in accordance with the proposed outline as far as possible.

[11] The issues will be determined as follows:

The first stage

[12] The first stage includes the following:

(a) The respondents' unlawful occupation of the property.

(b) The City's obligations towards the respondents specifically (alternatively to certain of them); in particular, its obligations to provide the respondents whose names are listed on Annexure A (and those on Annexure B) with adequate housing.

(c) Whether the City has complied with these obligations and if not, the extent to which this has not been done.

(d) The City's obligations towards the applicant, in particular:

(i) its obligation to assist the applicant in finding a solution to the respondents' housing needs;

(ii) its obligation to compensate the applicant for the damages suffered by it thus far as a result of the City's failure to satisfactorily address the needs of the respondents;

(iii) its obligation to compensate the applicant for future damages it stands to suffer until such time as the housing needs of the respondents are satisfactorily met;

(iv) whether the City has complied with these obligations;

(v) if not, what steps the City was obliged to take in this regard in order to remedy the situation:

- as far as the respondents are concerned;
- as far as the applicant is concerned;

(vi) what is required of the respondents in this process.

(vii) what is required of the applicant in this process.

(viii) the parties' obligation to report to court on their participation in the process and its outcome.

The second stage

[13] The following issues stood over for determination in the second stage:

(a) The extent to which the parties have complied with the court order granted in the first part of the process.

(b) The implementation of that which would have been agreed.

(c) Whether an eviction order is appropriate and if so:

(i) the exact date and manner of the eviction;

(ii) the costs of the application.

(d) Further and/or alternative relief in respect of that which is still outstanding.

THE RESPONDENTS' STATUS ON THE PROPERTY

[14] At the hearing of the matter, the respondents alleged that the provisions of the Extension of Security of Tenure Act 62 of 1997 (**ESTA**) were applicable to their occupation. After several postponements of the matter, the respondents abandoned their reliance on the provisions of ESTA. I accept, for the reasons advanced, which I do not repeat, that the provisions of ESTA do not find application in this matter.

[15] The respondents at hearing also alleged that they were occupiers within the definition of the IPILRA. The respondents have asserted formal rights to the land in that their right to occupy was derived from the Donald Cook donation.

[16] The provisions of IPILRA are to make provision for "informal rights to land". The IPILRA envisaged the use of, the occupation of or the access to land in terms of any tribal, customary or indigenous law or practice of a tribe. The respondents' occupation does not qualify under any of these categories.

[17] The IPILRA provisions further envisage a right in terms of similar customs, usage or administrative practices in particular areas or communities where the land in question at the time vested in either the SA Development Trust or the government of a self-governing territory or the government of the former TBV States. The respondents also do not fall into this category.

[18] The provisions of IPILRA are further applicable to a right or interest in land "of a beneficiary under a trust agreement in terms of which the trustees are a body or functionary established or appointed by or under an Act of Parliament or the holder of public office..." Mr Moosa, who appeared on behalf of certain of the respondents listed in annexures A and B, submitted that their rights "stem from a 'donation' of the land ...by ...Donald Cook ...to be held in trust by CUH and developed". However, the evidence indicates that on 24 June 1996, Donald Cook sold the property to CUH for a purchase price of R387 600. Instead of donating the land, as alleged, Donald Cook had donated R110 000 to its former employees "...in full and final settlement of all promises, be it in writing or implied, by all former and current management,...Donald Cook". It appears from the papers filed that some respondents received a cash pay-out as their share of the donation.

[19] There is no evidence of a trust agreement; instead, the evidence clearly indicates that CUH and Donald Cook entered into a deed of sale pursuant to which CUH acquired ownership of the property.

[20] The respondents also claimed that they were tenants on the property. The provisions of IPILRA specifically exclude the rights of tenants or the interests of a labour tenant from the operation of that Act. It is my view that the provisions of IPILRA do not find application in this matter.

[21] On 21 December 2007, the applicant took transfer of the property and there were no restrictions registered against its title. At the time of transfer, the applicant was aware of the respondents' presence on the property although the property had been zoned for industrial use.

[22] The respondents at least those listed in annexure A, had the Donald Cook and CUH's consent to be on the property, which consent was not terminated prior to the service of the termination notice, which I

deal with below. The applicant intended to develop the property to incorporate it into its other industrial operations in the area. The applicant also intends to build a road over the property that would cut through the area occupied by the respondents.

[23] The respondents would have to move for the applicant to execute the planned development. Aware of the pitfalls inherent in that process, on 7 April 2008, the applicant embarked on negotiations with the respondents, which process developed as follows:

(a) The negotiations began when the applicant was contacted by Wesley Van der Heyde (**Van der Heyde**), who at the time represented the occupiers on the property.

(b) The respondents alleged that they were lawful occupiers on the property. Thereafter followed negotiations between the parties in which the applicant claimed that the respondents were unable to prove their entitlement to further remain on the land.

(c) The applicant approached Mr Galiep Galant (**Galant**), a facilitator, to facilitate the negotiations between it and the respondents. Galant was unable to facilitate the negotiation of an agreement acceptable to both parties.

(d) In December 2008, the applicant engaged the services of a second facilitator, Mr Neville Naidoo (**Naidoo**). On 11 February 2009, Naidoo held his first meeting with the community. Various meetings followed. It appears from the applicant's founding affidavit that it made the following proposal:

"94.5 In terms of the offer the first to sixty three respondents the applicant would, if the terms and conditions as contained herein were accepted by the community and the appropriate zoning as envisaged obtained, alienate approximately 1.33ha of Erf 5315 to these respondents in order to accommodate 63 service sites,

each measuring approximately 100sqm, including an area of public open space as reflected on the attached plan, schedule B.

94.6 Applicant further undertook to erect a house constructed of brick and mortar and measuring approximately 40sqm on each of the sites.

94.7 The cost of the service site and house would be financed by applicant/the aforementioned respondents/utilizing the maximum government housing subsidy available to each/them.

94.8 To qualify for a house, each of the one/sixty three respondents would have to apply for their subsidy.

94.9 Applicant would assist each member of the community in the process.

94.10 Those who did not qualify for the maximum subsidy, or a lesser subsidy, would have to apply for a bond to make up the shortfall between the actual subsidy granted and the maximum subsidy available, failing which they would not be illegible for one of the sixty three new houses.

94.11 Should any of the one/sixty three respondents no longer occupy the unit in question on Erf 5315 or if certain of them did not qualify for a subsidy and/or bond then the number of sites *were to be reduced accordingly.*

94.12 So as to ensure that the development was completed in accordance with the appropriate standards and provide for acceptable standards of construction, the agreement would provide therefore that the proceeds of the subsidy/bonds would, pending transfer of the completed development to the community, be held in trust by an independent firm of attorneys where after the proceeds would only be paid to the applicant.

94.13 Upon taking occupation of the new houses the applicant would immediately demolish the structures vacated by the respondents.

94.14 The allocation of the respective sites *to the individual respondents was to be the responsibility of the first and sixty-three respondents.*

94.15 Transfer of the individual properties to the community would only take place after all the existing structures had been vacated and demolished and the backyard dwellers had vacated Erf 5315.

94.16 The said portion of the land needed to be rezoned from industrial to single residential use, where after subdivision of the property was required into individual erven for each of the first/thirty three respondents and would take between six and twelve months to be approved. Only once the rezoning had been approved could construction begin.

94.17 The entire process could take up to 18 months to complete.

94.18 An alternative access to the property off Macassar Road, if approved by the local community, would require an adjustment of the proposed layout which was acceptable to first to sixty three respondents.

94.19 Applicant was prepared to conclude formal agreements of sale with the first to sixty three respondents for the individual erven once subdivided. The selling price of the land would be R nil."

[24] The process of negotiations failed, primarily because the applicant treated the respondents as unlawful occupiers and they asserted

lawful occupation. The applicant relied on the provisions of PIE to allege that the respondents were unlawful occupiers.

[25] PIE defines an unlawful occupier as follows:

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

[26] In August 2008, the applicant, with the assistance of the sheriff of the court, served a notice on the respondents informing them that:

"Our client is the registered owner of Erf 5315 Macassar, which property is situated at Reed Road, Freezia Park in Macassar .... You and your family are currently in occupation of a dwelling on the said property. In as much as it is alleged that you may, in the past, have had consent to occupy the property, we wish to inform you that such consent no longer exists. It is therefore our instructions that you do not have any consent, be it express, tacit or otherwise, to further still be in occupation of the property, and it is consequently our instruction to confirm, as we hereby do, that your right of occupancy has been terminated. You are kindly hereby requested to vacate the property within 3 (three) months after receipt hereof, failure of which it is our instructions to approach the High Court in terms of the Prevention of Illegal Eviction ...."

[27] The respondents argued that the applicant could not unilaterally terminate their occupation as it did in 2008. The applicant argued that in terms of the common law, the requirements for termination of a precarious tenancy are reasonable notice and possibly good cause. The applicant's counsel argued that should good cause be a

requirement then "there can be little doubt that this requirement may easily be met."

[28] I am satisfied that the respondents had the consent of the owner of the property to be in occupation until the applicant withdrew that consent. This is so on a conspectus of the evidence presented in this matter. (See ***Residence of Joe Slovo Community, Western Cape v Thubelisha Homes*** 2009(9) BCLR 847(CC)).

[29] It follows that an application under PIE can only succeed if the consent to occupy was lawfully terminated. As indicated above, the failed negotiations process commenced in April 2008, and it therefore follows that at the end of that process, the respondents knew of the attempt to evict them and the basis therefore. In August 2008, the respondents received the eviction notice/letter. The letter was annexed to these papers and I have set out its content above in terms whereof the respondents were given 3 months to vacate the property.

[30] In addition, the respondents received service of the eviction notices authorised by this court in these proceedings. In my view, the applicant had on proper notice to the respondents terminated their lawful occupancy.

[31] Advocate Stelzner, who appeared for the applicant, submitted that the applicant did not have to show good cause for the termination of its consent for the respondents to occupy the property. I, without finding that the applicant has to show good cause, am of the view that it had in this matter shown good cause. I say this for the following reasons:

(a) The applicant paid R17 million for a property zoned for industrial use.

(b) The applicant is also the owner of the land adjacent to the property that it had developed into an industrial estate known as

the Fergrove Industrial Estate. The applicant wanted to develop the property and incorporate it into the Fergrove Industrial Estate because it is situated at the entrance to the latter property.

(c) In August 2008, the applicant had withdrawn any consent the respondents had to occupy the property. However, prior to the termination, the applicant had embarked on a negotiation process to find a solution suitable to both parties.

(d) The respondents do not pay rent and the applicant has had to bear the responsibility for the municipal services utilised by the respondents. The municipality billed the applicant with a R2 million account for those services, which debt remains unsatisfied.

(e) The applicant has offered to donate a portion of its property to the City in order to accommodate the relocation of some of the residents.

THE CITY'S OBLIGATION

[32] I have indicated the issues for determination in respect of the City above, I deal with each in turn:

The City's obligation

"The City's obligation towards the respondents specifically (alternatively to certain of them) in particular its obligation to provide the respondents whose names are listed on annexure "A" and those on "B" with adequate housing."

[33] The City alleged that these proceedings were premature because the applicant should first have engaged with it. The hearing of the matter was postponed to enable the applicant to engage with the City. The parties were unable to resolve the matter.

[34] The applicant relied on section 26 of the Constitution for its claim that the City had an obligation to provide the respondents with access to adequate housing. The section reads as follows:

"26 Housing.

(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 realization of this right ...."

[35] In addition, section 152(1)(b) read with (d) of the Constitution, compels the City to ensure the provision of services to communities in a sustainable manner and to promote a safe and healthy environment. In the matter of ***Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg v City of Johannesburg and Others*** 2008(3) SA 208(CC) at para 16. The court said the following:

"The City ... must provide services to communities in a sustainable manner, promote social and economic development, and encourage involvement of communities and community organisations in matters of local government. It also has the obligation to fulfil the objectives mentioned in the preamble to the Constitution...

Improve the quality of life of all citizens and free the potential of each person. Most importantly, it must respect, protect, promote and fulfil the rights in the Bill of Rights. The most important of these rights for present purposes is the right to human dignity and the right to life ...."

[36] It is so that the Housing Act 107 of 1997 was enacted to give effect to section 26 of the Constitution. In terms of section 2(1)(c) of the Housing Act, municipalities must:

"(c) Ensure that housing development provides as wide a choice of housing and tenure options as is reasonably possible;

(d) Encourage and support communities to fulfil their housing needs by assisting them to access land, services and technical assistance; and..."

[37] In terms of section 9 of the Housing Act 107 of 1997, each municipality should, as part of its integrated development planning, take all reasonable and necessary steps within the framework of the applicable legislation and policy to ensure that:

(a) residents within its jurisdiction have access to adequate housing on a progressive basis.

(b) appropriate housing development is planned, coordinated and promoted; and

(c) land use and development is planned and managed.

[38] The City has to make provision for those in need of housing. Mr Stelzner submitted that the Constitutional Court and the SCA have both found that local authorities such as the City have constitutional obligations to discharge in favour of those facing eviction under PIE and it "...should therefore not be open to it to choose not to be involved."

[39] Yacoob J in ***Residence in Joe Slovo Community, Western Cape v Thubelisha Homes*** 2009(9) BCLR 847(CC) at para 75 said the following on the subject:

"The Constitution deals expressly with the duties of councils towards disadvantaged sections of our society. It states that the objective of local government includes ensuring 'the provision of services to communities in a sustainable manner and promote that social and economic development,' and that a municipality must structure and manage its administration and budgeting and planning processes to

give priority to the basic needs of the community, and to promote the social and economic development of the community."

[40] Advocate Golden, who appeared for the City, submitted that the applicant knew of the existence of the respondents on the property because Dudley Annenberg (**Annenberg**), one of the applicant's directors, was also a director of Benguela, the applicant's predecessor-in-title. She alleged that the City was not aware that the respondents were in unlawful occupation of the property; only in August 2009, when the applicant served notice of these proceedings on the City, did it learn of the applicant's allegation.

[41] Advocate Golden admitted that the City has an obligation to provide access to housing for people who face eviction whether from private or state owned property. The City, so the argument went, is obliged to provide access to housing to persons in need thereof either in terms of the City's emergency provisions or in terms of its other projects. Advocate Golden described the City's problems with the applicant's proposal as follows:

"The occupiers identified would need to meet the criteria for a subsidy;

There would be no guarantee the persons would be approved for subsidy;

The application for a bond from a financial institution would fall completely outside of understanding, scope and financial ability of the indigent occupiers;

The portion of land identified still needed to be rezoned which is a time consuming process and will involve the necessary environment impact assessment and other processes."

[42] The City further complained that the proposal did not provide for approximately 109 persons on the property. On 11 February 2010,

the applicant proposed that the City buy the property measuring 5.25 ha currently occupied by the respondents, at a price of R450/m². The City found that proposal unacceptable for the following reason:

"... the Applicant proposed to sell the land occupied by the Respondents to the City at a purchase price of R450.00/ m² or at a price of R21 million for 5.25 ha;

That the acquisition of occupied land at the purchase price of R21 million, which equates to R88 903.00 per opportunity, assuming density of 105U/ ha, was not affordable or sustainable in terms of the City's housing policies and programs.

Regard should also be had to the fact that the Applicant purchased the property in October 2007 with full knowledge that a portion of Erf 5315 was occupied and that the risk of, and associated costs pertaining to such an acquisition by the Applicant was no doubt discounted in the original purchase price of the land;

There were now in excess of 175 occupants on the land,... intended for the resettlement of the 1st to 63rd Respondents, 'rendering it' ... too small and inadequate to accommodate all the persons currently on this site and;..."

[43] Advocate Golden submitted that the City could not purchase the property in terms of the applicant's proposal because the purchase price was not affordable or sustainable in terms of the City's integrated 5-year housing plan. Acceptance of the proposal would cause the City to spend R23 million of its R48 million budget on the respondents in a single financial year. The City alleged that it had negotiated in good faith and that the negotiations failed mainly due to the exorbitant amount that the applicant wanted for the property. The applicant in these proceedings denied the latter allegation.

[44] The applicant made a further proposal in terms whereof a low-cost housing development would be developed on the property that would

accommodate 120 40m² two bed roomed / flats on the basis that the applicant would donate 1.41 ha of land to the City, with the City providing services and building the proposed two-storey apartment blocks. The City said that the new proposal was not viable in terms of its 5-year housing plan. Advocate Golden submitted that:

"It is important for this Court to note that the City's five-year plan is its integrated plan to meet its constitutional obligations to provide access to housing in an integrated and sustainable manner. We make this point at the outset, given that the Applicant's amended relief is premised on the contention that the City's behaviour towards it and the Respondent is unconstitutional, and that, in particular, the City's housing policy is unconstitutional."

[45] Counsel submitted that the City had allocated R48 million in the 2010/11 financial year for the acquisition of land. Those funds were mainly allocated to meet the new housing projects that have been proposed; those in the planning stage and those under construction and which will constitute the City's new housing project until the year 2015. The City alleged that its delivery of houses to the poor was done in a manner that was planned, integrated and sustainable within the City's available resources. However, the City acknowledged that although the applicant's donation of 1.41 ha of land would accelerate the provision of low-cost housing, it could not accommodate the necessary housing opportunities for all the families currently living on the property. The City indicated that the respondents currently occupy 5.5 ha of land, which is a far greater expanse than the 1.41 ha that the applicant was prepared to donate.

[46] In addition, the City alleged that the Western Cape Provincial Government's records reflected that subsidies were approved and allocated to 60 of the respondents in the past. In these proceedings, it was common cause that those subsidies related to the failed CUH development. In these proceedings, the City alleged that those

respondents would not be eligible for a further subsidy because it would be in breach of both the National Housing Act and the City's housing policy. Advocate Golden submitted that it would be extremely unfair to other persons who have been on the City's waiting list for many years if those 60 respondents were granted a second subsidy. I find that position in the circumstances of this matter self-serving. It does not appear from the papers that the City assisted the respondents in any manner when CUH went into liquidation. These are the same people of whom the City now says:

"The application for a bond from a financial institution would fall completely outside of understanding, scope and financial ability of the indigent occupiers;"

[47] In addition, the City complained that the latter proposal envisaged a sectional title development. This was unacceptable because the City had never designed, built or managed a sectional title development nor were sectional title developments included in its housing plan. To make matters worse, the City did not have any available land to temporarily accommodate the respondents. The City submitted that land in and around Cape Town was extremely expensive and scarce and that all its temporary relocation areas were oversubscribed.

[48] The City indicated that a 2 500 unit development in the Macassar area was envisaged in its forward planning. Although some of the respondents might qualify for houses in that development because they had been on the City's waiting list for many years, others may not. The City therefore proposed that it could only accommodate the proposal in respect of the respondents in its next 5-year plan after 2014.

[49] The applicant found the City's attitude completely unacceptable, particularly because the City continued to invoice it for the municipal services utilised by the respondents. I have understanding for the

strong view expressed by the applicant's counsel regarding the City's attitude, which I find, at best, unhelpful.

[50] It is so that the City participated in the CUH project and subsidised 60 of the 63 respondents mentioned in annexure A. However, there is nothing on these papers to indicate that when CUH went into liquidation, that the City intervened to protect at least its own investment in the project. It now ill behoves the City to take the non-committal attitude it has displayed thus far, which attitude will have to change in the face of the finding I intend to make in respect of the respondents' occupation on the property. However, I do not express any opinion on the merits of the proposals referred to above.

[51] Advocate Golden submitted that section 26 of the Constitution did not entitle people to claim shelter or housing immediately upon demand; instead, it obliged the State to devise and implement a coherent, co-ordinated programme designed to meet its section 26 obligation. I agree. However, that does not mean that the City is entitled to continue with the attitude it has displayed in these proceedings. (See **President of the Republic of South Africa and Another v Modderklip Boerdery** (Pty) Ltd AGRI SA and Others Amici Curiae 2005(5) SA 3 (CC)).

[52] In my view, the City's obligation towards the respondents is to engage in *bona fide* negotiations with the view to finding a solution to the housing need that will arise following this judgment. I accept that until a court had ruled on the legality of the respondents' occupation, it would have been very difficult for the City to engage meaningfully in the process especially because the respondents had persistently claimed that they were in lawful occupation.

[53] The City's obligation in terms of these occupiers has been clearly set out by Langa CJ in the Modderklip matter para 49:

"... The progressive realisation of access to adequate housing, as promised in the Constitution, requires careful planning and fair procedures made known in advance to those most affected. Orderly and predictable processes are vital...at the same time, the requisite measures to operate in a reasonable manner; they must not be unduly hamstrung so as to exclude all possible adaptation to evolving circumstances. If social reality fails to conform to the best-laid plans, reasonable and appropriate responses may be necessary. Such responses should advance the interests at stake and not be unduly disruptive towards other persons." (my underlining)

The second issue in respect of the City

"...whether the City has complied with these obligations and if not the extent to which it has not done so."

[54] In my view, the City, instead of engaging the process with a view to finding a solution, has merely raised its various difficulties. As indicated above, the City will on receipt of this judgment know that the respondents are in unlawful occupation and might face imminent eviction. Therefore, a different approach will be required of the City in the next round of negotiations.

[55] I intend to grant a structural interdict directing *bona fide* engagement by the City in the process to find a solution to the housing crisis that will face the respondents following this judgment.

The third issue in respect of the City

"The City's obligation towards the Applicant in particular its obligation to assist the Applicant to finding a solution to the Respondents' housing needs."

[56] Advocate Golden correctly submitted that the City has an obligation to provide access to housing for people who face eviction from private or state owned property. That obligation does not change

because the applicant bought the property with knowledge of the respondents' occupancy. I accept that prior to this judgment; the City did not know that the respondents were in unlawful occupation of the property.

[57] It follows that the City now has the obligation to engage the applicant's and the respondents' proposals and, where necessary and appropriate, to adapt its own projects to accommodate the respondents. It will not assist the City merely to refuse a proposal because it had not previously engaged in a particular type of development. I refer to the refusal to consider a sectional title development on the basis, among others, that it had not done so previously.

The fourth issue in respect of the City

"Whether the City is obliged to compensate the Applicant for the damages suffered thus far as a result of the City's failure to satisfactorily address the needs of the Respondents."

[58] The applicant relied on the matter of **Blue Moonlight Properties 39 (Pty) Ltd v Occupiers of Saratoga Avenue and Another** 2009 (1) SA 470(W) for its compensation claim.

[59] Advocate Golden said the following about the Blue Moon Properties matter:

(a) In the Blue Moon matter, the owner of the property had been deprived of its entitlement to use and develop its property. That was sufficiently linked to the breach by the City of Johannesburg of Blue Moon Properties' right to equality of treatment and its failure since at least 2006 to have implemented a reasonable programme and include in its budget provision for the accommodation of indigent occupiers of privately owned land.

(b) In the Blue Moon matter, that City had washed its hands off any obligation and had failed to adopt a coherent programme to take steps to secure accommodation for the occupiers who stood to be evicted from the land in question. That City's failure was aggravated by the fact that before and during the 3 years while the case was pending, a body of law had been built up that the City should have heeded.

(c) In addition, the City of Johannesburg appeared to have had a sufficient budget for emergency or temporary accommodation without reference to the Provincial Government; in fact, the City had anticipated a budget surplus.

(d) The City in the Blue Moon matter had warned the applicant, the owner of the property that formed the subject of that matter, regarding the dangerous state of the building.

[60] I agree that the Blue Moon Properties matter is distinguishable from the current matter in the following respects:

(a) In the Blue Moon Properties matter, the City knew that the occupants were in unlawful occupation whereas in the current matter the respondents still claim that they are in lawful occupation of the property.

(b) In addition, in this matter the City has acknowledged that it has an obligation towards those persons who faced eviction from private and state owned land whereas the City of Johannesburg had limited its obligation to "... those whom it evicts from privately – owned dangerous buildings, if they are desperately poor and find themselves in a crisis." (See **City of Johannesburg Metropolitan Municipality v Blue Moonlight** (338/10) [2011] ZASCA 47 (30 March 2011))

[61] Therefore, it would not be appropriate to hold the City responsible for the applicant's damages suffered to date because of the

respondents' occupation of the property. However, it does not follow that the R2 million municipal bill is for the applicant's account. In my view, that account should be included in the issues for negotiation that must follow this judgment.

The fifth issue in respect of the City

"Its obligation to compensate the applicant for future damages it stands to suffer until such time as the housing needs of the respondents are satisfactorily met."

[62] The City will on delivery of this judgment be aware of the respondents' status on the property. The City has correctly acknowledged its obligation towards the respondents. A failure to reasonably review its current projects with a view to adapting, where practical and economically viable, to accommodate the respondents will give rise to responsibility for the damages that result from such failure.

The sixth issue in respect of the City

"Whether the City has complied with these obligations and if not what steps the City was obliged to take ...in order to remedy the situation."

[63] It appears clearly from the above that the City has not complied with its obligations. I accept that failure is partly due to the respondents' disputed status on the property. I further accept that the City requires time to properly evaluate the situation in view of the now certainty in respect of the respondents' status on the property. I will in the order I intend to make allow the parties the opportunity to exchange and comment on proposals and file reports where appropriate.

[64] In making allowance for the exchange of proposals and the filing of reports, I have considered the respondents' challenges in arranging meetings and instructing their legal representatives.

CONCLUSION

[65] I, for the reasons set out above, make the following findings:

(a) The respondents are in unlawful occupation of the property that forms the subject of this application. I hasten to add that it does not follow that eviction is appropriate in this matter. That will be a matter for determination in the next stage.

(b) The City has an obligation, in consultation with the respondents and the applicant, to find a solution for the housing crisis that will follow this judgment.

(c) The City further has an obligation to investigate and report on the position of the 60 respondents who received subsidies in the CUH housing project; that investigation should indicate whether any part of that subsidy is still available and if so how the affected respondents might access it.

(d) The City further has to report to this court how many of the respondents will qualify for housing in its planned Macassar project and whether those respondents will qualify for housing subsidies.

(e) The City is directed to report on the availability of temporary accommodation for all or some of the respondents.

(f) The City should in its report to this court indicate how it intends to deal with the R2 million municipal account it has raised against the applicant.

(g) The City should further, as a matter of urgency, investigate the possibility of an alternative accounting system for the municipal services utilised by the individual users at the property.

(h) The City is directed to indicate why it cannot in the future accommodate a sectional title development. I accept that the City

has not been involved in a sectional title before; however, that cannot be a reason not to consider it in appropriate circumstances.

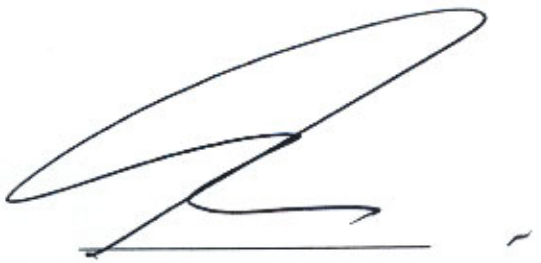
(i) The applicant is to consider an economically viable proposal to include all the persons currently resident on the property and submit such proposals to the respondents and the City as directed in the order annexed hereto.

(j) The respondents are directed to respond to the proposals and reports as directed in the order annexed hereto.

(k) Any proposal should include realistic timelines, having regard to school terms as well as the educational needs of children in a relocated area. The proposals should also obviously have regard to other requirements such as employment opportunities and health care needs.

ORDER

[66] I for the reasons set out above make the order annexed hereto marked "**X**"



Baartman J