IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 297/2014

REPORTABLE

In the matter between:

IRIS ARILLDA FISCHER	First Applicant
CITY OF CAPE TOWN	Second Applicant

and

PERSONS WHOSE IDENTITIES ARE TO THE APPLICANTS UNKNOWN AND WHO HAVE ATTEMPTED OR ARE THREATENING TO UNLAWFULLY OCCUPY ERF 150 (REMAINING EXTENT), PHILIPPI	Respondent

and

BOITUMELO RAMAHLELE AND FORTY-SIX APPLICANTS LISTED IN ANNEXURE "A" TO THE APPLICANTS' NOTICE OF COUNTER-APPLICATION	First to Forty-Sixth Applicants

and

IRIS ARILLDA FISCHER	First Respondent
CITY OF CAPE TOWN	Second Respondent

JUDGMENT: THURSDAY 13 MARCH 2014

GAMBLE J

INTRODUCTION

1. On 7 and 8 January 2014 the Second Applicant, the City of Cape Town ("the City") conducted a series of raids on the Cape Flats which were reminiscent of the well-documented operations conducted by the apartheid government in the 1980's in areas such as Crossroads and KTC. Units of heavily armed men clad in bullet-proof gear and protective helmets went on to private property and systematically demolished informal structures.

2. Residents of Cape Town who had lived through the civil unrest of the 1970's and 1980's may well have had a sense of *deja vú* if they had witnessed this event. They may have asked themselves whether such behaviour was permissible in a constitutional democracy. Had they asked the City if this was possible they would have been assured that it considered that it was acting lawfully and fully within its rights.

3. When the persons whose structures had been demolished approached the High Court for urgent spoliatory relief, the City opposed and asserted the lawfulness of its behaviour. That is what this case is about. But first, some background.

THE PROPERTY

4. The First Applicant Ms. Iris Arillda Fischer, is the owner of Erf 150 Philippi, a piece of land some 2,7 ha in extent. She resides on the property in a formal brick house with her son, Mr. Jacob Fischer, who occupies another brick

house on the property. Ms. Fischer is a 78-year old pensioner and Mr. Fischer a school teacher in his 40's.

5. The property is located in an area to the east of Lower Crossroads and to the south of Cape Town International Airport, and has been in the Fischer family for more than half a century. Ms. Fischer herself has lived on the property for 47 years. The property appears to be unfenced and located in an undeveloped area on the Cape Flats, there being no agricultural or commercial enterprise thereon. As I understand the photographs which accompany the papers in this matter, the surroundings on the property are covered with bush and scrub typical of the sort of vegetation that one encounters on the Cape Flats.

6. I do not know how far the property is from the nearest area of human settlement, but it is not in dispute that since April 2013 there have been a number of incursions onto the property by people seeking to erect informal structures thereon.

7. In late April and early May 2013 the City moved onto the property at the request of the Fischers and demolished a good number of structures which had been put up on the property shortly before. On 30 April 2013 the City says it demolished 73 structures and the following day another 120. Included in the latter were a number of structures which had been re-erected overnight.

8. The Fischers were seemingly unaware of the presence of these structures given the size of the property and the density of the vegetation thereon. Be that as it may, the structures were erected without the consent of the owner of

the property and it is not in issue that they were illegal. The occupiers took no steps at that time to address the lawfulness of their removal from the land by the City.

9. The City says that after the May 2013 demolition, there was a small group of people who put up four or five structures every night and took them down again in the morning. In August 2013 the City gave Ms. Fischer notice under section 6 of PIE[1] to evict the unlawful occupiers. She evidently engaged the services of a local attorney who did precious little to assist her. In the meantime, says the City, there was a gradual increase in incursions onto the property at the rate of about one structure a week. By early January 2014 this number allegedly stood at about 20 structures.

THE EVENTS OF 7 AND 8 JANUARY 2014

10. On Monday, 7 January 2014 at about 15h00, City officials observed a number of vehicles in the street near the property from which large quantities of building material were being offloaded. At the same time, people commenced with the erection of informal structures on the property. These appear to have been constructed from wood and corrugated iron sheets.

11. The City commenced with a demolition operation at about 18h00 on that day. In the process it took down about 32 structures. However, not all were taken down and when the City's law enforcement officials withdrew from the area at around 19h00, there were between 20 and 30 structures left on the property.

[1] The Prevention of Illegal Eviction From and Unlawful Occupation of Land Act, 19 of 1998, known by the acronym "*PIE*".

12. The City's demolition squad returned on the morning of Tuesday, 8 January 2014 at around 09h00. It discovered that a further 15 structures had been erected on the property overnight and it took immediate steps to demolish some of these. The City withdrew from the property at around 10h30 that day and says that since then there have been no further incursions onto the land.

THE MAIN APPLICATION

13. On Friday, 10 January 2014, the City and Ms. Fischer launched the main application in these proceedings to prevent any further incursions onto the property. Binns-Ward J granted an order that day in which the respondent was described as"

> "*Persons whose identities are to the applicants unknown and who have attempted or are threatening to unlawfully occupy Erf 150 (remaining extent), Philippi*".

These unidentified persons were ordered to show cause on 18 February 2013 why they should not be interdicted from:

> "*2. …*
>
> *2.1 …*
>
> *2.1.1 Entering or being upon Erf 150 (remaining extent), Philippi (hereinafter referred to as "the property") for purposes of unlawfully occupying or invading the property.*

2.1.2 Erecting, completing and/or occupying any structure on the property.

2.1.3 Intimidating, harassing, assaulting or in any way interfering with the first applicant.

2.1.4 Inciting or encouraging other persons to settle on the property or to erect structures on the property for the purposes of unlawfully occupying or invading the property or erecting any structures on the property.

2.1.5 Occupying any vacant structures on the property.

2.2 Authorising the Applicants, duly assisted by the Sheriff and insofar as needs be, by the members of the South African National Defence Force and the South African Police Service to give effect to the provisions of this Order by:

2.2.1 forthwith removing any person found to be in breach of this Order;

2.2.2 demolishing any structure erected on the property since the grant of this Order;

2.2.3 removing any possessions found at or near such structures including any building materials, which

possessions and/or building materials shall be kept in safe custody for three months by the Second Applicant until released to the lawful owner thereof and to take all reasonable steps in order to give effect to this Order.

3. Paragraphs 2.1 and 2.2 of this Order shall operate as an Interim Order with immediate effect. For clarity it is recorded that the provisions of paragraphs 2.1.1 and 2.1.2 shall not apply to occupation of the property by persons who are already primarily resident thereon at the time the Order is made."

14. Provision was made in that order for service thereof by the Sheriff at the property by, *inter alia*, reading out the contents with a loud-hailer and by erecting a notice board with the order pinned to it at the entrance to the premises. The court also granted any sufficiently interested party leave to anticipate the return date on 24 hours notice to the City's attorneys.

THE COUNTER-APPLICATION

15. On Tuesday, 14 January 2014, forty-two listed persons (whom I shall call either "*the counter-applicants*" or "*the occupiers*") sought leave to anticipate the return date of Binns-Ward J's order. They asked for the discharge of the rule *nisi* granted on 10 January 2014, costs of suit and the following substantive relief:

"*4. That a rule nisi do issue calling upon the respondents*[2] *to show cause on the 10th day of February 2014 why the following relief should not be made final:*

4.1 declaring the conduct of the City of Cape Town in demolishing and/or dismantling the informal structures erected by the applicants at Erf 150 (remaining extent) Philippi to be unconstitutional and unlawful;

4.2 interdicting and restraining the respondents from evicting or demolishing any informal structures erected by the applicants at Erf 150 (remaining extent) Philippi without a valid Court Order;

4.3 interdicting and restraining the respondents from demolishing, removing or otherwise disposing of any informal structures, or the constituent materials of such structures, erected by the applicants at Erf 150 (remaining extent) Philippi;

4.4 interdicting and restraining the respondents from intimidating, harassing or assaulting the applicants or any person occupying Erf 150 (remaining extent) Philippi;

4.5 directing the City of Cape Town to construct for those applicants, whose informal structures were demolished on

[2] Ms. Fischer and the City were cited as Respondents in the counter application

7 and 8 January 2014 and who still require them, temporary habitable dwellings that afford shelter, privacy, and amenities at least equivalent to those that were destroyed and which are capable of being dismantled, at the site at which their previous informal housing structures were demolished;

4.6 directing the City of Cape Town to pay the costs of the applicants' counter-application on the attorney and client scale."

16. On that day (a provisional court day during the summer recess) the matter was heard by Zondi, J. The parties were of the view that the occupiers' founding affidavit in the counter-application (which served as a reply in the main application), disclosed certain material disputes of fact which could not be resolved on the papers. They agreed that those issues be sent to oral evidence on Wednesday, 19 February 2013 for determination of the following issue:

"*Whether the structures which were dismantled by the City of Cape Town on 7th and 8th January 2014, at the property known at Erf 150 Philippi-East remaining extent, were those which were unoccupied and vacant.*"

The customary procedural directions relevant to such a hearing were made.

17. The main application seems, at that stage, to have followed a separate course. It was postponed to the Motion Court where, also on 19 February 2013, Salie-Samuels AJ granted an agreed order to further postpone the matter to 22 May 2014.

18. Shortly before the hearing of the counter-application on 19 February 2014 I intimated to counsel in chambers that before hearing oral evidence I required the parties to address me on two points of law to which I shall refer shortly. I indicated to counsel that I regarded this approach to be in accordance with, for example, the Wallach case.[3] I also indicated to counsel that I was of the view that the main application should be anticipated and be heard together with the counter-application the following day. The parties were amenable to these proposals.

19. The law points were argued on 20 and 25 February 2013 with Mr. S Magardie, the Director of the Cape Town offices of the Legal Resources Centre, appearing for the occupiers, and Mr. A Katz SC and Ms. M Adhikari for the City and Ms. Fischer. The court is indebted to the legal representatives for their assistance in this matter, both in their heads of argument and in court in relation to what appears to be a novel point.

THE CITY'S ALLEGATIONS REGARDING THE STATUS OF THE STRUCTURES

20. The City's answer to the spoliation application brought by the occupiers is made at various levels of authority. At the top of the chain of command is Mr. Stephen Hayward who is the City's Head: Anti-Land Invasion, a unit which is

[3] Wallach v Lew Geffen Estates CC 1993 (3) SA 258 (A) at 263A-H.

located within the City's Directorate of Human Settlements. Hayward deposed to the principal affidavit in the founding papers before Binns-Ward J and the answering papers before Zondi J.

21. The next in line is Mr. David Nortje, a Principal Field Officer with the Anti-Land Invasion Unit ("*the ALIU*") within the City's aforesaid Directorate of Human Settlements. Then there are Messrs Deon Dowman and Jeffrey Dawson, who are Senior Field Officers, and Rudolf Henry, a Junior Field Officer with the ALIU, all of whom made affidavits in support of Hayward. Affidavits are also made by employees in the City's Directorate of Safety and Security, including Mr. Lodewyk Pieterse, a Law Enforcement Officer who has worked for the City for 28 years, and Mr. Arthur Daniels, a Principal Inspector: Law Enforcement Officer. I shall deal briefly with the relevant parts of the affidavits filed by these employees of the City.

HAYWARD'S AFFIDAVIT

22. Hayward works in an office in Bellville, some distance from the property, and does not appear to have been on the ground, as it were, on either 7 or 8 January 2014. He relies on the allegations of his fellow employees (contained as they are in supporting and confirmatory affidavits) for the purposes of his affidavit.

23. In regard to the City's conduct at the property on the days in question, he says the following in his affidavit of 14 January 2014:

"*5. … Nortje did not attend at the property at the time during the removal of the structures on 7 January 2014 and 8 January 2014 but … he visited the property after the removals had been completed and … he was in constant radio communication with the ALIU staff members and the law enforcement officials who effected the removals. …*

6. …

7. … [I]t must be emphasised that the City takes its constitutional and statutory obligations very seriously. It, at all times, tries to comply with its duties to protect the rights of all. It appreciates the importance of section 26(3) of the Constitution and the provisions of the Prevention of Illegal Eviction Act 19 of 1998 ("PIE") and attempts to satisfy them.

8. Indeed it is submitted that the City did not violate PIE or s26(3) of the Constitution on Erf 150, Philippi on the 7th and 8th of January 2014 or at any other time.

9. …

10. The question immediately arises why were some structures demolished and others not. The City says, and common sense and logic, are consistent with the City [sic] views, that it was only structures that were ***not*** *yet homes that were demolished. …*

> *25. The City contends that the operations of the ALIU generally, and in this particular instance are consistent with the Constitution and the law and are lawful in that the ALIU operates solely in circumstances where land invasions are either taking place or are imminent. The ALIU does* ***not*** *demolish homes without a court order.*
>
> *26. In such cases there can be no suggestion that the provisions of PIE find application in that the operations of the ALIU are never directed at evicting persons from their homes or dwellings.*
>
> *27. All that the ALIU does in circumstances where land invasions are taking place or are imminent is to prevent any structure from being erected on a particular property or to remove such structures where they are in the process of being erected, and prior to such structures being occupied by any person.*"

24. The allegations made in these paragraphs formed the foundation of the City's case in opposing the counter-application. Mr. Katz SC's argument focussed on the sharp point that what the City demolished were not homes and, because they were not homes, the City was not bound to observe the provisions of PIE. Mr. Katz SC readily accepted that if the City's argument on this score did not find favour, that was the end of the matter and the counter-application had to succeed.

25. I shall deal with the City's argument in more detail below but before I do so I need to refer to other parts of Hayward's affidavit. He sought to distinguish three discrete groups of people who were in occupation of the property:

> "*17.1 first, there are those persons who had been in occupation of the property for some length of time, prior to 7 and 8 January 2014;*
>
> *17.2 secondly, there are those persons who had attempted to unlawfully invade and/or occupy the property on 7 and 8 January 2014 and who were prevented from erecting structures or were [sic] they had managed to erect structures such structures were lawfully removed by the ALIU prior to such structures being occupied; and*
>
> *17.3 thirdly, those persons who have [sic] attempted or are threatening to unlawfully occupy the property*."

26. The third group of persons was the subject of the main application, said Mr. Hayward, and in the absence of any defence thereto having been set up, the City sought confirmation of the rule granted by Binns-Ward J. At the conclusion of argument, however, Mr. Magardie and Mr. Katz SC were in agreement that the rule *nisi* should be extended for a number of reasons which are presently not relevant. I shall therefore incorporate the extension of the rule *nisi* in the order I intend making.

27. As regards the first group of people, Hayward said that it had not been the City's intention to destroy their homes: they admittedly enjoyed the protection

of PIE. For this reason, the City had been careful to mark the structures which it thought resorted under the first group with an "*X*" painted on the structure with red spray paint. Demolition personnel were instructed to leave such marked structures untouched.

28. Hayward describes what happened after the April/May 2013 demolitions by the City thus:

> "*42. During this period (June 2013 to August 2013) approximately 20 structures were erected and became occupied and these structures were not removed from the property. These occupied structures remain on the property and form the majority of those which were not removed from the property during 7 and 8 January 2014.*"

29. It seems as if the City's regular patrols in the area were effective and that no new structures sprung up until January 2014 when events took the following turn:

> "*44. Matters, however, changed significantly on 7 January 2014. At approximately 14h45 on 7 January 2014 Mr. Nortje was advised by a law enforcement official on patrol at the property, Mr. Lodewyk Pieterse, that vehicles were standing in a queue outside the property and that it appeared that a large group of people were in the process of erecting structures on the property. Having regard to his experience Mr. Lodewyk Pieterse understood this process to indicate that an orchestrated land*

invasion was taking place at the time. A copy of the audio recording of the initial report will be provided along with this affidavit, if required.

45. *Mr. Nortje immediately contacted his superiors including myself and certain other City officials in that the reported land invasion was taking place on privately owned land and according to City policy specific permission had to be obtained in order to intervene in the situation. Permission to intervene was given and Mr. Nortje directed his staff to attend at the property to assess the situation on the ground. The ALIU members arrived at the property at approximately 15h15 on 7 January 2014.*

46. *In the interim Mr. Daniels and Mr. Nortje contacted the South African Police Services, the Metro Police and the City's Law Enforcement Division to advise them of the planned intervention. A meeting was held between the ALIU and the various law enforcement agencies in respect of the planned intervention at the property. The ALIU staff at the property reported that there were between 30 and 50 people in the process of erecting new structures on the property at the time.*

47. *…*

48. *Consequently the ALIU together with law enforcement officers commenced with their activities sometime between 17h00 and 17h30 on 7 January 2014.*"

30. Hayward says that the ALIU followed its "*standard operating procedures*" which allegedly included:

30.1. attempting to negotiate with a community leader, where possible;

30.2. in the absence of such a leader (which was the case here) approaching individuals directly in an attempt to dissuade them from further erecting structures.

31. The procedure then allegedly progressed as follows:

"*49. …*

49.3 As a consequence the ALIU staff commenced removing of [sic] all structures which had been erected on that day;

49.4 At the commencement of the dismantling procedures ALIU staff contacted Mr. Nortje and advised him that there were certain structures which were, in their opinion, newly erected on that day, but which appeared to be occupied nevertheless;

49.5 ***Mr. Nortje instructed his staff <u>not</u> to remove any structure where there was any doubt as to whether the structure was occupied even in circumstances where the structure appeared to be newly erected;***

49.6 As a consequence the only structures which were removed were those which were clearly unoccupied and vacant. Copies of the audio recordings of discussions between Mr. Nortje and the ALIU staff members will be provided along with this application, if required.

50. In fact the Fischers after the event, asked Mr. Nortje why certain structures which they were certain had not been present on the property on 6 January 2014 had not been removed and Mr. Nortje advised him that where there was any uncertainty as to whether a structure was occupied or not such structures were not removed."

NORTJE'S AFFIDAVIT

32. Nortje says that he was not present at the property during the demolitions on 7 and 8 January 2014 but arrived there after the ALIU "*had completed the demolition of the structures which were in the process of being erected on the property*". He was, however, in regular radio contact with the ALIU staff and law enforcement officials responsible for the demolition work on both days.

33. Nortje confirms that he was in charge of the operation on both days and confirms the allegations made by Hayward, in particular, regarding his (Nortje's) instructions to staff as set out in paragraph 31 above.

DOWMAN'S AFFIDAVIT

34. Dowman says that on 7 January 2014 at about 15h00 he was alerted to activity by the counter-applicants via a call from Nortje. He and his passenger, Henry, then proceeded to the property where they saw "*people (who) were in the process of erecting new structures on a portion of the property*". He reported this back to Nortje, who arranged for the ALIU and law enforcement officials to be despatched with all haste.

35. Dowman says that they then went onto the property and sought a leader with whom to negotiate. This proved fruitless and after the individuals were requested to dismantle their structures, the City officials stepped in and started demolishing themselves. He goes on to describe the following events:

> "*12. We followed our normal procedure, which in the first instance involves identifying unoccupied or vacant structures.*
>
> *13. What the ALIU normally does in order to ascertain whether a structure constitutes someone's home is to observe the state of completion of the structure, whether the construction materials appear to be new, whether the structure contains any furniture or belongings and whether the ground around the structure appears to be undisturbed.*
>
> *14. Our standard operating procedures require that no structure which appears to be occupied is removed under any circumstances, at least without a court order.*

15. We did not remove any structure which was occupied on 7 January 2014.

16. In addition there were certain structures which appeared to be newly erected, but which also contained other items of furniture or belongings.

17. I contacted Mr. Nortje to request instructions as to what to do with these structures, where there was a degree of uncertainty. Mr. Nortje instructed me that in any case where there was uncertainty as to whether or not the structure was occupied such structure was to be left alone and not dismantled.

18. We dismantled approximately 32 unoccupied structures on 7 January 2014. There were between 20 and 30 structures which had been standing for sometime which we left alone and there were a further 15 or 16 structures which we had initially marked for removal, but which we were uncertain about which we also left standing as instructed by Mr. Nortje.

19. I further confirm that no homes or structures which appeared to be occupied were dismantled by the ALIU on 7 January 2014."

36. Henry only confirms the affidavits of Dowman and Hayward and has no further narrative in his affidavit.

DAWSON'S AFFIDAVIT

37. Like Henry, Dawson is still a relatively junior member of the ALIU – both have about two years experience. Dawson says that he was not involved in the operation conducted by the ALIU on the 7th but on 8 January 2014 he was told by Nortje to inspect the property to ascertain whether any of the structures demolished the previous day had been put up again.

38. Dawson says that on the 8th the ALIU dismantled about 15 structures, none of which "*appeared to be occupied*". When he returned to the property the following day, Dawson conducted an audit of the remaining structures. He says that he then counted 53, took photographs of them and numbered them individually from one to 53. He was unsure whether all 53 structures were on the Fischer property or the neighbouring property, which he identified as "*Erf 597*". I should add that this is the only mention that is made in the papers of structures on any property other than the Fischer property.

PIETERSE'S AFFIDAVIT

39. Pieterse says that he drove past the property between 15h00 and 16h00 on the 7th of January. He says that he saw a large amount of building materials being off-loaded from vehicles parked at the entrance to the property. He reported this unusual occurrence to Nortje who despatched an ALIU official to inspect. Pieterse returned to his office to enlist the assistance of his colleagues in the Law Enforcement Unit.

40. While confirming the correctness of Hayward's affidavit insofar as it related to him, Pieterse makes the following specific observations:

> "*10. During the operation on 7 January 2014, I observed an ALIU staff member (Mr. Deon Doman [sic]) identifying structures empty and which contained no furniture and appeared to be vacant as the structures which were to be dismantled. As far as I am aware those were the only structures which were dismantled.*
>
> *11. I returned to the property along with the ALIU on 8 January 2014. I observed that certain structures which had been dismantled the previous day had been re-erected. These structures had been spray painted with an "*X*" and were therefore taken down again.*
>
> *12. I further confirm that as far as I am aware no homes were dismantled by the ALIU during this period.*
>
> *13. My instructions from my superiors, which I always follow, and did follow on 7 and 8 January 2014 is to never assist the ALIU if it contravenes by. For [sic] example, dismantling a person's home without a court order.*"

THE APPROACH TO THE EVIDENCE

41. I intend approaching the allegations made in the counter-application along the lines that one adopts when adjudicating an exception, i.e. that the allegations made by the deponents to the affidavits on behalf of the City are assumed to be correct. I believe that, since there are disputed facts which the parties would want to have resolved by the hearing of oral evidence application of the Plascon-Evans rule[4] may operate too harshly against the City in the present circumstances before such oral evidence is heard. Counsel for the City were in agreement with this approach.

THE TWO ISSUES OF LEGALITY

42. I asked the parties to address me on two issues of legality in relation to the City's conduct during the demolition operation on 7 and 8 January 2014:

    42.1. First, since the incursion had taken place on private land, in what capacity did the City purport to act?

    42.2. Secondly, on what basis did the City claim that its conduct was lawful in the context of the provisions of section 26(3) of the Constitution and PIE?

    I will deal with the questions in that order.

[4] Plascon-Evans Paints (Pty) Limited v Van Riebeeck Paints (Pty) Limited 1984 (3) SA 623 (A).

THE CITY'S ENTITLEMENT TO ACT ON PRIVATE PROPERTY

43. It may have been expected, in a matter such as this, that the City would have relied upon section 6 of PIE, the relevant provisions whereof read as follows:

> "*6.* ***Eviction at instance of organ of state***
>
> *(1) An organ of state may institute proceedings for 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 of 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."

44. The reluctance of the City to follow this route is not attributable to section 6(6) of PIE which imports the procedural provisions of section 4 to an application in terms of section 6(1). The City's problem with that importation, said Mr. Katz SC, is that section 4 has mandatory notice periods which effectively delay the hearing of any application to court by more than two weeks, given that a 14 day notice of the proposed application must be given to any occupiers of land sought to be evicted.

45. Where the City is the owner or "*person in charge*" of the land, it may avail itself of the provisions of section 5 of PIE which read as follows:

"*5.* ***Urgent proceedings for eviction***

(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 occupiers;

(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."

46. I suppose too that the City could approach a court on behalf of a private landowner if it was properly authorised to do so *qua* agent of the owner. But it seems, as I shall illustrate later, that such an interpretation would probably be stretching the purpose and meaning of section 5 too generously.

47. Notwithstanding these alternatives, in this case the City expressly turned its face against any reliance on PIE and proceeded to demolish structures without any prior approach to Court. It adopted this more expeditious and expedient course of action because, as the affidavits cited above show, it claimed that PIE only applied to persons who occupied land in "*homes*", and that the structures of the occupiers in this case had not been on the land for sufficient period of time for them to be termed "*homes*".

48. Where then does the City otherwise acquire the power to enter upon private land and demolish structures put up by persons ostensibly unlawfully on such land? I believe that the point of departure is that, in terms of Fedsure[5]:

> "*[55] There are a series of provisions in chap 10 [of the Interim Constitution] itself which make it plain that a local government's powers to act are limited to powers conferred by the Constitution or laws of a competent authority. For example, s174(3) provides that:*
>
> > *'A local government shall be autonomous and, within the limits prescribed by or under law, shall be entitled to regulate its affairs.'*
>
> *And s175(4) provides that:*
>
> > *'A local government shall have the power to make by-laws not inconsistent with this Constitution or an Act of Parliament or an applicable provincial law.*'
>
> *[56] These provisions imply that a local government may only act within the powers lawfully conferred upon it. There is nothing startling in this proposition – it is a fundamental principle of the rule of law, … recognised widely, that the exercise of public power is only legitimate where lawful. The rule of law – to the extent at least that it expresses this principle of legality – is*

[5] Fedsure Life Assurance Limited and Others v Greater Johannesburg Transitional Metropolital Council and Others 1999 (1) SA 374 (CC) at 399B-D.

generally understood to be a fundamental principle of constitutional law."

49. The City says that in terms of sec 151(3) of the Constitution (in the chapter which deals with local government):

> *"(3) A municipality has the right to govern, on its own initiative, the local government affairs of its community, subject to national and provincial legislation, as provided for in the Constitution."*

It will be noted that this sub-section is in substance similar to sec 174(3) of the Interim Constitution, which was discussed in Fedsure.

50. Then says the City, sec 152(1)(b), (c) and (d) of the Constitution confirm that the objects of local government include the provision of services in a sustainable manner, the promotion of social and economic development and the promotion of a safe and healthy environment. It goes on to aver that its powers are delineated by sec 156(1) of the Constitution which gives it the authority to administer local government matters listed in Schedule 4 Part B, Schedule 5 Part B and "*any other matters assigned to it by national or provincial legislation."* In addition, the City says that sec 156(5) grants it the right "*to exercise any power concerning a matter reasonably necessary for, or incidental to, the effective performance of its functions*."

51. While accepting that the control of incursions by land invaders onto private land is not a matter falling directly within the ambit of local government matters as referred to in the aforementioned two Schedules, the City argues

that the Constitutional Court has accepted that government sometimes takes lawful action for which no specific authority exists in legislation but which is sourced in the power to perform the general constitutional duties imposed upon it. Reference is made to cases such as Kyalami Ridge [6] and Modderklip [7].

52. I think Modderklip is a good example of circumstances in which the general duty of a local authority to act reasonably and proactively in respect of land invasions was recognised by the Constitutional Court. In approaching the role of the State (be it at national, provincial or municipal level) to the question of land invasions, Langa ACJ reminded us of the historical context in which the question is located:

> *"[36] The problem of homelessness is particularly acute in our society. It is a direct consequence of apartheid urban planning which sought to exclude African people from urban areas, and enforced this vision through policies regulating access to land and housing which meant that far too little land and too few houses were supplied to African people. The painful consequences of these policies are still with us 11 years into our new democracy, despite government's attempts to remedy them. The frustration and helplessness suffered by many who still struggle against heavy odds to meet the challenge merely to survive and to have shelter can never be underestimated.*

[6] Minister of Public Works v Kyalami Ridge Environmental Association and Another 2001 (3) SA 1151 (CC)

[7] President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd 2005 (5) SA 3 (CC).

> *The fact that poverty and homelessness still plague many South Africans is a painful reminder of the chasm that still needs to be bridged before the constitutional ideal to establish a society based on social justice and improved quality of life for all citizens is fully achieved."*

The "*painful consequences*" referred to by Langa ACJ have in no way been alleviated nine years later.

53. As Langa ACJ stressed the State is the only party that holds the key to the effective solution of homelessness:

> *"[43] The obligation on the State goes further than the mere provision of the mechanisms and institutions referred to above. It is also obliged to take reasonable steps, where possible, to ensure that large-scale disruptions in the social fabric do not occur in the wake of the execution of court orders, thus undermining the rule of law. The precise nature of the State's obligation in any particular case and in respect of any particular right will depend on what is reasonable, regard being had to the nature and the right or interest that is at risk, as well as on the circumstances of each case.*
>
> *[44] …*

[45] It is unreasonable for a private entity such as Modderklip to be forced to bear the burden which should be borne by the State, of providing the occupiers with accommodation. Land invasions of this scale are a matter that threatens far more than the private rights of a single property owner. Because of their capacity to be socially inflammatory, they have the potential to have serious implications for stability and public peace. Failure by the State to act in an appropriate manner in the circumstances would mean that Modderklip, and others similarly placed, could not look upon the State and its organs to protect them from invasions of their property. That would be a recipe for anarchy."

54. In the present case the City, as the relevant organ of State, has purported to take on the role which the Constitutional Court defined for it in Modderklip. Fully cognisant of its obligation to uphold the rule of law under sec 1(c) of the Constitution, the City has assumed a general duty to act reasonably and proactively, and to take appropriate measures to prevent unlawful land invasions, and, as it were, to nip the situation in the bud – before it has had the opportunity to blossom into a full-blown problem. Accordingly, it justifies its conduct primarily on that basis.

55. Then, says the City, the control of land invasions is incidental to its housing obligations contained in sec 26(1) and (2) of the Constitution [8]. While contending that the primary legislative responsibility for housing rests with the

[8] S26(1) Everyone has the right to have access to adequate housing.
S26(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.

national and provincial spheres of government, the City accepts that the responsibility therefor is assigned to it under sec 9(1) of the Housing Act 107 of 1997 ("the Housing Act") and sec 15(1) of the Western Cape Development Act, 6 of 1999 ("the Provincial Housing Act"). It says that these provisions place a broad responsibility on it to take all reasonable and necessary steps within the framework of national and provincial legislation and policy to, *inter alia*,

55.1 ensure that inhabitants in the City have adequate access to housing on a progressive basis;

55.2 prevent unsanitary and unhealthy conditions of human habitation;

55.3 identify appropriate land for housing development;

55.4 plan and manage land usage in an orderly fashion; and

55.5 promote conflict resolution where this occurs in the process of housing development.

56. The City acknowledges that under the Housing Act [9] and the Provincial Housing Act [10] the national and provincial spheres of government are enjoined to determine housing policy. However, following Grootboom [11], where the Constitutional Court held that the Housing Code published by the National Minister for Human Settlements had to include provisions to ensure the

[9] See sec 3(2)(a) and 7(2)(a)
[10] See sec 3(2)(b)
[11] Government of the Republic of South Africa and Others v Grootboom 2001 (1) SA 46 (CC)

availability of emergency housing when required, Chapter 12 of the Housing Code, now allows municipalities to seek funding for such projects from those other spheres of government.

57. Then, says the City, the Constitutional Court in Blue Moonlight [12] held that the obligations of municipalities to provide emergency housing in the cases where evictions would result in homelessness were not secondary to those of national and provincial government and might require the local authority to fund emergency housing out of its own coffers:

> *"[67] Besides its entitlement to approach the province for assistance, the City has both the power and the duty to finance its own emergency housing scheme. Local government must first consider whether it is able to address an emergency housing situation out of its own means. The right to apply to the province for funds does not preclude this. The City has a duty to plan and budget proactively for situations like that of the Occupiers."*

A local authority's resources are, of cause, not boundless and what can be expected of it in discharging its Blue Moonlight obligations by way of emergency housing is ultimately a question of reasonableness. [13]

58. I agree with Mr. Katz SC that the consequence of the approach articulated above is that the City has a general duty to plan for the progression of the

[12] City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another 2012 (2) SA 104 (CC) at para 57
[13] Blue Moonlight para 57.

right to housing in an orderly and systematic manner and that it must be permitted to plan and manage land usage within its jurisdiction with a free hand, subject of course to applicable national and provincial legislation, policy prescripts and directions of our Courts where permitted.

59. I accept also that should the City allow invasions of private land to occur, it would only be a matter of time before it would be called upon to address the plight of occupiers facing eviction from such land. It is, after all, liable to be joined as a party in such proceedings for precisely that reason.

60. Accordingly, to the extent that the unlawful occupation of private land poses a fundamental threat to the orderly planning and development of available land by the City, and the City has been asked to intervene, I am persuaded that the City is enjoined to take all reasonable steps available to it to prevent unlawful incursions onto private land. The first legal point is therefore decided in favour of the City.

61. I would add that the primary responsibility for the protection of private property rests with the owner [14] and that party has access to the relief afforded by sections 4 and 5 of PIE. Yacoob J made the following observation in this regard in Mkontwana, albeit in a different context [15]:

> *"[59] This unlawful occupation benefits neither the property nor the owner and, in most cases, is prejudicial to both. It is nevertheless the duty of the owner to safeguard the property, to*

[14] Mkontwana v Nelson Mandela Metropolitan Municipality and Another 2005 (1) SA 530 (CC) at para 59; Modderklip para 29.

[15] The liability of a property owner for municipal levies and charges, where the land has been occupied illegally.

take reasonable steps to ensure that it is not unlawfully occupied and, if it is, to take reasonable steps to ensure the eviction of the occupier. If the owner performs these duties diligently, unlawful occupiers will not, in the ordinary course, remain on the property for a long period. It is ordinarily not the municipality but the owner who has the power to take steps to resolve a problem arising out of the unlawful occupation of her property. It is accordingly not unreasonable to expect the owner to bear the risk."

62. Whether a municipality can take the pre-emptive steps referred to above of its own volition is not something which has to be decided in this matter since it is clear that the City stepped in only after Ms. Fischer had asked for help to deal with a problem with which she manifestly could not cope. This case is therefore limited to that situation.

WAS THE CITY BOUND TO OBSERVE PIE IN THIS CASE?

63. This question requires an interpretation of PIE in accordance with the contextual approach recently determined by the Supreme Court of Appeal in the Natal Pension Fund case [16]:

"[18]…The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by

[16] Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) at 603F

reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself' …read in context and having regard to the purpose of the provision and the background to the preparation and production of the document."

64. In Port Elizabeth Municipality [17] Sachs J dealt at length with the origins of PIE and the relegation of its predecessor, PISA [18], to the scrap heap of some of the apartheid era's most obnoxious legislation. As Sachs J observed, the use of PISA by the government of the day effectively criminalised the occupation of land by "*squatters*" and facilitated their speedy removal therefrom:

> *"[9] PISA was an integral part of a cluster of statutes that gave a legal/administrative imprimatur to the usurpation and forced removal of black people from land and compelled them to live in racially designated locations. For all black people, and for Africans in particular, dispossession was nine-tenths of the law..residential segregation was the cornerstone of the apartheid policy. This policy was aimed at creating separate 'countries' for Africans within South Africa…Through a combination of spatial apartheid, permit systems and the creation of criminal offences, the [Native Urban Areas Consolidation] Act strictly controlled the limited rights that Africans had to reside in urban areas. People living outside of what were defined as native locations were regarded as squatters and, under PISA, were expelled from the land on which they lived.*
>
> *[10] Differentiation on the basis of race was, accordingly, not only a source of grave assaults on the dignity of black people. It*

[17] Port Elizabeth Municipality v Various Occupiers 2005 (1) SA 217 (CC)
[18] The Prevention of Illegal Squatting Act 52 of 1952

resulted in the creation of large, well-established and affluent white urban areas co-existing, side by side, with crammed pockets of impoverished and insecure black ones…The principles of ownership in the Roman-Dutch law then gave legitimation in an apparently neutral and impartial way to the consequences of manifestly racist and partial laws and policies. In this setting of State-induced inequality, the nominally race-free PISA targeted black shack-dwellers with dramatically harsh effect…

PISA, accordingly, gave the universal social phenomenon of urbanisation…an intensely racialised South African character. Everywhere, the landless poor flocked to urban areas in search of a better life. This population shift was both a consequence of and a threat to the policy of racial segregation. PISA was to prevent and control what was referred to as squatting on public or private land by criminalising it and providing for a simplified eviction process…The power to enforce politically motivated, legislatively sanctioned and State-sponsored eviction and forced removals became a cornerstone of apartheid land law… This marked a major shift, both quantitavely and qualitatively (politically). Evictions could be sought by local government and achieved by use of criminal rather than civil law… It was against this background, and to deal with these injustices, that

s26(3) of the Constitution was adopted and new statutory arrangements made."

65. As Sachs J went on to observe, PIE was adopted with the express intention of overcoming the manifest abuses of the past and promoting the new order promised in s26:

> *"[12] PIE not only repealed PISA but, in a sense, inverted it: Squatting was decriminalised and the eviction process was made subject to a number of requirements, some necessary to comply with certain demands of the Bill of Rights. The overlay between public and private law continued, but in reverse fashion, with the name, character, tone and context of the statute being turned around. Thus, the first part of the title of the new law emphasised a shift in thrust from prevention of illegal squatting to prevention of illegal eviction. The former objective of reinforcing common-law remedies, while reducing common-law protections, was reversed so as to temper common-law remedies with strong procedural and substantive protections; and the overall objective of facilitating the displacement and relocation of poor and landless black people for ideological purposes was replaced by acknowledgement of the necessitous quest for homes of victims of past racist policies. While awaiting access to new housing development*

programs, such homeless people had to be treated with dignity and respect."

66. The constitutional right of illegal occupiers to due process in a court of law before eviction from, and/or demolition of their homes as protected in s26(3), is given content to in the provisions of PIE, which prescribes how effect is to be given to the right of such due process. [19]

67. As I have said, the thrust of the City's argument in this case is that PIE does not apply because it did not destroy people's "*homes*". While there is reference to the word "*home*" in the preamble to PIE, there is no further reference to the word in the body of the Act. Rather, the mischief which PIE is aimed at addressing is to ensure due process in relation to evicting unlawful occupiers from land, buildings or structures.

68. The concepts relevant to such due process are defined as follows in sec 1 of PIE:

*68.1 "**evict**" means to deprive a person of occupation of a building or structure, or the land on which such building or structure is erected, against his or her will, and "**eviction**" has a corresponding meaning.*

[19] Cape Killarney Property Investments (Pty) Ltd v Mahamba and Others 2001 (4) SA 1222 (SCA) at para 20

*68.2 "**building or structure**" includes any hut, shack, tent or similar structure or any other form of temporary or permanent dwelling or shelter.*

*68.3 "**land**" includes a portion of land; and*

*68.4 "**unlawful occupier**" means a person who occupies land without the express or tacit consent of the owner or person in charge, or without any other right in law to occupy such land…*

69. The only sections of PIE (other than the definition of "*evict*") in which the words "*building or structure*" are to be found are sections 6(1)(a) and 6(3)(a), which I have set out above. Those sections pertain to local authority activity, such as that employed by the City in this case.

70. The activity that PIE proscribes without a court order under either of sections 4, 5 or 6, is:

70.1 to deprive a person of the occupation of,

70.2 either a building or structure (including a hut, a shack, a tent or similar structure, whether temporarily or permanent), or the land on which such building or structure is erected, in circumstances where,

70.3 the occupation of such building, structure or land occurs without the consent of the owner or person in charge thereof.

71. Applying that approach to the instant case, the following emerges:

71.1 It is common cause that the occupiers had no consent to be on the Fischer property;

71.2 It is not in dispute that on 7 and 8 January 2014 the City destroyed temporary structures falling within the definition of "*building or structure*";

71.3 The only issue then is whether the occupiers were deprived of occupation of the temporary structures, or occupation of the land on which these were erected.

72. The argument of the City based on the evidence which I have set out above, is that all structures in which their demolition squad found people or signs of human habitation, were regarded as "*homes*". For this reason the ALIU did not demolish those temporary structures.

73. The City contends further that those temporary structures that were vacant (in the sense that there were no people found therein, or that there were no signs of human habitation therein such as furniture or personal effects) were lawfully demolished since the City did not regard such structures as "*homes*".

74. In my view, the City's approach was fundamentally flawed. The question was **not** whether the temporary structures were **homes**. Rather, the question was whether those structures were **occupied** at the time that they were demolished.

75. The evidence presented by the City suggests that it was ultimately left up to Dowman to decide which structures were to be destroyed, albeit that he was instructed by his superiors as to how to go about his work. Dowman explains in para 13 of his affidavit what he did "*in order to ascertain whether a structure constitutes someone's **home**".* This included observing the state of completion of the structure, whether the building materials used appeared to be new, whether the surrounding ground appeared to be undisturbed, and whether the structure housed any furniture or personal effects.

76. Dowman also refers to certain standard operating procedures requiring members of the ALIU not to demolish any structure which "*appears to be occupied*". And, in the event of doubt, the preferred option was to leave the structure standing. Pieterse on the other hand says that on 8 January 2014 he saw that structures which were marked with an "X" were demolished. But he too asserts that "*no homes were dismantled"* on the 8th of January 2014.

77. As the papers demonstrate, the City's operation seems to have been somewhat haphazard in that the evidence suggests both confusion and a degree of arbitrariness in the selection of targeted structures. This is no doubt because the City's officials did not ask themselves the correct question *viz* are these **unlawful occupiers**?

78. Had the City approached the matter properly and contextually considered the provisions of PIE, I am of the view that it would have come to the conclusion that none of the structures that were pulled down were being unlawfully occupied under PIE. I say so for the following reasons:

78.1 It is common cause, and Mr. Katz SC accepted, that all of the structures demolished over the two days in question were complete;

78.2 The fact that the structure had reached the stage of its completion indicates an intention on the part of the builder thereof to take up residency therein. Common sense tells one that poor people who invade another's land, do so in the hope that they will be able to stay there and, importantly, permanently so, because they will in all likelihood no longer have anywhere else to stay. Hence, the necessity to take all of their worldly possessions with them when they move.

78.3 The fact that a particular structure was empty when the City demolished it most certainly does not lead to the conclusion that it was unoccupied: the occupant may have been at work, or have taken the children to the clinic or, most importantly, collecting his/her furniture and belongings elsewhere to move

them into the recently erected structure. The alternatives are limitless.

79. At the very least though, I would suggest that people effectively occupy the land upon which an informal structure is erected (regardless of its state of completion) by virtue of the fact that the structure is located thereon. I refer in this regard to the minority judgment in Ndhlovu [20] where Olivier JA discussed the meaning of *"unlawful occupier*" with focus on the word "*occupier*":

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

[20] Ndhlovu v Ngcobo; Bekker and Another v Jika 2003 (1) SA 113 (SCA) – a series of cases involving mortgagors who refused to leave their properties after sales in execution had taken place and in respect of whom the applicability of PIE was considered.

80. The learned Judge of Appeal also considered the Afrikaans text of PIE (which was the unofficial text) and came to the following conclusion:

> *"[42] …There is thus an indication, in the Afrikaans text, that PIE was intended to apply to the unlawful occupation of land as a positive action, as in the case of squatters taking occupation of land, and not to apply to defaulting ex-tenants and ex-mortgagors who simply remain in unlawful occupation. (Emphasis added)*

81. Olivier JA went on to observe that in interpreting PIE courts had to move away from textual interpretation. In an approach which preceded the Natal Pension Fund case by almost a decade, the learned Judge of Appeal said the following:

> *"[43] The problem of ascertaining to which situations PIE applies is, however, not capable of a definite and final solution by a mere textual interpretation of the definition itself. The answer is to be found in broad, context-sensitive to PIE (sic) and its place in the constitutional and legislative framework of land tenure laws.*
>
> *[44] There seems to be general agreement that PIE applies to the situation where an informal settler (a squatter) moves onto vacant land without any right to do so and without the consent of the landowner or his/her agent. There are thousands, if not millions, of such squatters in our country. They are usually*

unemployed, the poorest of the poor, and live with their families in self-erected tin, cardboard or wooden shacks."

82. In my view, since the fundamental principle of PIE is to afford a right to due process to the most marginalised members of society before being evicted from another's land, it does not serve the purpose of the legislation to measure with "*intellectual callipers*", as it were, how long the occupier has been on the land, or whether there are factors indicating a possibility that the act of occupation has not been completed or that the person may perhaps have given up occupation, before affording the right to judicial oversight of the process of eviction. If the structure is complete, the invasion of the piece of land in question has taken place, occupation has occurred, and the provisions of PIE are applicable.

83. I am accordingly of the view that the second legal point is to be decided in favour of the occupiers.

84. In the event that I am wrong in this approach, and that the question which ought to have been asked was indeed whether the relevant structures were "*homes*", I am of the view that the position is no different for the City. I say so for the reasons which follow.

85. When considering the type of structure which enjoys protection under sec 26(3) as a "*home*", Sachs J remarked in Port Elizabeth Municipality that the section:

> *"[17] …Evinces special constitutional regard for a person's place of abode. It acknowledges that a home is more than just a shelter from the elements. It is a zone of personal intimacy and family security. Often, it will be the only relatively secure space of privacy and tranquillity in what (for poor people, in particular) is a turbulent and hostile world."*

86. In Barnett [21] Brand J noted that while "*home*" is a difficult concept to pin down, it contemplates an element of "*regular occupation coupled with some degree of permanence."*

87. However, the facts of that case are materially different to the present. The matter concerned a group of relatively well-off, "*literate and sophisticated people"* who had unlawfully built a collection of rudimentary holiday cottages on pristine State land along the Wild Coast in the Eastern Cape. They all had dwellings elsewhere from which they set out every time they went to visit their cottages. When the Government sought an eviction order against them the occupiers relied, *inter alia*, on the protection of PIE which they said was applicable to their "*home*s" on the Wild Coast, and argued that their eviction from these structures was not fair in the circumstances.

88. With reference to Sachs J's comments referred to in para 85 above, Brand JA disposed of the PIE argument thus:

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[21] Barnett and Others v Minister of Land Affairs and Others 2007 (6) SA 313 (SCA) at para 38

> *"[40] His sentiments cannot, in my view, apply to holiday cottages erected for holiday purposes and visited occasionally over weekends and during vacations, albeit on a regular basis, by persons who have their habitual dwellings elsewhere. Thus I conclude that for purposes of PIE, the cottages concerned cannot be said to be the defendants' 'homes'. Their 'homes' are in KwaZulu-Natal. Consequently I hold the view that PIE finds no application."*

89. On the facts before him, Brand JA appears to have been satisfied that the cottages which were temporarily occupied by the owners thereof were not "*homes*" under PIE because the occupants' permanent places of residence were elsewhere. It was this fact, rather than the duration or manner of occupancy of the cottages that persuaded the Court that the structures were not homes covered by PIE. Since the occupiers of the cottages had ordinary places of residence elsewhere, their rights to shelter would not be affected by the demolition of the unlawfully erected structures on the Wild Coast. Obviously in those circumstances they did not require nor deserve the protection of PIE.

90. Mr. Magardie drew the Court's attention to an insightful article by Prof. Fox of Queens University in Belfast, Northern Ireland, in the Journal of Law and Society. [22] The abstract to the paper suggests that interdisciplinary research, could provide a starting point for the development of a more clearly articulated

[22] Lorna Fox, the meaning of Home: a Chimerical Concept or a Legal Challenge, Journal of Law and Society Volume 29 No. 4, December 2002.

socio-legal understanding of the meaning and value of home to occupiers. The author points to:

> *"The centrality of home in human dealings, and the deep significance of rights and obligations relating to home [which] renders the lack of rigorous analysis directed towards the formulation of a legal concept of the value of home difficult to defend."*

The author also points to the following observation by K.J. Gray and P.D. Symes [23]:

> *"All of us – even the truly homeless – live somewhere, and each therefore stands in some relation to land as owner – occupier, tenant, licensee or squatter. In this way land law impinges upon a vast area of social orderings and expectations, and exerts a fundamental influence upon the lifestyles of ordinary people."*

91. It is important therefore to properly locate the concept of "*home*" as it is contemplated in s26(3) of the Constitution for it is that form of structure that may not be demolished without due process. Applying a contextual interpretation to the word "*home*" in the section of the Constitution which deals with socio-economic rights, I believe that the interpretation should be wide rather than restrictive. People with limited, if any, resources, such as the occupiers in this case, have managed to scrape together enough money to buy

[23] Real Property and Real People (1981 (4)

the basic materials (wood, iron and plastic sheeting) to erect the most basic of structures in which they wish to live peacefully would undoubtedly call those structures "*home*".

92. In Rudolph [24] Selikowitz J had little hesitation in accepting that the rudimentary structures erected in a city park (a public open space) in that case were the occupiers' homes:

> *"There can be no doubt that the shelters erected by the respondents are their homes. Indeed,* ***their only homes****. They reside with their families in these shelters and have nowhere else to live." (Emphasis added)*

93. In Breedevallei [25], Bozalek J held that in determining what constituted a "*home*" within the meaning of PIE, context was all important and that a generous interpretation was warranted. In that matter, a group of people had unlawfully occupied part of a newly completed low-cost housing project without permission for about 10 days. In finding that PIE was applicable the Court held as follows:

> *"[19]…[The] context in the present matter, insofar as it can be determined on the papers, is that of people whose pre-existing accommodation is completely unsatisfactory, be it by reason of overcrowding or its precariousness. It requires little imagination to accept that persons in these circumstances who, in the belief*

[24] City of Cape Town v Rudolph and Others 2004 (5) SA 39 (C) at 59C-D
[25] Breedevallei Munisipaliteit v Die Inwoners van Erf 18184, Dikkopstraat 3, Avian Park, Worcester and 18 Others [2012] ZAWCHC 390 (13 December 2012)

that they have some claim thereto, occupy empty houses built by a local authority for persons such as themselves (but as yet officially unallocated) will, without the elapse of much time in occupation, consider such property to be their 'home'.

[20]…In regard to the degree of permanence of such occupation, this can only be measured in relation to the ten day period between initial occupation and the challenge to their right of occupation when the appellant launched the application on or about 13 January 2012. I can see no reason why, in this context, even such a short period would not constitute the requisite degree of permanence."

Then, somewhat presciently the Court went on to speculate as follows:

"It would be a remarkable proposition if it were to be contended, for example, that squatters who overnight make their home on unoccupied land by erecting a make-shift shelter and who have no other fixed abode could not claim the protection of PIE if the authorities were to immediately demolish such dwellings without a court order. This was the case throughout much of the 1970's and the 1980's when so-called squatters migrated to Cape Town in large numbers and on a daily basis had their flimsy shelters demolished as described above. It was against, and in the light of, this historical background, replicated throughout the country

> *over decades, that s26(3) of the Bill of Rights and PIE were enacted. In other words, where a person's housing circumstances are dire, much less may be required for such a person to establish a 'home' by way of regular occupation and a degree of permanence."*

94. I find myself in respectful agreement with the sentiments expressed by the learned judges in both of these cases. In the present matter it is not so much the period of occupation of the property which renders PIE applicable but the intention behind it. Mr. Katz SC accepted that all the structures that were demolished by the City were completed when they were torn down. He sought justification for the legitimacy of the City's conduct in the evidence of the employees referred to earlier in this judgment. It was only those completed structures which were empty that were taken down, the argument being that an empty structure was an unoccupied structure and the protection of PIE was therefore not required.

95. In his affidavit Hayward states baldly that such structures were "*not yet homes*" but unfortunately does not state what the basis for his conclusion is. It could not have been just because they were empty at the time as, this could have been purely coincidental as I have already demonstrated above.

96. The affidavit of Nortje shows that some structures which had been erected that day (or overnight) were not demolished because they were seen to be occupied. Only vacant and unoccupied structures were apparently removed.

Clearly the short duration of time that those structures in which people were found to be present at the time that the ALIU moved onto the land did not disqualify those occupiers' structures from being regarded as "*homes*". There is therefore no logical basis not to regard those completed, but empty, structures as homes as well.

CONCLUDING REMARKS

97. I am therefore satisfied that the occupiers were deprived by the City of the procedural right to be heard under PIE before their structures were so unceremoniously destroyed.

98. I wish to make it very clear that the granting of relief in this matter is most definitely not to be interpreted as the approval by the Court of the conduct of the occupiers on 7 and 8 January 2014. Certainly the granting of relief is no reward for their behaviour which was unlawful from the outset and unacceptable in a democratic state, which has committed itself, through the provisions of sec 26 of the Constitution, to progressively advance the rights of our citizens to have access to adequate housing. By taking the law into their own hands, the occupiers have undoubtedly compromised the orderly advancement of those rights under s26.

99. The task of the City in discharging its constitutional obligations as a local authority in the manner I have considered lawful in terms of the first issue which I have determined, is certainly a difficult one and there can be little doubt that resources are limited. The City must look after the interests of its land-owners

(who are after all valuable ratepayers) when called upon to do so. But then, the City must ensure that it acts in accordance with the rule of law, which is the bedrock of a constitutional state. If it acts precipitously and aggressively, it runs the risk that civil unrest may result as a response to its actions. The descent into anarchy will seriously undermine the constitutional state.

100. In granting the relief set forth hereunder, I am of the view that both parties have asserted the protection and/or advancement of constitutional rights and obligations. In addition, the City has achieved partial success in relation to the issues argued. In such circumstances, it is appropriate that each party bears its own costs of suit.

ORDER OF COURT

A. The main application, being the return date of the rule *nisi* issued in the application for urgent interdictory relief by Binns-Ward J on 10 January 2014 is postponed for hearing on the semi-urgent roll to Thursday 22 May 2014.

B. The costs associated with the main application are to stand over for later determination.

C. It is declared that the conduct of the City of Cape Town in demolishing and/or dismantling the informal structures erected by the counter applicants at erf 150 (remaining extent) Phillipi, was unconstitutional and unlawful.

D. The Respondents in the counter application are interdicted and restrained from evicting or demolishing any informal structures erected by the counter applicants at erf 150 (remaining extent) Philippi without a valid court order.

E. The Respondents in the counter application are interdicted and restrained from demolishing, removing or otherwise disposing of any informal structures, or the constituent materials of such structures, erected by the counter applicants at erf 150 (remaining extent) Philippi.

F. The City of Cape Town is directed to construct for those counter applicants whose informal structures were demolished on 7 and 8 January 2014, and who still require them, temporary habitable dwellings that afford shelter, privacy and amenities at least equivalent to those that were destroyed and which are capable of being dismantled, at the site at which their previous informal housing structures were demolished.

G. Each party will bear its own costs of suit in regard to the counter application.

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P.A.L. GAMBLE, J

GAMBLE, J: 13 MARCH 2014

ORDER OF COURT

A. The main application, being the return date of the rule *nisi* issued in the application for urgent interdictory relief by Binns-Ward J on 10 January 2014 is postponed for hearing on the semi-urgent roll to Thursday 22 May 2014.

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P.A.L. GAMBLE, J