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

Reportable

CASE NO: 23595/2015

In the matter between:

GENEVA CLAASEN	First Applicant
RUBEN JAMES CLAASEN	Second Applicant
THOSE MALES AND FEMALES, ADULTS AND MINOR CHILDREN, WHO RESIDED AT 1 STRATFORD AVENUE, EERSTE RIVER, WESTERN CAPE	Third Applicant

And

THE MEC FOR TRANSPORT AND PUBLIC WORKS, WESTERN CAPE PROVINCIAL DEPARTMENT	First Respondent
CITY OF CAPE TOWN	Second Respondent

JUDGMENT: 11 November 2016

DAVIS J

Introduction

[1] In his meticulously documented account of legal struggles during apartheid, Professor Richard Abel wrote that 'law has been a terrain of political contestation throughout South African history'. He therefore asked: 'is the law, like war, merely politics by other means'. (Richard Abel *Politics by the means: law in the struggle against apartheid 1980-1994* (1995) at 9, 14)

[2] During the dark days of apartheid the debates waged concerned the role of law in an authoritarian system. Today, the question arises as to the role of the vindication of rights struggles as a mechanism to ensure a more equal and dignified society. (See Jackie Dugard and Malcolm Langford "*Art or Science? Synthesising lessons from public interest litigation and dangers of legal determinism*" 2011 (27) SAJHR 39) The present dispute does concern those who dreamt of a better life once apartheid had ended, but who are now desperate and vulnerable and living in precarious circumstances.

Factual background

[3] Applicants have resided at Geneva house ('the property') for many years. At one point the property was operated as a non-profit organisation designed primarily to assist destitute persons and women and children in particular. The property is owned by first respondent. On 21 January 2016 first respondent obtained an order of eviction which authorised the eviction of the applicants by 29 February 2016. At the time of the eviction it appeared that there were approximately 115 people living on the premises, half of whom were families made up of women headed families with children, families with minor children and some elderly and disabled persons.

[4] The applicants approached this Court on the basis of an application for the rescission of the eviction order. For the sake of completion, I should add that, on the day of the eviction, over 80 of this group left either to find alternative accommodation or to places undetermined. Accordingly, by the time this matter reached this court it was contended by the first respondent that only 19 adults and 137 children resided at the property and that first respondent had tendered to find

all of them alternative accommodation. They refused because, as I understand their position, they want to reside at the property and do not want to be separated from each other.

[5] On 27 July 2016 I granted an order postponing the matter for a later hearing and ordered the persons set out in an annexure to the court order to remain on the property until the determination of the complete dispute.

The order of eviction

[6] The history relating to the eviction is to be located more than a decade before the matter reached this court. On 9 July and 30 September 2003 first respondent and the Geneva Crisis Centre ('the centre') concluded a lease agreement with first respondent. The property to be leased in terms of the lease agreement was known as the portion measuring approximately 1084.55 m of House Le Fleur, the former Faure School for Girls situated at 1 Stratford Avenue Eerste River. On 23 February 2004 first respondent caused a letter to be addressed to the centre informing it that the lease agreement would expire on 31 March 2004 and that, in terms of clause 2 thereof, the centre had two months to vacate the premises which could not be effected by later than 31 May 2004.

[7] The centre did not vacate the premises by this date. Therefore on 3 August 2004 first respondent caused a further letter to be generated to the Director of the Department of Social Services regarding allegations of women and child abuse at the centre. Pursuant thereto, in early September 2004 investigations were carried

out by various officials of first respondent, the upshot of which was that a series of significant complaints were directed at first applicant in her personal capacity.

[8] First respondent then caused a further letter to be generated on 3 September 2004 in terms of which the lease agreement was terminated with immediate effect. A further confirmatory letter followed on 15 October 2004. Notwithstanding this range of complaints, little happened until the matter final proceeded to the Magistrates Court in the District of Kuilsriver during 2007. The Magistrate had a problem with the sexual abuse allegations and suggested that first respondent proceed on the grounds of an expired lease and arrear rental. Before first respondent could pursue this cause of action, on 14 May 2009, the Department of Social Development held an internal meeting with regard to the centre and, particularly, in connection with an allegation in respect of the noncompliance with the Non Profit Organisation Act 71 of 1977. On the next day, 15 May 2009, the Department of Social Development addressed a notice of noncompliance by the Centre with its obligations in terms of the Non Profit Organisation Act. It appears that the centre was then deregistered. During June 2009 first applicant formed another non-profit organisation called Geneva House and registered it. There is however no formal lease agreement currently in place.

[9] According to Ms Ronel Judin, Chief Director: Immovable Asset Management of the Department of Transport and Public Works Western Cape Provincial Department, who deposed to first respondent's answering affidavit, during the period from the end of 2009 until October 2010 first respondent was under the impression that the property was operating in accordance of the requirements with

the norms and standards referred to and with "the terms of the tacit lease agreement".

[10] In early April 2013, following further complaints, Ms Judin says 'it seems that the Department is once again faced with serious problems at Geneva House'. On February 2015, an environmental assessment from the Kleinvlei Police Precinct was produced, which contained the request that the centre be closed down.

[11] Finally, in December 2015 first respondent launched an eviction application. The applicants were served with copies of the main eviction application by the Sheriff of this Court. The eviction application was opposed on 30 December 2015 and despite a filling of a notice to oppose, no opposing papers were forthcoming from applicants.

[12] On 19 January 2016 the matter came before Blignault J who noted the notice of opposition and enquired as to the absence of applicants at court. He requested that the first respondent contact the first, second and third applicants and request that they attend court on 21 January 2016, failing which the eviction order would be granted. The State attorney Ms Shireen Karjiker, prepared a letter to this effect which was served by the Sheriff as well as being sent by fax and email. It appears that Ms Karjiker also attempted to contact first, second and third applicants by telephone on a number which appeared on a letterhead of the notice to oppose but she was unsuccessful in this regard. The phone was not answered.

[13] On 21 January 2016 neither first, second or third applicants appeared in court in terms of the directions of Blignault J. Accordingly, the eviction order was granted in terms of which first, second and third applicants were ordered to vacate the property by 29 February 2016. First respondent therefore submits in the light of this narrative that the eviction order was properly granted on the basis that the applicants were unlawful occupiers as defined in terms of the Prevention of Illegal Eviction and Unlawful Occupation of Land Act 19 of 1998 ('PIE Act') and that the order was just and equitable under the circumstances. Geneva House together with first and second applicants had 'historically perpetrating illegal activities (prostitution, drug use, gang related activities and abused the residence physically and verbally) and for the court to have allowed this to continue would amount to a travesty of justice ...' (sic)

***In limine* objections**

[14] Ms Dicker, who appeared together with Ms Mahomed on behalf of the first respondent, contended that both first applicant in the rescission application and Ms Louw in the earlier urgent application purported to have the authority to act on behalf of the third applicant ("the group") cited in the initial order but failed to set out who exactly comprised the third applicant nor were confirmatory affidavits from these persons or a power of attorney in favour of either the first applicant or Ms Louw produced. There was no reason, according to Ms Dicker, why the 19 adults and 37 minor children currently on the property and whose details could be obtained were not cited in their personal capacities as co-applicants.

[15] In the application of rescission first applicant describes herself as;

> 'The founder and facilitator of Geneva House... not only did I run this NPO together with volunteers but this property is also my only home which I have been living in since approximately 2003 when the NPO was started. I also act as a representative for the remaining applicants and I am duly authorised to depose to this affidavit on their behalf... I am also advised that I may deposed to this affidavit and institute these proceedings on their behalf in terms of s 38 of the Republic of South Africa Constitution Act 108 of 1996.'

[16] Section 38 of the Republic of South Africa Constitution Act 108 of 1996 ('the Constitution'), which provides that "anyone acting in a public interest" may approach a competent court for relief, is the most far reaching of the grounds offered by first applicant in justification of standing. In *Ferreira: Vryenhoek and others v Powell NO and others* 1996 (1) SA 984 (CC) at para 233 O'Regan J said:

> 'Factors relevant to determining whether a person is genuinely acting in the public interest will include considerations such as: whether there is another reasonable and effective manner in which the challenge can be brought; the nature of the relief sought, and the extent to which it is of general and prospective application; and the range of persons or groups who may be directly or indirectly affected by any order made by the Court and the opportunity that those persons or groups have had to resent evidence and argument to the Court.'

[17] Given the parlous situation in which the other applicants find themselves, a purposive interpretation of s 38 would vindicate the animating idea behind this argument in favour of standing and thus justify dismissing this *in limine* objection.

[18] As Sachs J said in his characteristically eloquent fashion in *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) at 239 E:

> 'Thus, those seeking eviction should be encouraged not to rely on concepts of faceless and anonymous squatters automatically to be expelled as obnoxious social nuisances. Such a stereotypical approach has no place in the society envisaged by the Constitution, justice and equity require that everyone is to be treated as an individual bearer of rights entitled to respect for his or her dignity.'

The second *in limine* objection

[19] Applicant's, in the initial rescission application, based their grounds for relief on Rule 42 (1)(a) and Rule 31 (2) (b) of the Uniform Rules of Court as well as upon the common law. Turning to Rule 42 (1) (a), there does not appear to be any basis set out by the applicants as to how the eviction order was granted in error which would justify the application of Rule 42(1) (a).

[20] Similarly, rescission in terms of Rule 31 (2) (b) refers to a rescission of a default judgment; that is a judgement granted in circumstances in which the defendant did not deliver a notice of intention to defend or is in default of the delivery of the plea. This rule does not appear to have application in this case, as there is no dispute that, in this case, applicants were served with the eviction application by the Sheriff. It is common cause that a notice of intention to oppose was filed on 30 December 2015 and stamped by the Registrar of this Court on 4 January 2016. Furthermore, on 19 January 2016 when the matter came before Blignault J, he carefully considered the absence of the applicants at court and

requested first respondent to contact them and request that they attend court on 21 January 2016, failing which the eviction order would be granted.

[21] For this reason, the facts of this case fall within the scope of the decision of the Supreme Court of Appeal in *Lodhi 2 Properties Investments CC and another v Bondev Developments (Pty) Ltd* 2007 (6) SA 87 (SCA) where Streicher JA held that a judgment to which a party is procedurally entitled cannot be considered to have been granted erroneously by reason of facts of which the court which granted the judgment was unaware. Similarly, a judgment to which a party is procedurally entitled in the absence of the defendant cannot be said to have been "granted erroneously" in the light of the subsequently disclosed defence. The key finding in this decision was that the existence and nonexistence of the defence on the merits is an irrelevant consideration and, if subsequently disclosed, cannot transform a validly obtained judgment into an erroneous judgment.

Common law

[22] For rescission to be granted in terms of the common law, the applicants have to provide a reasonable explanation for default, show that the application was made *bona fide* and that there is a *bona fide* defence which has prospects of success. See *Colyn v Tiger Food Industries Ltd t/a Medowfeed Mills (Cape)* 2003 (6) SA 1 (SCA) at para 11.

A reasonable explanation for the default

[23] First applicant states as follows:

'The applicants had every intention to defend the eviction application and had filed a notice to defend and appointed attorneys to represent us. We were unaware that these attorneys failed in their duty to assist us and we were unaware that the eviction order went through unopposed.'

Later first applicant says the following:

'We are poor and mostly uneducated. We do not have the experience or know-how to represent ourselves and we know of no other means of obtaining legal representation in order to make use of our constitutional right to access to the court. We were unable to afford any legal representation. It is only after the Human Rights Commission assisted us to make an application for representation *in forma pauperis* that we are able to obtain representation and therefore access to the court.

We were unaware that the matter was before court again. I refer to annexure "RJ2" to the first respondent's spoliation application of 18 July 2016. It is a sheriff's return of service dated 20 January 2016. The one return merely indicates service at 16:30 in the afternoon, and the other return states that it was served personally on me. It reflects a letter dated 19 January 2016 from the State Attorney advising us that we were to be in court on the 21 January 2016 that is the next morning. I cannot recall receiving the letter and the return of service is in any event ambiguous. In any event, there is no proof that the occupants of Geneva House were notified to appear in court the next day. I submit that it would have been unreasonable and prejudicial to have notified us at such a late hour to appear in court the very next day.'

[24] I accept that this explanation is subject to a range of difficulties, particularly in that the applicants claim not to have known about the hearing date but were aware of the date on which to file the notice to oppose and were notified by the Sheriff of the directions made by the court that they attend court on 21 January 2016. I take account however that, in the main, these are impecunious litigants

who, are hardly conversant with the nature of court proceedings and, that in the event that the other requirements for rescission are met, a level of latitude should be exercised in their favour, particularly when the dispute goes to the core of the rudiments of a dignified life.

A bona fide application

[25] Ms Dicker submitted that even though the eviction took place on 5 May 2016 applicants were aware thereof since 15 April 2016. They had been represented by attorneys since at least 9 May 2016. Notwithstanding this fact, the rescission application was only launched on 12 August 2016 at the direction of the presiding judge on 18 July 2016. No explanation was proffered for this delay.

[26] Ms Dicker also attacked the bona fides of first and second applicants submitting that they were intent on securing a property as a permanent residence, when it was common cause that it was always intended to be used only as a temporary shelter for abused women as stipulated in the lease agreement. But if one takes the view, as this court is compelled to, that this case also involved applicants who otherwise will be homeless, it is difficult to see on what basis a rescission application, as brought, has not been launched as a final, desperate and bona fide attempt the ensure a security of a dwelling in parlous circumstances.

Prospect of success

[27] Accordingly this entire case must fall to be determined on the basis of the prospects of success on the merits.

Duties of a court in hearing an eviction application

[28] Even before the advent of the Constitution was introduced, courts sought to engage fully with the implications of an eviction application. Thus, Goldstone J (as he then was) in *S v Govender* 1986 (3) 969 (T) at 971 f said as follows:

> 'The power to make such an ejectment order is a wide one. It is one which may, and in most cases will, seriously affect the lives of the person or persons concerned. It may, and frequently will, interfere with the normal contractual relationship which exists between landlord and tenant. Such an order should not therefore be made without the fullest enquiry.'

[29] The duty to conduct the fullest of enquiries has now been expanded as a result of the introduction of the Constitution. The Constitutional Court has developed an impressive jurisprudence which provides a court with a range of alternatives in exercising its discretion as to whether to order an eviction. These include directing the parties to engage meaningfully with each other (*Occupiers of 51 Olivia Road Berea Township* and *197 Main Street Johannesburg* 2008 (3) SA 208 (CC)), requiring a municipality to consider the appointment of a mediator (*Cashbuild South Africa (Pty) Ltd v Scott* 2007 (1) SA 332 (T) at paras 39-47), calling for reports concerning the availability of alternative accommodation (*Blue Moonlight Properties 39 (Pty) Ltd v Occupiers of Saratoga Avenue* 2009 (1) SA 470 (W)) and an obligation on the part of public authorities to ensure that occupiers, who are evicted, obtain temporary accommodation in a location as near as possible to the area from which they have been evicted. (*City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and another* (CC) 2012 (2) SA 104 (CC)).

[30] The animating idea behind this developing jurisprudence was captured in the following passage from the judgment in *PE Municipality* at para 23:

> 'The Constitution imposes new obligations on the courts concerning rights relating to property not previously recognised by the common law. It counterposes to the normal ownership rights of possession, use and occupation, a new and equally relevant right not arbitrary to be deprived of a home. The expectations that ordinarily go with title could clash head- on with the genuine despair of people in dire need of accommodation. The judicial function in these circumstances is not to establish a hierarchical arrangement between the different interest involved, privileging in an abstract and mechanical way the rights of ownership over the right not to be dispossessed of a home, or vice versa. Rather it is to balance out and reconcile the opposed claims in as just a manner as possible taking account of all the interest involved and the specific factors in each particular case.'

[31] The judicial function is to realize the ambition of the Constitution and to ensure that the vindication of its promises has a tangible effect on those who are central to its claim to the transformation of our society. Some twenty years ago Professor Frank Michelman captured this idea, at the dawn of our constitutional democracy:

> 'But it does seem to me that the bill of rights may ... serve as an opening towards a fundamentally reconceived society: a signpost along the road toward a revolutionised future. A future still to be charted. And charted in part through a process of law – that is, constitutional adjudication – that progressively instils concrete meaning into abstract rights statements with a view to realising in actuality, in the lives of all the people, in the still-and-for some-time-yet-to-come unfolding conditions of the new South African nation, the basic human interest for which the

> rights-statements stand as markers and commitments. It would follow, if that is roughly the spirit of your enterprise, that questions of substantive social justice will not be subordinated to those of democratic process and procedure when you do your parts as lawyers and judges to assay the meaning and construct the content of South African constructional law.' (1995 SAJHR 677 at 480)

[32] This function is a difficult one and requires a combination of understanding of the limits of adjudication together with the legal imagination required to breathe life into the constitutional text. Although he cautioned that judges must take care to ensure that they do not exceed the proper bounds of judicial conduct and thus improperly enter the arena or take over the running of litigation, Wallis JA noted, insofar as eviction cases is concerned, that:

> 'What they [courts] are obliged to do in eviction cases is ensure that all the relevant parties are before them, that proper investigations have been undertaken to place the relevant facts before them and that the orders they craft are appropriate to the particular circumstances of these case. If, despite appropriate judicial guidance as to the information required the judges are not satisfied that they are in possession of all relevant facts, no order can be granted.'

City of Johannesburg v Changing Tides 74 (Pty) ltd and others 2012 (6) SA 294 (SCA) at para 27.

[33] However eviction has massive effects on those who are the subject of the order and hence the concept of engagement must be substantively meaningful and designed to alleviate homelessness

Did the court granting the eviction order comply with these requirements?

[34] An examination of first respondent's affidavit in the eviction application reveals a range of difficulties. In the eviction, Ms Judin on behalf of the applicant (respondent in these proceedings) describes the occupiers (other than first and second applicant in these proceedings) as comprising "of unknown males and females who are unlawfully residing at the property but whose details are to the applicant unknown". Notwithstanding this averment, Ms Judin suggests that some of the residents have lived on the property for at least ten years and then says that there have been allegations of abuse of residents as well as illegal activities perpetrated on the property. In short, she avers that the property is not a safe haven for residents. There is no information provided about the identity, names and number of residents whom the applicant wish to evict, save to say that attempts "at complete assessments of families and individuals" were, stymied by the first respondent and uncooperative residents.

[35] Accordingly, the court which ordered eviction was not in a possession of key information regarding the exact number of residents on the property, the number of children, disabled person or households headed by women, or their personal circumstances. Notwithstanding an averment that social workers were involved, the applicant failed to provide the court with even an estimate of the number of vulnerable residents who would be affected by the order which it sought.

[36] Expressed differently, notwithstanding efforts made by the court to obtain the attendance of those who are about to be evicted, it was not possible for the court on the basis of the affidavit provided by first respondent to carefully consider the rights

and needs of the persons on whom the order would impact in terms of the comprehensive enquiries as mandated under the Constitution and the applicable provisions of the PIE Act.

First respondent's submissions regarding the breach of material terms of the lease agreement

[37] Based on the information secured from the various investigations, Geneva House was clearly not operating as a crisis and rehabilitation centre as required by the terms of the tacit lease agreement, nor was Geneva House making any rental payment to the first respondent and most crucial of all, despite alleged repairs and renovations undertaken by a company called Tetra Pak, the condition of the building had deteriorated and became uninhabitable.

[38] In the light of the breaches, the first respondent was entitled to terminate the lease agreement with immediate effect and on 10 June 2015, proceeded to do so by way of a notice to vacate.

[39] Suffice to refer to the approach adopted in *Molusi v Voges NO* 2016 (7) BCLR 839 CC which admittedly dealt with the relationship between the common law and ss 8(1) and 9 of the Extension of Security of Tenure Act 62 of 1997. The following *dictum* appears to me to have equal relevance to the argument insofar as a lease agreement is concerned in this case:

> 'The court did not strike a balance between the interest of the owner of the land and of those of the occupiers so as to infuse justice and equity of fairness into the enquiry. The Supreme Court of Appeal did not consider the fairness of the termination of

applicants' rights of residents nor did it give sufficient weight to the hardship that would eventuate from the termination of the rights of residence in eviction. This was despite the undisputed evidence that the eviction would render the occupiers homeless as there was no suitable alternative accommodation.' (para 45)

This *dictum* is in response to the over reliance of the Supreme Court of Appeal on the common law principle of *rei vindicatio*.

[40] For all of these reasons, the eviction order which was granted, notwithstanding the commendable care taken by Blignault J must be found to have breached the onerous enquiry mandated by the Constitution and therefore stands to be set aside.

What under the circumstances would have been a just and equitable order?

[41] First respondent provided affidavit evidence to the effect that the property is unsafe and in a dangerous condition and therefore unfit for habitation. In the application for eviction, Ms Judin refers to a Facility Condition Assessment Inspection Form completed by Works Inspector D Johnson in which it was found that the building was in a 'critical condition but least in part and 'the general overall condition of the building is regarded as poor and major upgrading and maintenance is required to restore the building to its original state.' Furthermore the costs of repair would be in the region of R 2 214 300.00. Ms Judin also referring to the difficulty of gaining access to the building. She claimed, 'we must be allowed access to the property as soon as possible as any further delays could cause series damage and possible injuries to the occupiers.'

[42] Although these averments were contested on the papers, it is important to take account of the state of the repair of the building and these averments which was made by first respondent. The question then arises as to whether there was significant meaningful engagement generated by the first respondent prior to or after the eviction so as to achieve reasonable accommodation with those affected by the order, given the condition of the building.

[43] Ms Dicker submitted that, on applicant's own version, over 80 of the previous persons who were at the property managed to leave and find alternative accommodation. She emphasised that the current position, at the time the case was argued, comprised 19 adults and 37 minor children, all of whom refused alternative accommodation, notwithstanding efforts made by the first respondent as well as the Department of Social Development. Ms Dicker also referred to the fact that the applicants had not dealt in any detail with first respondent's allegations regarding drugs and prostitution and other abuses which were perpetrated at the property, some of which was substantiated with documentation from community members attached to the answering affidavit.

[44] Reference is also made to further meaningful engagement that first respondent contended that it had initiated. Thus on 19 April 2016, prior to the eviction officials from second respondent, Ms Patricia Noyoo sent a "street people" team from second respondent to the property in order to conduct an assessment from the site. According to Ms Judin the inhabitants refused assistance. They advised that they would only consider being relocated if they were guaranteed alternative accommodation in the form of actual houses. The Department of Social

Development intervened in respect of the minor children who were resident at the property but again received no cooperation from the residents; hence on this line of argument no meaningful engagement was possible.

[45] On 3 June 2016 Ms Karjiker addressed a letter to "ex residents" in which she set out a number of steps which had been taken by the Department of Social Development to survey the "ex-residents" and to assist with alternative accommodation again repeated the offer to assist with relocation to alternative shelters.

[46] In summary, this is not a case where the first respondent did nothing to assist those who were evicted. The question arises as to whether what was done was sufficient in the circumstances on this case. The fact however is that on 15 July 2016 some two and half month after the execution of the eviction order, a number of families and children who were evicted were living in improvised tents on an open field during a very cold and rainy Cape Town winter. They had no access to running water or ablution facilities and were only able to access a single tap in an adjacent building. It does not appear that any of these averments were contested by respondents.

[47] Significantly an email generated by Ms Nolene Allen the Acting Director Litigation in the Department of the Premier read thus:

> 'In this matter we still have approximately 40 to 50 persons living outside the premises previously known as Geneva House in Eerste River. The Human Rights Commission has appointed attorneys to assist them and we are attempting to resolve the matter.

> We want to be able to indicate with certainty whether or not there is alternative accommodation available for them and exactly how many persons can be accommodated and where?
>
> Kindly advise whether you can provide some assistance in this regard or refer me to the relevant official who can assist please?'

This email should be read within the context of a letter generated by attorneys Marais Muller and Hendricks, representing a number of the applicants, in which the following said:

> 'Currently as we all acutely aware the residents are living in makeshift tents. They do not have access to water nor ablution facilities. Most of the children are sick and some have been hospitalised due to the exposure to the cold.'

In this letter it appears that it was the disaster management team of the second respondent which assisted the displaced residents by providing blankets, sanitary packs and baby hampers to the residents and their children.

[48] Furthermore, as Mr Magardie, who appeared on behalf of the South African Human Rights Commission which was admitted as an *amicus curiae*, and to whom I am indebted for their assistance, noted, the offer of shelters proposed by the first respondent were simply rejected out of hand. The argument of the applicants was that the shelters were situated far from schools and their place of employment, that they were charged fees and the rules of the shelter required residents to leave at certain times during the day and thus be out of the shelter by 08h00 am, that children would be separated from the parents, that the shelters were impractical as an alternative and would increase the travel costs of these applicants. Furthermore, the rules of the shelters would mean that many of these residents and their children would have to spend the day on the streets. These complaints had been

addressed to the State Attorney but there was no response regarding the impracticalities as they had been set out.

[49] What is important is that when an eviction is sought, the concept of meaningful engagement needs to take place in such a manner that the dislocation of the lives of those evicted, particular homeless and vulnerable people is minimised. Months after the eviction order has been granted, when there is no attempt to engage with the issue, it can hardly be claimed that there is meaningful engagement, particularly where the problems could have been solved prior to the order having been granted or during the process after the problems had been properly ventilated.

[50] This case must be assessed within the context of s 26 of the Constitution. As the Constitutional Court stated in *Government of the Republic of South Africa and others v Grootboom and others* 2001 (1) SA 46 at para 68:

> 'Effective implementation requires at least adequate budgetary support by national government. This, in turn, requires recognition of the obligation to meet immediate needs in the nationwide housing programme. Recognition of such needs in the nationwide housing programme requires it to plan, budget and monitor the fulfilment of immediate needs and the management of crises.'

[51] Although international law has played, regrettably, a somewhat insignificant role in the development of our socio economic rights jurisprudence, in terms of s 39 of the Constitution, a court must consider international law when interpreting the Bill of Rights. South Africa ratified the International Covenant on Economic, Social and Cultural Rights on 12 January 2015. Accordingly, General Comment 7, the right to

adequate housing, which has been developed by the United Nations Committee on Economic Social and Cultural Rights pursuant the Covenant provides guidance when it states as follows:

> 'Women, children, youth, older persons, indigenous people, ethnic and other minorities, and other vulnerable individuals and groups all suffer disproportionately from the practice of forced eviction. Women in all groups are especially vulnerable given the extent of statutory and other forms of discrimination which often apply in relation to property rights (including home ownership) or rights of access to property or accommodation, and their particular vulnerability to acts of violence and sexual abuse when they are rendered homeless.'

[52] Further content to this right is given in the report of the Special Rapporteur on Adequate Housing as a component to the right to an adequate standard of living and on the right to non-discrimination in this context (26 December 2011). The Report notes that in order to better protect and realise women's right to adequate housing, the State must prioritise the needs:

> 'Of particular vulnerable and/or marginalized women, including widows, elderly women, lesbians, homeless women, migrant women, women with disabilities, women who may be single mothers or single heads of household, women living with or otherwise affected by HIV/AIDS, women belonging to minorities, domestic workers, sex workers, illiterate women and women who have been displaced.'

[53] Significantly, the National Housing Code which was enacted in terms of s 4 of the Housing Act 107 of 1997 contains a series of principles, guidelines and standards that apply to the various programs affected by the State in relation to housing. Chapter 12 of the Housing Code provides for assistance to people who

find themselves in need of emergency housing. The definition of emergency includes a situation where people 'are evicted or threatened with eminent eviction from land or unsafe buildings or situations where proactive steps ought to be taken to forestall such consequences'.

[54] In summary, the assistance must be given at the time of the eviction and the consideration of what is appropriate must be central to the enquiry which courts are required to undertake pursuant to the Constitution and in terms of PIE and other relevant legislation, when ordering the eviction of people who may be rendered homeless pursuant to the order.

The appropriate just and equitable order

[55] Having found that the initial order must be rescinded as it is inconsistent with the requirements of the Constitution, this Court must now make an order that is just and equitable in terms of s 172 (1)(b) of the Constitution. This relief must be designed to protect and enforce the rights which are contained in the Constitution and, in particular, the failure of the first respondent to find suitable alternative accommodation for the residents of the property who were evicted on 05 May 2016 and thus dealing with the failure to plan properly for the execution of the order which was granted.

[56] It must also take account that the respondents in this case did respond, albeit not necessarily in time and in full and further it must be cognisant of the state of repair of the property. It is therefore designed to respond to the problem of

potential homelessness in the short term and then create the opportunity for engagement towards a more meaningful solution.

[57] It follows that an appropriate order must now be made.

1. The rescission application in respect of the order granted by Blignault J on 21 January 2016 is upheld and the order is set aside and replaced with the following order:

2. The attorneys for the occupiers of Geneva House ("the occupiers"), who are listed on annexure "X" hereto, being 5 male adults, 14 female adults and 37 minor children, are directed on or before 24 November 2016 to furnish the State Attorney and the attorney for the COCT with their personal details including their names, ages, family circumstances, sources of income and appropriate proof of identity. These details shall be confirmed by an affidavit of information and belief from the attorney for the occupiers and where possible, by affidavits from the occupiers referred to therein.

3. The occupiers are directed to provide their full cooperation during the process referred to herein and the provision of the relevant information.

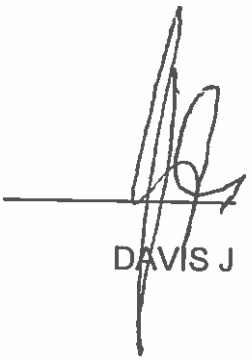
4. First and second respondents are directed to provide a report to this court by no later than 09 December 2016, confirmed by relevant officials on affidavit, detailing the accommodation that will be made available to the occupiers referred to in paragraph 1 and when such accommodation will

be made available. The accommodation must be in a location as near as feasibly possible to Eerste River and the report must specifically deal with the issue of proximity and explain why the particular location and form of accommodation has been selected. It must also set out the steps taken, during the period before the report is filed, to engage with the occupiers through their attorneys or any other means that may appear appropriate. The applicants will have 10 days upon receipt of the report in which to answer and provide a response to the proposals of first and second respondent.

5. During the period between this order being granted and the report of the second respondent duly supported by first respondent, these respondents together with the Department of Social Development are to provide all of the occupiers referred to in paragraph 2 above with temporary emergency accommodation by no later than 7 days from the date of the receipt of the affidavits referred to in paragraph 2 above, due regard being had to their resources and suitable accommodation being available, if possible within a reasonable distance from schools to which applicants children attend. In the event of the occupiers failing to vacate the property within two weeks of being allocated such accommodation, First Respondent will be entitled to approach this court on 48 hours notice for the eviction of applicants.

6. If there is non-compliance with the provisions of this order, any party is authorised to set the matter down for hearing for appropriate relief on a date to be agreed in consultation with this Court.

7. Each party is to pay his/her/its own costs of suit.



DAVIS J