OFFICE OF THE CHIEF JUSTICE

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO: 9443/14

IRIS ARRILDA FISCHER	Applicant
v	
THE PERSONS LISTED ON ANNEXURE X TO THE NOTICE OF MOTION AND THOSE PERSONS WHOSE IDENTITY ARE UNKNOWNTO THE APPLICANT AND WHO ARE UNLAWFULLY OCCUPYING OR ATTMEPTING TO AOCCUPY ERF 150 (REMAINING EXTENT) PHILLIPI, CAPE DIVIDIOSN, PROVINCE OF THE WERSTRN CAPE.	1st Respondents
CITY OF CAPE TOWN	2nd Respondent
THE NATIONAL MINISTER OF HOUSING	3rd Respondent
THE PROVINCIAL MINISTER OF HOUSING:	
WESTERN CAPE GOVERNMENT	4th Respondent

CASE NO: 11705/15

MANFRED STOCK	1st Applicant
MANFRED STOCK (PTY) LTD	2nd Applicant
POWER DEVELOPMENT PROJECTS (PTY) LTD	3rd Applicant
EIRINPROP (PTY) LTD	4th Applicant
NTWA DUMELA INVESTMENTS (PTY) LTD	5th Applicant
v	
THE PERSONS UNLAWFULLY OCCUPYING ERVEN 145, 152, 156, 418, 3107, PHILLIPPI & PORTION 0 FARM 597, CAPE RD	1st Respondent
THE CITY OF CAPE TOWN	2nd Respondent
THE WESTERN CAPE PROVINCIAL MINISTER FOR HUMAN SETTLEMENTS	3rd Respondent
THE NATIONAL MINISTER OF POLICE	4th Respondent
THE NATIONAL MINISTER OF HUMAN SETTLEMENTS	5th Respondent
MINISTER OF THE DEPARTMENT OF RURAL DEVELOPMENT AND LAND REFORM	6th Respondent
THE WESTERN CAPE PROVINCIAL MINISTER OF COMMUNITY SAFETY	7th Respondent
THE GOVERNMENT OF THE REPUBLIC OF SA	8th Respondent
THE GOVERNMENT OF THE WESTERN CAPE	9th Respondent

CASE NO: 14422/14

COPPER MOON TRADING 203 (PTY) LTD	Applicant
v	
PERONS WHOSE IDENTITIES ARE TO THE APPLICANT UNKNOWN AND WHO UNLAWFULLY OCCUPY REMAINDER ERF 149, PHILLIPI, CAPE TOWN	1st Respondent
CITY OF CAPE TOWN	2nd Respondent
THE SHERIFF OF THE HIGH COURT, MITCHELL'S PLAIN NORTH	3rd Respondent
THE NATIONAL MINISTER OF HUMAN SETTLEMENTS	4th Respondent
THE PROVINCIAL MINISTER OF HUMAN SETTLEMENTS	5th Respondent

JUDGMENT DELIVERED ON THIS 30TH DAY OF AUGUST 2017

FORTUIN, J:

A. INTRODUCTION

[1] This is an application in which, at the outset, it is necessary to ask the following pertinent question: What does one do with 60 000 people when neither the owner of the land on which they reside, nor the local authority in whose jurisdiction they live, can or want to accommodate them? The further question that needs to be answered is why are we in this situation? I decided to start this judgment with a quotation from a publication called *Business as Usual* by the Centre on Housing Rights & Evictions, also known as COHRE[1]:

> "*The growing elite fear that shacks (which are nothing more than the homes of the very poor) will be a threat to a 'world class' future, and the consequent demand for their annihilation, is a desire to escape the suffering of the past by excluding it from sight and mind and concern rather than by overcoming it by patient collective effort. This injunction to take seriously the history that has produced a situation where shacks are the best housing option for millions of people is an injunction to see poverty – and not the effort of the poor to house themselves – as a social crisis."*

[1] "Business as Usual: Housing Rights and 'slum eradication' in Durban, South Africa"; Centre for housing Rights and Evictions, September 2008, page 61.

[2] This article reflects the sentiments of many privileged South Africans and local authorities before 1994; a time when inequality was the order of the day. A time when the dignity of the majority of our people was ignored. A time when access to land and a place to stay was used to strip people of their dignity.

[3] The manner in which land was used to further entrench the inequalities between whites and blacks was discussed in an article[2] on the **Native Land Act[3]** (subsequently renamed the Black Land Act):

> *"The Native Land Act ... apportioned 8% of the land area of South Africa as reserves for the Africans and excluded them from the rest of the country, which was made available to the white minority population. Land available for use by Africans was increased by 5% [in terms of the Native Development and Trust Land Act 18 of 1936] bringing the total to 13% of the total area of South Africa, although much of the land remained in the ownership of the state through the South African Development Trust supposedly held in trust for the African people. Thus 80% of the population was confined to 13% of*

[2]Rugege: "Land Reform in South Africa: An Overview"; (2004) 32 International Journal Legal Information, 283.
[3]27 of 1913

the land while less than 20% owned over 80% of the land... This apportionment of land remained until the end of apartheid in early 1990's and remains virtually unchanged."

[4] Fortunately, we moved away from that repressive and oppressive past to a constitutional democracy in 1994, when a dignified life for all South Africans was envisaged. The importance of the right to dignity, entrenched in our Constitution, was stated as follows in the matter of **S v Makwanyane**[4]:

"The importance of dignity as a founding value of the new Constitution cannot be overemphasised. Recognising a right to dignity is an acknowledgement of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern. This right therefore is the foundation of many of the other rights that are specifically entrenched in [the Bill of Rights]."

[4]1995 (3) SA 391 (CC) at page 507.

[5] The question that needs to be answered is whether we have moved on today, in any way, since 1994 or even 2004 when the above article was written? The sentiments expressed in the COHRE article in paragraph 1 above are as relevant today as it was before 1994. When I therefore deal with the applications before me, it is the above principles that I have to bear in mind. The case that I am currently dealing with brings these questions to the fore in a very real way.

[6] This matter consists of three different applications brought by different applicants, for very similar relief. I shall proceed by giving the different factual backgrounds of, and the relief sought, by the respective applicants. The areas currently occupied by the First Respondent(s) became known as “Marikana”. This portion of the judgment will partially be done by way of tables so as to place the amount of information that should be absorbed, into a manageable form.

[7] Thereafter I shall deal with the different respondents in each of the applications. There are two groups of first respondents, one for the Fischer (“first respondent in Fischer) and Stock applicants (“first respondent in

Stock") and a second one for the Coppermoon applicants ("first respondent in Coppermoon"). The second respondent in each of the applications is the City of Cape Town ("the City") and I shall therefore discuss their submissions only once as it applies to all three applications. The National and Provincial Ministers ("the state respondents") are all dealt with as one, except for the Minister of Safety and Security ("Ministers of Police"), who was only cited by the Stock applicants.

B. APPLICABLE LEGAL ASPECTS

[8] The following legal aspects are applicable in respect of all three applications.

a. Legislative Framework

The following sections of the Constitution of the Republic of South Africa 108 of 1996 ("the Constitution"):

- Section 7(2) ;
- Section 25;
- Section 26; and
- Section 38.

Other Legislation and Policies

- Sec 9(3) Housing Act 107 of 1997 (“the Act”);
- Chapter 13 of the National Housing Code (“National Housing Code”); and
- The National Housing Programmes
    - Chapter 12 - Housing Assistance in Emergency Housing Situations (“Emergency Housing”).

[9] In determining whether the applicants in *casu* are faced with a breach of their constitutional rights, the nature of the applicable rights should be examined. The applicants claim that their rights in terms of s25 of the Constitution, and the occupiers’ rights in terms of s26 of the Constitution, were violated and are continuously being violated by the state. In order to examine the content of these rights, it is necessary to look at the full constitutional matrix in order to determine whether there was, in fact, a violation.

[10] The first section where the state’s constitutional obligations are listed is in s7 (2) of the Constitution, which reads as follows:

“*7…*

(2) The state must respect, protect, promote and fulfil the rights in the Bill of Rights."

[11] The sections dealing specifically with land and housing should be measured in light of s7 (2). These constitutional provisions read as follows:

"***25. Property.*** *- (1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.*

…

(9) Parliament must enact the legislation referred to in subsection (6).

*"**26. Housing.*** *- (1) Everyone has the right to have access to adequate housing.*

...

(3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the

relevant circumstances. No legislation may permit arbitrary evictions."

[12] Section 38 of the Constitution reads as follows:

*"**38. Enforcement of rights.** - Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are —*

(a) anyone acting in their own interest;

(b) anyone acting on behalf of another person who cannot act in their own name;

(c) anyone acting as a member of, or in the interest of, a group or class of persons;

(d) anyone acting in the public interest; and

(e) an association acting in the interest of its members."

[13] The relevant housing legislation should also be examined, i.e. **The Housing Act 107 of 1997**. Section 9(3) of the Act reads as follows:

> *"**9. Functions of municipalities***
>
> *...*
>
> *(3)(a) A municipality may by notice in the Provincial Gazette expropriate any land required by it for the purposes of housing development in terms of any national housing programme, if—*
>
> *(i) it is unable to purchase the land on reasonable terms through negotiation with the owner thereof;*
>
> *(ii) it has obtained the permission of the MEC to expropriate such land before the notice of expropriation is published in the Provincial Gazette; and*
>
> *(iii) such notice of expropriation is published within six months of the date on which the permission of the MEC was granted.*
>
> *(b) Sections 1, 6 to 15 and 18 to 23 of the Expropriation Act, 1975 (Act No. 63 of 1975), apply, with the changes required by the context, in respect of the expropriation of land by a municipality in terms of paragraph (a), and any reference in any of those sections—*

(i) to the "Minister" and the "State" must be construed as a reference to the chief executive officer of the relevant municipality and the relevant municipality, respectively;

(ii) to "section 2" must be construed as a reference to this subsection; and

(iii) to "this Act" must be construed as a reference to this Act."

[14] **Chapter 13 of the National Housing Code**, in particular sub-heading 13.2.2, deals with the principles of the Programme and determines when grants will be made available to municipalities:

*"**Grants to municipalities:** Grants under the programme will be made available to municipalities for the undertaking of projects based on the upgrading of whole settlements on a community basis as opposed to the normal approval of individual subsidies in respect of specific qualifying beneficiaries;*

...

Qualification for benefits: *In order to promote successful implementation on a community basis, the programme provides benefits for all the inhabitants of an informal settlement, in a variety of ways including persons currently excluded from any of the benefits of the Housing Subsidy Scheme;...”*

[15] **Chapter 12** of the **National Housing Programmes** deals with **Housing Assistance in Emergency Housing Situations** and in particular with the rules governing emergency housing situations. Para12.3.4.1 states as follows:

*“**Activities covered by the Grant***

Subject to the rules of this Programme, assistance in the form of grants to address Emergencies, will be made from the Fund to a municipality via the provincial government concerned in the form of a transfer payment for any one or more of the following activities in order to achieve the objectives of the Programme:

a. ...

b. The purchase of land where the municipality has no alternative land in ownership; ...”

[16] Para 12.3.8 deals with the acquisition of land and reads as follows:

"12.3.8 Land Acquisitioning

a. Where land suitable for housing development in emergency housing situations is required, it must first be sought from land identified in Spatial Development Frameworks that supplement Integrated Development Plans. Preference should be given to the acquisition of State owned land. Privately owned land may be acquired as a last resort.

b. ...

c. ***Acquisition***

- *€...*
- *For privately owned land, the price must be based on market-related rates to be established on the basis of the average of three independent valuations by qualified professionals and must be negotiated with the owner and an effort be made to obtain an option to purchase. Failing the achievement of an agreement the expropriation of the required land could be considered in terms of the*

provisions and procedures required by the Expropriation Act, 1975 (Act No. 63 of 1975).”

[17] The institutional arrangements as well as a summary of the steps of an approved application can be found in para12.4 and reads as follows:

“***12.4 Institutional Arrangements***

Founded on the principles of co-operative governance and the creation of partnerships between different spheres of government, and based on the principle of subsidiary, which implies that normally a function should be performed at the level most suitable to the circumstances, the roles and functions attributed to the three spheres of government and others under this Programme are listed below. These are in accordance with the provisions of the Housing Act, 1997.

All parties involved must address prescribed procedures expeditiously given the particular circumstances of the emergency situation. The flow chart herein summarises the main activities in respect of an application which is approved:

Figure 1: Summary of main steps of approved application

Step 1: Municipality

Plan proactively.

Investigates and assess emergency housing need.

Collaborate with the province in initiating and preparing applications.

Submit application to provincial housing department.

Step 2: Provincial Department of Housing

Provide guidance and assistance to municipality.

Collaborate with municipality in initiating and preparing application.

Ensure coordination with any disaster management initiatives and other role-players.

Consider application.

Submit application to national department of housing with comments.

Step 3: National Department of Housing

Emergency Housing Steering Committee considers application.

Approve application.

Transfer funds to provincial department of housing.

Step 4: Provincial Department of Housing

Conclude agreement with municipality.

Monitor progress.

Control and disburse funds.

Provide assistance and support to ensure successful completion of the project

Step 5: Municipality

Implement.

Provide undertakings.

Develop permanent housing solution."

[18] Para 12.4.1 lists the responsibilities of municipalities, including their obligation to conduct pro-active planning. Para 12.4.2 lists the responsibility of Provincial Housing Departments to implement the Programme and to generally collaborate with municipalities in order for them to meet their obligations. In para 12.4.3, the budgetary obligations of the National Department of Housing are listed, *inter alia* to transfer funds.

b. Relevant Case Law

[19] What follows is a number of *dicta* between 1997 and 2016 dealing with the issues at hand in one or more of the applications *in casu.*

[20] In the matter of **Fose v Minister of Safety and Security**[5] ("Fose matter"), Ackermann, J dealt with whether "Constitutional damages" could/ought to be given as "appropriate relief" in terms of s 7(4)(a) of the Interim Constitution for the breach of a constitutionally guaranteed right. The facts of the matter related to assaults allegedly committed by SAPS members within the scope of their employment. The issue was whether the plaintiff could claim, for the same assaults, damages under common law, as well as constitutional damages which had a punitive element.

[21] S 7(4)(a) of the Interim Constitution read as follows:

> *"When an infringement of or threat to any right entrenched in this Chapter is alleged, any person referred to in paragraph (b) shall be entitled to apply to a competent court of law for appropriate relief, which may include a declaration of rights."*

[5]1997 (3) SA 786 (CC)

[22] The Constitution did not prescribe what "appropriate relief" would amount to. The court held that:

> *"Appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case the relief may be a declaration of rights, an interdict, a mandamus or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the courts may even have to fashion new remedies to secure the protection and enforcement of these all-important rights.[6]"* [Footnotes omitted.]

[23] In the South African context, the court held that:

> *"Notwithstanding these differences, it seems to me that there is no reason in principle why 'appropriate relief' should not include an award of damages, where such an award is necessary to protect and enforce chap 3 rights. Such awards are made to compensate persons who have suffered loss as a result of the breach of a*

[6] Fose supra, page 799, para 19.

statutory right if, on a proper construction of the statute in question, it was the Legislature's intention that such damages should be payable, and it would be strange if damages could not be claimed for, at least, loss occasioned by the breach of a right vested in the claimant by the supreme law. When it would be appropriate to do so, and what the measure of damages should be will depend on the circumstances of each case and the particular right which has been infringed.[7] *"*
[Footnotes omitted.]

[24] The court then concluded that in that particular case there was no room for additional constitutional damages in order to vindicate the infringed rights.

[25] The court states in para 69:

"Given the historical context in which the interim Constitution was adopted and the extensive violation of fundamental rights which had preceded it, I have no doubt that this Court has a particular duty to ensure that, within the bounds of the Constitution, effective relief be

[7]Fose supra, page 821, para 60.

granted for the infringement of any of the rights entrenched in it. In our context an appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the right entrenched in the Constitution cannot properly be upheld or enhanced. Particularly in a country where so few have the means to enforce their rights through the courts, it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated. The courts have a particular responsibility in this regard and are obliged to 'forge new tools' and shape innovative remedies, if needs be, to achieve this goal." [Footnote omitted.]

[26] In the matter of **Modderfontein Squatters, Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, Amici Curiae); President of the Republic of South Africa and Others v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, Amici Curiae)** [8] ("Modderklip SCA"), two related matters were heard together, dealing with the following:

[8] 2004 (6) SA 40 (SCA)

- application for leave to appeal against an eviction order; and
- appeal against the order in the enforcement matter (which flowed from the order made in the eviction matter).

[27] The facts of Modderklip SCA are shortly as follows: Modderklip owns a portion of the Modder East Farm ("MEF"), which adjoins Daveyton Township (part of Ekurhuleni Municipality). During the 90's people from Daveyton started settling in the strip between MEF and Daveyton, which area became known as the Chris Hani Informal Settlement. In May 2000 approximately 400 people that the Municipality had evicted from Chris Hani, moved onto MEF. Eventually the area became known as the Gabon Informal Settlement, accounting for approximately 40 000 people.

[28] To effect the eviction, the Sheriff demanded R1,8 m as security, an amount which the landowners could not pay. Modderklip thus found itself in the position of having a court order in its favour, but being unable to afford to enforce it.

[29] The salient points in this matter are that, in the court *a quo,* Agri SA as *amicus curiae* suggested that, as the occupied land was not suitable for permanent settlement, the land should be expropriated. In the court *a quo* Modderklip and Agri SA accepted that unconditional removal of the occupiers, effectively eviction, was not a viable option. Instead they proposed an order in two parts:

- a declaratory order relating to the State's constitutional obligations, not only to Modderklip, but also to the occupiers;
- a *mandamus* requiring the state to submit comprehensive plans to solve the problems of the land owner and the occupiers.

[30] This was in effect what was ordered in the court *a quo*.

[31] Harms J sets out the gist of the problem in para 41:

> *"The problem, as must by now be apparent, lies on two fronts. On the one hand, there is the infringement of the rights of Modderklip. On the other, there is the fact that the enforcement of its rights will impinge on the rights of the occupiers. Moving or removing them is no answer and they will have to stay where they are until other*

measures can be devised. Requiring of Modderklip to bear the constitutional duty of the State with no recompense to provide land for some 40 000 people is also not acceptable. Although, in an ideal world, the State would have expropriated the land and have taken over its burden, which now rests on Modderklip, it is questionable whether a court may order an organ of State to expropriate property."

[32] The court held that the only feasible remedy, based on the facts of the matter, would be "constitutional" damages (damages awarded due to a breach of a constitutionally entrenched right). In para 43 Harms J states:

"No other remedy is apparent. Return of the land is not feasible. There, is in any event, no indication that the land, which was being used for cultivating hay, was otherwise occupied by the lessees or inhabited by anyone else. Ordering the State to pay damages to Modderklip has the advantage that the Gabon occupiers can remain where they are while Modderklip will be recompensed for that which it has lost and the State has gained by not having to provide alternative land. The State may, obviously, expropriate the land, in which event Modderklip will no longer suffer any loss and compensation will not

be payable (except for the past use of the land). A declaratory order to this effect ought to do justice to the case. Modderklip will not receive more than what it has lost, the State has already received value for what it has to pay and the immediate social problem is solved while the medium and long-term problems can be solved as and when the State can afford it." [Footnote omitted.]

[33] Similarly to the present case, Modderklip involved an incredibly large number of people. Initially an eviction order was sought, but by the time it came to court the unfeasibility of this was accepted. The State was also unable to provide alternative land for the occupiers.

[34] The Modderklip SCA matter differs from the present case as buyout was not persisted with in court and expropriation was not sought as a form of relief, though it was commented on by the court.

[35] The matter of **President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd (Agri SA and Others, Amici**

Curiae)[9] ("Modderklip CC") was in essence an appeal against the SCA's finding that Modderklip's s 25 rights – and the s 26 rights of the occupiers - had been breached by the State. Also that Modderklip was not entitled to the relief it sought, as it had failed to institute eviction proceedings timeously.

[36] The court held that Modderklip had not been idle. They sought the assistance of the municipality and the State from the start of the occupation, but no such assistance had been forthcoming. Even if delayed action had been shown on the part of Modderklip, on the facts of the matter, it could not be seen as sufficient to disentitle them to the relief sought.

[37] The court further held that the State must also take reasonable steps, to the extent possible, based on the circumstances of each case, to ensure that:

> "... *large-scale disruption in the social fabric do not occur in the wake of the execution of court orders, thus undermining the rule of law.*"[10]

[9] 2005 (5) SA 3 (CC)
[10] Modderklip (CC) para 43.

and that Modderklip's attempts to remedy the situation:

> "... *were frustrated by the ineffectiveness of the mechanisms provided by the State to resolve this specific problem because of the sheer magnitude of the invasion and occupation of Modderklip's property.*"[11]

[38] Under the circumstances of that particular case, it was unreasonable of the State to stand by and do nothing when it was not possible for Modderklip to evict the occupiers due to their numbers and their circumstances and no acceptable reason for such failure had been given. The court specifically mentioned that no reason was given as to why Modderklip's offer to sell the affected portion of the land was not taken up. The State's failure breached Modderklip's:

> "... *constitutional rights to an effective remedy as required by the rule of law and entrenched in s34 of the Constitution."*[12] [Footnote omitted.]

[39] The State had resisted the SCA's order of constitutional damages, but the Constitutional Court dismissed this.

---

[11]Modderklip (CC) para 44.
[12]Modderklip (CC) para 51.

[40] With reference to the **Fose** matter, the court stated that appropriate relief in any case must be effective. It held that while a declaratory order would have given Modderklip the option to proceed delictually against the State, what was required in the instant case was a remedy that went beyond simply clarifying its rights.

[41] As to the question of expropriation, it was argued that ordering same would amount to the court telling the State how to fulfil its obligations, which violated the doctrine of separation of powers. The court found that it was not necessary to decide the point. It had no information before it as to whether other land was available to settle the occupiers on, and that, if such land was in fact available, it would not be just to order the State to purchase specific land for resettlement.

[42] While the facts of Modderklip are broadly similar to those in the instant case, it supports constitutional damages as a form of relief, but offers no real authority on other forms of relief.

[43] In the matter of **Ekurhuleni Metropolitan Municipality v Dada NO and Others** [13] ("**Ekurhuleni Municipality** matter"), the facts were as follows: the matter involved 76 families that, during 2004, had moved onto property owned by a charitable trust. An early attempt was made to evict them, but was withdrawn. During 2006 the trustees again launched an eviction application, citing the 76 families as first respondents and the Ekurhuleni Municipality as the second. The occupiers launched a counter application seeking a declaratory order concerning their constitutional rights, an interdict preventing their eviction until suitable alternative accommodation was available and ordering the Municipality to comply with its constitutional obligations. By agreement only the counter application was heard.

[44] The High court had held that on the evidence before it there:

[13] 2009 (4) SA 643 (SCA)

"... *is not a single supporting document or fact to demonstrate that the municipality has any action planned relating to the unlawful occupiers of the property."*[14]

[45] The court states that:

"*[t]he Constitutional Court in the Grootboom case did not, with respect, take the opportunity to monitor and, in the context of our country, police the conduct of the State, inclusive of municipalities, in ensuring that the provision of housing for poor people is a priority and accomplished within a manageable time frame"*.[15]

[46] With reference to the Modderklip matter the Judge stated that he is aware that his ruling could be seen as telling the State how to fulfil its duties, with the resultant separation of powers implications. However, he was of the opinion that the:

[14]Dada and Others NNO v Unlawful Occupiers of Portion 41 of the Farm Rooikop and Another 2009 (2) SA 492 (W) at page 499 para 28.4. ("The Dada matter").
[15]Dada and Others NNO supra, page 500, para 35.

"*... Constitution provides for a robust role of the Judiciary in the legal and political life of the nation."*[16]

[47] The court proceeded as follows:

"*[46] The National Housing Code's Programme for Housing Assistance in Emergency Housing Circumstances (the emergency housing programme) defines an emergency as a situation where –*

> *the affected persons are, owing to circumstances beyond their control, evicted or threatened with imminent eviction from land or unsafe buildings, or situations where pro-active steps ought to be taken to forestall such consequences ....*

[47] This programme makes funding available from the provincial departments of housing for emergency housing assistance. It requires municipalities to investigate and assess the emergency housing need in their areas of jurisdiction and to plan proactively therefor.

[48] I accept that this municipality has formulated a policy and a plan to deal with homeless people in its area of jurisdiction. I find,

[16]Dada and Others NNO supra, page 501, para 41.

however, that insofar as the inhabitants of the applicants' property are concerned, no emergency plan has been put into effect."[17]

[48] As a result the court ordered the municipality to purchase the property at R260 000 within 30 days of the order.

[49] The SCA held as follows when discussing the *ratio* of the court *a quo:*

"... he [Cassim, AJ] ... expressed the view that the courts had not gone far enough towards enforcing the rights in s 26 of the Constitution in these cases. On this basis, it seems, he apparently decided that the courts should be galvanised into taking a 'robust approach' to the implementation of the provisions of the Constitution. This type of approach is probably the very antithesis of the approach which this court and the Constitutional Court have endorsed in a number of recent decisions."[18] [Footnote omitted.]

[50] Pointing out that the courts should give due deference to:

[17]Dada and Others NNO supra, page 503, paras 46 to 48.
[18]Ekurhuleni Metropolitan Municipality v Dada NO and Others 2009 (4) SA 463 (SCA) at page 468 paras B – D.

> "*... the legitimate and constitutionally-ordained province of administrative agencies; ...*"[19]

the court held that while the court *a quo* was possibly correct in concluding that the Municipality had not acted as expeditiously as might have been appropriate, that this did not :

> "*... justify his adopting a solution which was well outside the limits of his powers. Even if he considered that the occupiers were entitled to bypass the statutory provisions expressly enacted by Parliament for the purpose of implementing the rights entrenched in Ch 2 of the Constitution, he was nevertheless bound to consider the occupiers' case under the provisions of s 38 of the Constitution, in which event he was empowered to grant 'appropriate relief'. The order that the municipality should purchase the property was plainly not 'appropriate relief'*."[20] [Footnote omitted.]

[51] Consequently the order that the Municipality purchase the property was set aside on appeal.

---

[19]"The Future of Judicial Review in South African Administrative Law", Cora Hoexter (2000) 117 SALJ 484 at 501 –2, as quoted in Ekurhuleni supra, page 468, para D.

[20]Ekurhuleni supra page 470, paras A – C.

[52] On the facts of this particular matter, it is clear that alternative accommodation was merely speculated on, enforced buyout failed, while neither expropriation nor constitutional damages was discussed, even though the Act was briefly mentioned in the court *a quo*.

[53] The matters of **Blue Moonlight Properties**[21] ("**Blue Moonlight"** matters) concerned the eviction of 86 people unlawfully occupying dilapidated commercial property belonging to Blue Moonlight, as well as the City of Johannesburg's obligation to provide housing to them, should they be evicted.

[54] The facts are briefly as follows: The group consisted of approximately 81 adults and 5 children. At least one of the occupiers had been in residence on the property from 1976. Blue Moonlight purchased the property for development in 2004. In May 2006, Blue Moonlight commenced eviction proceedings under PIE. The occupiers opposed the

[21]City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another 2011 (4) SA 337 (SCA); City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another 2012 (2) SA 104 (CC).

application and the City was joined in light of its statutory and constitutional obligations.

[55] In February 2010 eviction was ordered by the High Court. The court found the City's housing policy unconstitutional insofar as it discriminates against people in need of housing who are facing eviction by private land owners. The SCA set aside the structural order as well as the compensation order in favour of Blue Moonlight. It upheld the eviction order and declared the City's housing policy unconstitutional insofar as the occupiers did not qualify for temporary housing.

[56] The City therefore appealed against the ruling that its housing policy is unconstitutional and that it must provide accommodation to the occupiers.

[57] Blue Moonlight argued that an indefinite delay of the eviction would amount to the arbitrary deprivation of its rights in terms of s25, that PIE makes no provision for expropriation and that a private land owner is under no obligation to provide free housing.

[58] In respect of alternative accommodation, the court stated that the duty with respect to s26 falls on local, provincial and national levels of government and that the three spheres must cooperate, as confirmed by **Grootboom**. In court the City accepted that the occupiers' situation does in fact constitute an emergency.

[59] The court held that the City's view, that it is not primarily responsible for the realisation of the right to housing and its reliance on **Grootboom** to support this, was misplaced, as **Grootboom** did not absolutely divide the responsibility among the three levels of government. Further that there was no indication in Ch 12 that the City is entirely dependent on funding from provincial government in order to provide emergency housing. The City has a duty to proactively plan, and accordingly budget for situations such as these.

[60] The court found that it is not sufficient for the City to argue that it had not budgeted for an eventuality when the fulfilment of its obligations required it to plan and budget therefore.

[61] Buyout, as a remedy, was not discussed; neither was expropriation nor constitutional damages. The primary issue here had been the City's housing policy, its interpretation thereof and its constitutionality.

[62] The similarities between these matters and the matters currently before me are the clash between the right to property in terms of s25 and the rights to housing in terms of s26, as well as the fact that the City, in both instances, claims it is neither obliged nor able to accommodate the occupiers.

[63] The differences between the matters can be summarised as follows. The constitutionality of the City's housing policy was not questioned in the instant case. The **Blue Moonlight** matters involved a very small number of people and it also concerned an eviction, which in the present case it seems to be agreed is not feasible. The occupiers had already been on the land for some time when Blue Moonlight bought it, which is partly true for some of the Stock parties. In proceedings before the Constitutional Court, while Blue Moonlight did make a number of submissions in respect to its rights, it was largely not a party to the proceedings, instead it agreed to

abide by the court's ruling. The dispute was primarily between the City and the occupiers.

[64] In **Blue Moonlight (SCA)**[22]the following was stated:

> *"The adjudication of the right of access to adequate housing more often than not presents intractable problems... It is irrefutable that the State is obliged to take positive action to meet the needs of those living in extreme conditions of poverty, homelessness or intolerably inadequate housing. What is in dispute in the present case, as is frequently the case in disputes concerning housing, is the extent of the State's obligation in this regard."*

[65] The court set out the obligations of the three spheres of government in paras 29 to 35 of the judgment. It goes on to state at para 36:

> *"The process created by Ch 12 is that when a municipality considers that a housing emergency that falls within the terms of Ch 12 has arisen within its area of jurisdiction, it is required to apply to the*

[22] Blue Moonlight (SCA) supra, page 339-340, paras 1-2.

provincial government for 'project approval' for its plan to deal with the emergency. If the provincial government approves the project, it provides funding to the municipality, to enable it to provide temporary shelter for the victims of the emergency. In this case, the City belatedly applied for funding to provide temporary shelter for the occupiers and others who were similarly situated, but the provincial government, pleading lack of funds, refused to assist."

[66] The court concluded that on a view of the totality of the legislative scheme, the City did not simply have a derivative obligation to the occupiers, but a direct one, and also that the City can fund its own housing programme and administer its housing policy from its own resources.

"It is clear, however, from what is set out ... above, that the City is not only empowered to act in circumstances such as those under consideration, but is obliged to."[23]

[67] In respect of the City's obligation, the court stated as follows:

[23]Blue Moonlight (SCA) supra, page 351, para 42.

"To a great extent the City is to blame for its present unpreparedness to deal with the plight of the occupiers. It knew of their situation from the time that the litigation started, through its many delays extending over three financial years. It did not, in all that time, make any provision, financial or otherwise, to deal with a potentially adverse court order or take steps to re-allocate resources or rework priorities so that the occupiers could be accommodated."[24]

[68] The **Mazibuko and Others v City of Johannesburg and Others**[25] matter concerns the right to access to water in terms of s27 of the Constitution. As such the factual background is not applicable and none of the remedies at issue in the present case were discussed. The relevance can be found in the Constitutional Court's view on the City's (Municipality's) positive obligation in terms of s27 of the Constitution.

"Thus the positive obligations imposed upon government by the social and economic rights in our Constitution will be enforced by courts in at least the following ways. If government takes no steps to realise the rights, the courts will require government to take steps. If

[24]Blue Moonlight (SCA) supra, page 354, para 52.
[25]2010 (4) SA 1 (CC).

government's adopted measures are unreasonable, the courts will similarly require that they be reviewed so as to meet the constitutional standard of reasonableness. From Grootboom it is clear that a measure will be unreasonable if it makes no provision for those most desperately in need. If government adopts a policy with unreasonable limitations or exclusions as described in Treatment Action Campaign (No 2), the court may order that those be removed. Finally, the obligation of progressive realisation imposes a duty upon government continually to review its policies to ensure that the achievement of the right is progressively realised."[26]

[69] The matter of **Odvest 182 (Pty) Ltd v Occupiers of Portion 26 (Portion of Portion 3) of Farm Klein Bottelary No 17, Botfontein Road ("The Property") and Others**[27] concerned an eviction application by a private land owner. Approximately 233 people (79 households) were involved. The property had changed hands a number of times. The last two owners had knowledge of the occupiers at the time the property was obtained.

[26] Mazibuko supra, Para 67.
[27] (19695/2012) [2016] ZAWCHC 133 (14 October 2016).

[70] The question was whether eviction would be just and equitable, and if so, what a just and equitable date would be for the eviction.

[71] Odvest had apparently obtained the property for the purpose of industrial / semi-industrial development. On the part of the occupiers, it appeared that most of them were either unemployed or only casually employed, and that eviction would almost certainly result in them being homeless.

[72] The City had filed four reports, each essentially detailing why it could not accommodate the occupiers elsewhere, and why it could not purchase the property itself. At this time, the City indicated that it would submit an application for emergency housing to the provincial government, and that they would only be able to assist the occupiers if such application was approved with regards to both land and funding. The response from provincial government was that the City's application would have to relate to either the affected property itself, or to alternate land which the City was supposed to identify.

[73] A fifth report followed in which the City indicated that they could accommodate the occupiers within an existing development, but only in 4 to 5 years' time. It also appeared that the City had not proceeded with its funding application of a year earlier.

[74] It was argued on behalf of the City that absent an attack on the constitutionality of the City's housing policy, the court could not find that the City had breached it constitutional obligation in failing to provide emergency housing. The court disagreed:

> *"A court will naturally not order a party to do something which is impossible (Blue Moonlight para 69). However, if the City were able to provide emergency alternative accommodation, the court would not be precluded from incorporating this as a component of an eviction order merely because the alternative land did not currently constitute one of the projects in the City's housing policy or because the occupiers were not currently beneficiaries of any approved project."*[28]

[28]Odvest supra, Para 107.

[75] The similarities with the instant matter are that the case originated as an eviction order, and the City persisted with the contention that they are neither obliged to provide alternate (emergency) accommodation, nor able to do so.

[76] The differences are that the **Odvest** matter involved a small number of people. The eviction order was persisted with, and the current owner bought the property in the knowledge that the occupiers were on the property. For at least one of the Stock applicants in *casu,* this was also the case.

[77] Buyout was not discussed as alternative relief, neither was expropriation nor constitutional damages. The Housing Act was only referenced within the context of the Housing code and the City's interpretation thereof.

C. FACTUAL BACKGROUND FISCHER

[78] The 86-year old Mrs Fischer has been living on the property since 1969, i.e. for some 47 years by 2016. She lives there with her two sons, although they seem to occupy only a very small portion of the actual land held under the title deed. The buildings account for less than 5% of the total extent of the land. Mrs Fischer lives in a brick house with her son Jacob, a teacher in his 40's. The property has been in the Fischer family for over half a century. They have been residing on the property undisturbed until 2013.

[79] The property is situated adjacent to another long-standing informal settlement and to the east of Cape Town International Airport. It is unfenced and in an undeveloped area of the Cape Flats. It is 2,7 hectares in extent, and in 2013 was covered in dense and overgrown shrubbery.

[80] The history of the acquisition of the property and the occupation is, in short, as follows:

Date	**Event**	**Action taken**
1969	Date on which Mrs Fischer ("Mrs F")	

	apparently settled on the property.	
May 2013	First time Mrs F became aware of people unlawfully settling on the property (Her son was advised by the City that occupiers started taking residence during April 2013 as they had invaded adjacent properties also.)	Anti-Land Invasion Unit ("ALIU") on or about 30 April 2013 took down 73 illegal structures. Occupiers re-erected them, and ALIU returned and took them down again.
Jun – Aug 2013		Approximately 20 further structures were erected on Mrs F's property.
August 2013	The City sent Mrs F a letter advising her that recent inspection had revealed more illegal structures on her property. She was advised to proceed in terms of PIE.	15 Aug 2013: Mrs F's sons approached an attorney to institute eviction proceedings. The attorney however did nothing. December 2013: they were advised to contact another attorney, which they did in January 2014. This fell through.
Approximately 7 Jan 2014	Another attempted invasion took place – the ALIU was on the property and	The City and the ALIU demolished 32 structures. 20

	observed 30 – 50 people in the process of erecting structures.	– 30 structures remained on the property
8 Jan 2014	Another 15 structures went up overnight	These were removed by the City.
10 Jan 2014	The City assisted Mrs F to apply for an eviction order. An Interim order was granted; return date 18 Feb 2014.	
14 Jan 2014	The occupiers tried to anticipate the return date, and launched a counter application, declaring demolitions unlawful, restraining further demolitions and instructing the City to provide temporary dwellings for those who had structures demolished.	Application was postponed to 22 May 2014. Then again to 1 September 2014. Counter application was referred to oral evidence, to be heard on 19 Feb 2015. The counter application was heard, and judgment given, by Gamble, J on 13 March 2015 (granted majority of relief sought). This was overturned on appeal to the SCA on 4 June 2015.
24 May 2014	Mrs F launched an application in terms of PIE.	
8 Aug 2014		Mrs F amended her Notice of Motion to include a new

		Annexure X.
13 Aug 2014	Formal joinder application proceedings.	Third and fourth respondents were joined.
29 Aug 2014	Application had been launched prior to SCA judgment	It was necessary to amend Annexure X to the Notice of Motion (with details of the occupiers). Done on this date.
26 Feb 2015	The City agreed to file a housing report in this matter by 8 May 2015.	Order by agreement to this effect granted.
6 May 2015	The City requested an extension to file the report on 5 June 2015.	
18 May 2015	The City requested that the **Fischer** and **Coppermoon** matters be heard together. Mrs F was not amenable to this.	
8 Jun 2015	Representatives for the Coppermoon applicants & Mrs F appeared before Savage, J for directions.	
29 Jun 2015	Report was filed by the City.	
15 Dec 2015	Mrs F files notice of intention to amend relief sought.	
10 Jan 2016	Alternative relief (Constitutional Damages) was sought for the violation of Mrs F's Constitutional rights. Mrs F does not list expropriation as alternative relief	

	on her papers, but will abide the court's decision if expropriation with market value compensation is ordered.	
16 Jan 2016		Notice of Motion amended accordingly.
31 March 2016	Counter application by occupiers seeking order in the following terms: Declaring that the 2nd, 3rd and 4th respondents have infringed the s25(1) rights of Mrs F and s26 rights of occupiers by failing to provide land; ordering the 2nd respondent to enter into negotiations with Mrs F to either purchase her land or, failing that, to expropriate her land and to report back to the court on progress in 2 months.	

D. RELIEF SOUGHT BY FISCHER

Relief sought		
As per the amended Notice of Motion (amended 16 Jan 2016)	i) Declaring that the 2nd, 3rd and 4th respondents violated Mrs F's constitutional right to property by failing to protect her property.[29] ii) Ordering 2nd respondent (and such of the others as may be necessary) to take all steps necessary to purchase Mrs F's property at a price to be determined. iii) Ordering 3rd and/or 4th respondents to provide the 2nd respondent with the funds to purchase Mrs F's property, to the extent that the purchase price is outside the 2nd respondent's budget. iv) Alternatively that the occupiers be evicted.	

E. FACTUAL BACKGROUND STOCK

[81] Mr Manfred Stock owns a number of properties, *inter alia* erven 145, 152, 156, 418 and 3107 Philippi and Portion 0 Farm 597 Cape Road. It is unclear when exactly Mr Stock moved onto the property. Attempts to develop the properties for housing purposes were largely unsuccessful as they are within a noise corridor.

[82] The different applicants in this matter are Mr Manfred Stock ("Mr Stock"), the first applicant; Manfred Stock (Pty) Ltd ("Stock (Pty) Ltd"), the

[29]This relief was sought in the Notice of Motion but later abandoned.

second applicant; Power Development Projects (Pty) Ltd (“PDP”), the third applicant; Eirinprop (Pty) Ltd (“Eirinprop”), the fourth applicant; NTWA Dumela Investments (Pty) Ltd (“NTWA”) , the fifth applicant.

[83] The different erven were obtained over a period of approximately 40 years, and for different reasons:

83.1 Erven 418 and 152 were obtained in 1963 and 1976 respectively. The plots were originally used for farming and subsequently different uses were considered e.g. commercial, industrial and housing;

83.2 Erf 156 was obtained in 1970. Originally, it was intended for agriculture and subsequently it was considered for commercial, industrial and housing purposes;

83.3 Erf 3107 was obtained in 1991. Originally, it was intended for a furniture factory and thereafter for general development of the area;

83.4 Portion 0 Farm 597 was obtained in 2008. At the time of purchase, some people were already resident on the property and they were allowed to remain, pending the planned development; and

83.5 Erf 145 was obtained in 2012. It was intended for industrial, commercial or residential purposes. Subdivision plans have subsequently been approved.

[84] The history of the acquisition of the property and the occupation is in short as follows:

Date	**Event**	**Action taken**
2005/2006	A Temporary Relocation Area ("TRA") was established on the neighbouring erf.	1st and 2nd applicants unsuccessfully resisted the establishment of the TRA; it was stated to be of only 2 years' intended duration, but is still there.
April 2013	Large scale occupation of Stock properties took place. 27 Apr: ALIU was alerted by several property owners as to an unlawful occupation in progress.	A range of steps were taken: Applicants enlisted the support of the SAPS and the ALIU to prevent the occupation; They applied for interdicts and other orders to prohibit occupation; Security personnel were employed;

		The property was fenced; Trespassing charges were initiated and formal complaints were lodged to the ALIU; They met with government officials to address the issue.
April 2013 November 2013 January 2014 April 2014	With the assistance of the SAPS and the ALIU, attempted occupations were fended off.	During this time period the 1st, 3rd and 5th applicants obtained interdicts prohibiting occupation (which were displayed on the property as per the orders). 1st Applicant obtained an interdict in November 2013 and 3rd applicant obtained same in August 2014. 5th Applicant obtained an eviction order in 2009 and further interdicts thereafter.
August 2014	Prior warning was received of an intended land occupation. The SAPS and the ALIU were notified.	The combined effort of the SAPS, the ALIU, Stock, Fischer and Coppermoon

	The 2nd applicant's property only became threatened at this point.	parties resulted in structures being dismantled. The 3rd applicant employed private security with armoured vehicles and dogs.
18 Aug 2014 - 21 Aug 2014	A "high level" meeting (Premier of the Western Cape, Mayor, senior members of the SAPS Management, City officials & some of the affected land owners) took place. The SAPS informed parties of their security requirements in order to provide further assistance in future (e.g. fencing).	The 3rd applicant indicated that that they had all the required measures in place (private security etc.) but that it had proven unsuccessful – guards were driven off the property by the occupiers and the SAPS withdrew.
22 Aug 2014	Joint operation took place to prevent further occupation.	The SAPS and the ALIU indicated that they would not continue to assist beyond this point. Within days the occupiers had returned to the property.
22 Jun 2015	Application filed.	
9 May 2016	Filed notice of intention to amend relief sought.	Effected 25 May 2016.

F. RELIEF SOUGHT BY STOCK

Relief sought		
	i) That 2nd respondent (or the appropriate respondent) be ordered to purchase the affected property (and 3rd/5th/6th/8th/9th respondents be ordered to provide the necessary funds). ii) Alternatively that 2ndrespondent pay constitutional damages (of value of property). iii) Alternatively that the property be expropriated (in terms of S 9(3) of the Housing Act). iv) Alternatively that the occupiers be evicted from the property. v) Declaring that the Provincial Minister of Community Safety, the Government of the Republic of South Africa and the Provincial Government of the Western Cape violated the applicants' Constitutional right to property, by failing to protect such property.	

G. FACTUAL BACKGROUND COPPERMOON

[85] Coppermoon acquired Erf 149, Philippi in 2007. The property was mortgaged to Nedbank and rezoned for industrial development as a business park, from which individual units were to be sold off. It appears as if the property was unused for about 7 years while the owners were busy

securing rezoning and planning permissions. Occupation took place shortly before development was due to commence.

[86] The history of the acquisition of the property and the occupation is, in short, as follows:

Date	**Event**	**Action taken**
Aug 2014	Applicants received an email from the ALIU on 4 August, informing them that an attempt to invade property was in progress. Applicant's attorneys inspected the property on 6 August and found 25 temporary structures on the property. Applicant was advised of the history of attempted invasions from May 2013 through to 2014. A Rule Nisi was granted on 7 August. The Sheriff executed the order on 8 August and found 69 structures on the property. The number of occupiers has since increased dramatically.	On 7 August a Rule Nisi was issued interdicting the respondents from: i)Entering/being on the property for the purpose of unlawful occupation; ii)Erecting/completing/occupying any structure on the property; iii)Inciting/encouraging others to settle on the property or erect structures on the property or to unlawfully occupy the property; and iv)Occupying any vacant structures on the property. The Rule Nisi was made final on

		28 August.
9 Aug 2014	The ALIU observed approximately. 100 structures being put up.	On 10 August the ALIU dismantled structures, but they were later erected again.
11 Aug 2014	The ALIU, the SAPS and the Metro SAPS were on the property.	50 structures that were being erected were dismantled, but the ALIU then left due to increasing violence on the scene.
13 Aug 2014	Applicants launched an eviction application.	The ALIU dismantled 46 structures that were in the process of being erected.
14 Aug 2014		The ALIU dismantled 122 structures that were in the process of being erected.
10-15 Aug 2014		Close to 1000 structures were erected on various properties in the area.
15 Aug 2014	An order was granted in terms of s4 of PIE that notice must be served on the 1st and 2nd respondents in eviction proceedings instituted by applicants.	Application was set down for 18 September 2014. By agreement it was moved to the semi-urgent roll for 20 November 2014.
18 Aug 2014	A meeting was held. The Premier of the Western Cape, the Mayor, senior SAPS Management, City officials and some of the affected land owners	After 22 August 2014 hundreds more structures were erected.

	were present. Applicants had not been invited to this meeting. By this time approx. 1500 structures had been erected. Thereafter no further attempts were made by the ALIU or 2nd respondent or 4th respondent or 5th respondent to prevent further land invasions.	
15 Oct 2014	Estimates that there are approximately 3000 structures on the property at this point.	
20 Nov 2014	Order granted by agreement in the following terms: i) Occupiers' occupation unlawful; ii) 2nd Respondent to file a report with the court regarding the matter (to conduct survey of Applicant's property); iii) 3rd Respondent joined; and iv) Eviction application postponed to 8 December 2014.	
24 Nov 2014	The City meets with Applicants to propose an alternate timetable for filing of report.	
5 Dec 2015	The City formally applies for	

	postponement of report date.	
8 Dec 2014	Eviction application postponed again on terms: i) Postponed to 15-16 April 2015; ii) 2nd Respondent given until 27 February 2015 to file report; and iii) 4th& 5th Respondents joined.	
13 April 2015	Further order granted: i) Application postponed from 15-16 April to 10-11 June 2015; ii) 2nd Respondent given extension from 27 February to 30 April 2015 to file report.	During April the City completed a survey of **Coppermoon** property and initiated a survey of **Fischer** property, but was still not able to finalise the reports in time.
18 May 2015	The City requested that the **Coppermoon & Fischer** matters be heard together.	
22 May 2015	Applicants requested information on the progress of the report, but. gave no indication as to its position on joining the 2 matters.	The City indicated that it would file the report as soon as possible. Applicants indicated that they would respond regarding joining the matters when they've seen the report. The City indicated that it could not finalise the report until it was clear whether it should draft

		separate reports or a consolidated report.
8 June 2015	Representatives for the **Coppermoon & Fischer** applicants appeared before Savage, J for directions.	The **City** was directed to file separate reports.
11 June 2015	Further postponement: i) Postponed sine die; ii) 2nd Respondent given yet another extension to file report to 29 June 2015.	Report filed on 29 June 2015.
30 June 2015	Court order granted setting out timetable for filing affidavits.	
9 Dec 2015	Filed notice of intention to amend Notice of Motion.	Amendment effected on 25 Jan 2016. Applicant now seeks similar relief to **Stock** Applicants & Mrs F.
8 March 2016	By order of court **Coppermoon, Fischer and Stock** matters set down for hearing together on semi-urgent roll. Timetable set for filing further affidavits.	
2 May 2016	Notice of intention to amend Notice of Motion again.	Effected on 18 May 2016.
4 May 2016	1st Respondents gave notice of intention to bring counter application,	

	seeking following: i) Declaring that 2nd and/or 4th and/or 5th respondents violated 1st respondents rights in terms of ss 25(1) and 26 of Constitution by failing to provide land; ii) Directing 2nd and/or 4th and/or 5th respondents to negotiate with applicant to purchase the affected land so that it's available for legitimate occupation; Alternatively: iii) Directing 2nd and/or 4th and/or 5th respondents to expropriate land on which 1st respondents currently reside so that it is available for legitimate occupation; Alternatively: iv) Directing 2nd and/or 4th and/or 5th respondents to provide land for 1st respondents within a reasonable distance from where they are now.	
30 May 2016	Further order postponing hearing to 24, 25 & 26 August 2016 and setting out timetable for further conduct.	

H. RELIEF SOUGHT BY COPPERMOON

Relief sought	
As per Notice of Motion amended 2 May 2016	1) Declaring 2nd, 4th& 5th respondents violated applicant's Constitutional right to property by failing to protect the affected property; 2) Ordering 2nd respondent (or appropriate respondents) to take all necessary steps in order to purchase the affected property from applicant (price to be determined as below); 3) Ordering 4th and/or 5th respondents to provide 2nd respondent with the necessary funds if such falls beyond 2nd respondent's budget; 4) That the purchase price be determined by an arbitrator which is to be appointed by the Cape Bar Council if the parties cannot agree; 5) Arbitrator to determine price based on market value at the time of the arbitration award, bearing in mind the following: 5.1) that the property value be determined on the basis of the property being vacant land (informal settlement to be disregarded); 6) Alternatively to the above: 6.1) Declaring that by failing to provide land to the 1st respondent's, the 2nd, 4th and 5th respondents violated applicant's rights in terms of s25 and the 1st respondent's

	right in terms of s26 of the Constitution; 6.2) 2nd Respondent to enter negotiations with applicant to either purchase the property, or if cannot agree, to expropriate property in terms of s9(3) of the Housing Act, and directing 2nd respondent to report to court within 2 months: - 6.2.1) Whether agreement was reached on purchase price; 6.2.2) If no agreement was reached, if 2nd respondent intends to expropriate the property, and if not, why not; 6.3) Alternatively, 6.3.1) Joining the Minister of Public Works; 6.3.2) Directing the Minister to report under oath whether he/she intends to expropriate the property, when it will be done, or if not, intending to expropriate, explaining why he/she fails/refuses to do so; 7) Further alternative to all above: 7.1) Directing 2nd, or 4th, or 5th respondents to pay applicant constitutional damages equivalent to the value of the property; 7.2) Directing that *quantum* of damages be determined by arbitrator (arbitrator to be appointed by Cape Bar Council if parties cannot agree on);

	7.3) Arbitrator to determine based on market value of property on date of arbitration award, bearing in mind: 7.3.1) That the value of the property be determined as if vacant land (informal settlement to be disregarded); 8) Further alternative: 8.1) The 1st respondents be evicted from the property; 8.2) applicant, assisted by the Sheriff and if necessary the SAPS and SA National Defence Force to give effect to the order by: 8.2.1) Removing 1st respondents from the property; 8.2.2) Demolishing all structures on the property; 8.2.3) All possessions found to be stored by applicant for 3 months until handed over to lawful owner thereof; 8.3) Directing the Sheriff to serve the order on 1st respondents as per court direction; 8.4) Directing that the order be served on the SAPS at Philippi East. 9) Costs: that cost of eviction (if ordered) be for 2nd/4th/5th Respondents' account and that the cost of the application be for 2nd, 4th, and 5th respondents jointly and severally.

I. RESPONDENTS' CASE – in respect of all three applicants

a. Occupiers (First Respondents)

i. Fischer and Stock

[87] On behalf of the first respondent it was submitted that the State should bear the burden of housing the occupiers. They further submitted that, as a result of the City's seventy year back log in providing formal housing, there are currently thousands of desperately poor people with no prospect of assistance by the City in the short, medium or long term.

[88] The court was further requested to consider the historical, social and economic factors which gave rise to the occupation. On their version, one of the factors to be taken into account is that the first respondents have been evicted from various areas in Cape Town where they lived under desperate conditions, and, as no help was forthcoming from the City and having no other alternative, they occupied any vacant land they could find.

[89] It is undisputed that the properties belonging to the applicants in these three matters have had at least some form of informal settlement on or near them. The occupation that forms the basis of the Fischer dispute, commenced in earnest in 2013.

[90] It is the first respondent's case that eviction on this scale cannot be humanely carried out and is therefore not a feasible option.

[91] It is further the first respondent's case that, if the State had engaged with the occupiers at the time when the occupation began, it would have been able to fulfil its constitutional obligation. As a result of the City's failure, the number of people increased exponentially. However, the State's obligation to act reasonably in respect of poor people occupying land unlawfully on account of having nowhere to go, persists.

[92] In respect of the State's two defences as to why they should not be ordered to take action in this matter, the first respondent's answer is as follows. Firstly, as they are occupying the properties because they had nowhere else to go they can be distinguished from people who occupy land specifically for the purpose of gaining preference in housing allocation. The City's failure to provide assistance is therefore not reasonable.

[93] Secondly, the City argued that to accommodate the occupiers will disrupt existing efforts to provide housing within the City's jurisdiction and, as such, will interfere with housing plans and policies. In this regard the first respondent argues that the duty to act reasonably involves a flexible response to emerging situations by adapting plans and policies. Further, the City makes specific provision for "reactive land acquisitions" in the event of unlawful occupation, therefore, assisting the occupiers would not operate as a disruption. The court has also been reminded that the City has had some years to plan for this matter, but has apparently not done so.

[94] According to the first respondent, none of the state respondents have given an acceptable reason why, instead of moving such a large number of people, they cannot simply acquire the land the people are already on.

[95] The first respondent argued that, while the SCA has indicated disapproval of buyout as a remedy, it has given its nod of approval to expropriation of unlawfully occupied property in situations where it is not

possible to provide alternative l and. In this regard see **Modderklip CC**[30] at para 64.

[96] It is the first respondent's submission that the applicable legislation *in casu* is the Act, specifically section 9(3)[31].

[97] Further, they submit that the two housing programs from the National Housing Code are relevant to this matter, i.e. the Emergency Housing Program and the Upgrading of Informal Settlements Program. As to the City's contention that the land currently occupied is not suitable for permanent settlement, it is submitted that the Emergency Housing Program is not necessarily intended for the provision of permanent housing.

[98] The first respondent dealt with the personal circumstances of the occupiers as is required in terms of PIE. At this stage, I do not find it necessary to deal with those personal circumstances.

[30] supra
[31] Refer to discussion on legal aspects in Para 13 above.

[99] It is the first respondent's submission that because constitutional damages deal with retrospective loss, ordering such damages will not resolve the situation the applicants and the occupiers are currently facing.

[100] In respect of expropriation, it is the first respondent's submission that s9(3) of the Act authorizes the municipality, subject to provincial consent, to exercise the power of expropriation by stepping into the shoes of the Minister of Public Works and, in addition, this power also involves the obligation to use that authority in specific cases.

[101] The City may therefore only expropriate when they have been unable to purchase the land.

ii. Coppermoon

[102] On behalf of the first respondents in the **Coppermoon** application, the court was asked to take the following aspects into consideration. Firstly, that it is common cause that the applicant is the owner of the

affected property and that the members of the first respondent are in unlawful occupation. Further, that it is common cause that the applicant had obtained an interdict at some point during the occupation, but before the principal body of occupiers had arrived. On the occupiers' version, the respondents came to occupy the property out of sheer necessity and would be rendered homeless if evicted. Moreover, that none of the state parties have attempted any meaningful engagement with the respondents.

[103] It is common cause that there is a substantial backlog regarding rental housing. Further, that the City cannot accommodate the respondents in emergency housing. On the City's own version, establishing new emergency housing accommodation can take up to 5 years. The court's attention is further drawn to the fact that the TRA established by the City has not been dismantled; in fact, it has grown and it now encompasses several erven. The second, fourth and fifth respondents have, in two years, not made any effort to assist the respondents or the applicants.

[104] It is therefore also the occupiers' version in the Coppermoon application that executing an eviction order will present a number of practical difficulties.

[105] It is their case that the only progress that has been made in two years is that some water points and ablutions have been installed adjacent to land belonging to the City. The City has made no application for assistance or funding to deal with the issue at hand.

[106] In answer to the City's contention that they need not engage because of the manner of settlement, i.e. that it was planned, orchestrated and violent, and in some instances involved violence by unknown people as not all members of first respondents were present at all the occasions, it is submitted that it is untenable to hold all the respondents to account for the actions of a few. Moreover, it is submitted that there are no allegations of ongoing violence, only vague suggestions and hearsay. It is their case that it could not have been such a pervasive problem as the Sheriff was able to paint numbers on the dwellings. Since, on the first respondent's own

version, the majority are willing to relocate, it is unlikely that they would then resort to violence.

[107] It is their version that it is in any event no answer to hide behind manifestly inadequate policy.

[108] In respect of the City's list of objections to the relief sought, i.e. that buyout is not a competent order; that the court cannot order relief against any tier of government as none of them have breached a right or failed to comply with a duty; that such an order would breach the separation of powers doctrine; that the land is unsuitable for housing; that parts of the property are identified by ESKOM for a power line project; that the City has identified some parts for future transport infrastructure development, the following is submitted on behalf of the first respondents in the Coppermoon application.

[109] In respect of the first three objections, it is submitted by the first respondent that it was dealt with by both the SCA and Constitutional Court, especially in Modderklip. Moreover, it is argued that neither the Constitution nor the Act prohibits such remedies.

[110] It is further submitted that no expert evidence was presented to the court that the land is unsuitable. In addition, the City established a TRA in the same area. The proposed realignment of the runway is hearsay. No confirmatory affidavits from either ESKOM or Transnet have been made available, with the result that allegations concerning them are hearsay. There is no indication of the source of the ESKOM information and also no indication that ESKOM has been made aware of the current situation on the land. Either way, this does not deal with the fact that the City does not own the land, and the applicants have rezoned it for purposes which do not include transport infrastructure or power lines. If ESKOM and Transnet did indeed need portions of the land, surely the City would have welcomed the opportunity to expropriate the property. Instead second, fourth and fifth respondents oppose such an option.

[111] It is therefore submitted that, there is no good reason why the relief sought by the applicants or the first respondents cannot be granted in these exceptional circumstances.

[112] Moreover, the first respondents are entitled to remain on the property and either the second, fourth or fifth respondents must make arrangements to either buy the property or expropriate it.

b. City of Cape Town (Fischer, Stock and Coppermoon)

[113] The City clearly distinguishes the facts in relation to Mrs **Fischer** from that of **Stock** and **Coppermoon**. It addresses its argument on four points:

113.1 declaratory order sought that the City has breached the applicants' constitutional rights;

113.2 directory order sought that the City purchase the various properties (buy-out relief);

113.3 directory order sought that the City expropriate the various properties; and

113.4 the order sought for constitutional damages.

[114] In respect of the buyout relief sought, the City argues against this relief on two grounds:

114.1 it is legally unsustainable on the facts; and

114. 2 it is an impermissible infringement on the separation of powers doctrine.

[115] On behalf of the City it is submitted that the court should not make a contract for the parties before it, as it is a matter for the mutual consent of the parties themselves. Further, that there can be no legal duty on anyone to purchase property. Therefore, it is argued that the City is empowered to purchase, but it cannot be placed under a duty to do so. It is their submission that ordering such a buyout would be both inappropriate and incompetent in law, as decided in the **Dada** matter.

[116] The court was also referred to the decision in Modderklip where buyout relief was not supported. It was submitted that neither the SCA nor the Constitutional Court considered it appropriate relief. The remedy granted there was constitutional damages.

[117] It is further argued on behalf of the City that buyout relief is not just and equitable in terms of s4 of PIE, or appropriate in terms of s38, for the following reasons:

117.1 either an actual or threatened breach of a right must be shown;

117.2 it is not disputed that the City has already placed the occupiers on a waiting list, which complies with the City's lawful emergency housing policy;

117.3 the State's decision to purchase, falls within executive discretion;

117.4 the City does not consider the relevant properties suitable for purchase;

117.5 portions of the properties are authorised for an ESKOM power line project;

117.6 the City wants to use portions of the properties for transport infrastructure;

117.7 the properties are situated in an industrial/agricultural development node;

117.8 the properties are not suitable for services necessary for human settlement; and

117.9 the properties are within the airport's noise corridor and noise insulation would make housing unaffordable.

[117] In respect of the **Stock** and **Coppermoon** submissions, the City opposes this relief on three grounds:

117.1 It does not flow from the pleaded causes of action;

117.2 It is not legally sustainable; and

117.3 It is not appropriate.

[118] On behalf of the City it is argued that the applicants have relied on PIE as a cause of action. They have amended their Notices of Motion to include expropriation, but this relief is not supported by supplementary affidavits and they have not supplemented their applications. It is submitted that the applicants must stand or fall on their papers.

[119] Further, that the power to expropriate in s9(3) of the Act is not tied to a duty to exercise it. In *casu,* two jurisdictional facts are not present. Firstly, the City must be unable to purchase from the owner. This

presupposes a willing buyer and an unwilling seller. In *casu* we have an unwilling buyer. The same reasons for not buying the land outright applies to not wanting to expropriate it. It is undisputed that the City may only expropriate with the permission of the MEC and that it has not considered any such proposal, because the City is unwilling to expropriate. It is submitted that as here exists no right to be expropriated, and no duty to expropriate, there is therefore no actionable cause. The City submitted that the SCA has held that courts cannot order expropriation as it is an administrative act which cannot be exercised by a court.

[120] It is submitted that s9(3) must be read subject to s25(2) and that, since the land, on their version, is unsuitable, no lawful purpose can be served by expropriation. Accordingly, the City would not be able to satisfy the requirements of s25(2).

[121] As the Act assigned to the City the power to expropriate when necessary it would be inappropriate for the court to usurp that power. It would also be inappropriate for the court to order expropriation without the Minister of Public Works having been joined.

[122] In respect of constitutional damages, the City submitted that damages may be appropriate in terms of s38, but that it must be awarded against the organ of state that caused the damage and that it must also be proportional to the loss of use and enjoyment of the property (which is unlikely to be the same as the amount that would probably be awarded on expropriation or buyout). It will also compensate for past damage, not for future damage, and the Constitutional Court has held that delictual remedies will usually suffice. It is submitted therefore that, to successfully claim this relief, it should be proved that:

122.1 it is necessary to enforce and protect a right in terms of the Bill of Rights; and

122.2 the loss was causally connected to the breach of the right.

[123] It is the city's argument that only the SAPS has a constitutional obligation to protect property and that the ALIU is mandated to protect City and Provincial property and only assist with private property when feasible. The state, as a whole, is obliged to promote, protect and fulfil the rights in the Bill of Rights, but not all organs of state are obliged to protect private property. It is submitted that the exclusivity of assigned functions must be

respected. Case law involving delictual liability of relevant organs of state do not assist, as constitutional damages are not based in delict. The occupiers alleged that the demolition of their dwellings was done forcefully and unlawfully. Even though the City denies that this amounted to an eviction, it has not disputed the allegations in the occupiers' affidavits.

[124] Therefore, it is submitted, it was the SAPS that was the proximate cause of the unlawful occupation and as such, constitutional damages would then fall against them.

c. Ministers of Police – National and Provincial (Stock)

[125] On behalf of the applicants in the Stock matter, it was claimed that both the **Provincial and National Ministers of Police** ("The Ministers of Police") violated their constitutional and statutory obligations to protect the applicants' property. As a result, different forms of relief are sought against them as reflected in the tables above.

[126] The prayer for constitutional damages was only included in the amended Notice of Motion and not referred to in the Founding Affidavit. The Ministers have no objection to the SAPS assisting with an eviction if it is granted by the court. It, however, opposes other relief sought against the **Ministers of Police.**

[127] On behalf of the **Ministers of Police** it is submitted that the questions to be answered are:

127.1 did the Ministers breach any Constitutional rights; and

127.2 if so, should they be directed to pay damages.

[128] It is submitted on behalf of the **Ministers of Police** that there is no factual or legal basis to make such an order. Further, that the court should consider the case made out by each of the applicants, in the **Stock** matter, individually. It is their submission that the case by the **Stock** applicants is based on alleged inaction or insufficient action in the face of unlawful occupations. In particular during August 2014, although some earlier events are also mentioned by the **Stock** application in their Founding Affidavit.

[129] According to the **Ministers of Police**, the land is vulnerable to occupation due to its location i.e. vacant, unimproved and readily accessible. They submit that there is no record of orders allegedly personally delivered by Mr Stock at the Philippi East SAPS station, and Mr Stock cannot provide proof of delivery of same. They referred the court to May 2013 where the SAPS did assist, where appropriate, in executing a court order granted in favour of **NTWA Dumela Investments**. However, on their behalf it was submitted that no record of SAPS involvement in operations during November or October 2013 could be found. Further, that there is also no record that **Power Development Projects** and **Eirinprop** requested the SAPS's assistance during November 2013. The **Ministers of Police** are of the view that the applicants do not take issue with the conduct of the SAPS during 2013.

[130] As the occupation during August 2014 forms the basis of the complaint against the **Ministers of Police**, it is argued that the fact that no record of orders received during this time is significant. The only record that could be found of charges being filed was that during this time, Mr

Stock (also on behalf of Stock properties) and **Power Development Projects** laid trespass charges. There is no record of any other parties filing charges.

[131] The SAPS and the ALIU assisted with evictions during August 2014. On behalf of the **Ministers of Police**, it is denied that the SAPS informed the Stock applicants that it would no longer be able to assist.

[132] The crux of their case is the allegation that the SAPS informed the property owners that they had to properly secure their land with fences and security guards, and the allegation that this showed an intention on the part of the SAPS to no longer assist actively in the protection of the applicants' property. This is contradicted by an email confirming what was discussed at the meeting. Also, there was in fact a major eviction operation on 22 August 2014 spearheaded by Power, as others had not obtained orders permitting evictions. The SAPS monitored the area for the next few days.

[133] The SAPS's response is that they are dealing with large unoccupied properties, with no perimeter fencing or clear markings, which are, at all times, accessible to people. It is their case that it is effectively impossible for the SAPS to prevent people from trespassing or moving onto the property. A number of spaces in the area have at times been subject to attempted land invasions. It is a high crime area. Crime prevention teams could not also monitor open spaces. Moreover, it is not reasonable to expect the SAPS to determine whether someone had the owner's tacit permission to be on the property, as some of the occupiers in fact had. It is submitted that the SAPS did not have the manpower or expertise to deal with land invasions. As per court orders, it is not the duty of the SAPS to execute eviction orders. That is the duty of the Sheriff and the landowners.

[134] The court was referred to two policy documents which determine the conduct of the SAPS and the "Public Order Police ("POP"): Crowd Management during Public Gatherings and Demonstrations" and the SAPS's Standard Operating Procedure ("SOP") on "Unlawful Occupation of Property and Evictions", which contains the stance which would have been communicated to the property owners regarding possible land invasions.

The SOP indicates what the SAPS expects land owners to do before and during occupations and on receipt of an eviction order.

[135] According to the **Ministers of Police**, the applicants failed to ensure that their properties were adequately secured so that people who wanted to occupy unlawfully, would not have access to it. Prior to August 2014, there is only one recorded interaction between the applicants and the SAPS (Mr Stock came to the SAPS for advice in 2013, but apparently did not follow the advice). It is their further submission that it is clear on the documents that the SAPS assistance was planned, coordinated and chronicled and involved extensive manpower and resources. Accordingly, it is all the more important that subsequent to such assistance being given, the land owner should do what is required of him to secure the property and prevent further occupations, otherwise the SAPS assistance would be in vain.

[136] With regards to the meeting on 20 August 2014, to which the ALIU invited affected land owners, it is the Ministers of Police's version that the purpose was to design a strategy to deal with the situation. The land owners' options were explained to them, and also what they needed to do in order to get the state machinery involved. It was further explained that

interdicts were not valid indefinitely, and could not be used to evict new or different occupiers.

[137] The orders that had been obtained did not direct the SAPS to execute the eviction, but only to assist the Sheriff in doing so. It is the submission of the **Ministers of Police** that it is not the duty of the SAPS to act as security guards and it is not possible to do so. However, it was at no time the stance of the SAPS that they were unwilling to assist the property owners. It was incumbent on the property owners to appreciate the limits of the SAPS's resources and authority, as well as their own responsibilities.

[138] According to the **Ministers of Police**, the applicants must establish that they had infringed their constitutional rights, but they have not done so. The applicants rely on case law establishing delictual liability, which is unhelpful as the claimed remedy is not in delict. Their contention that the SAPS had a positive duty to act to prevent crime (trespass) is flawed. It does not show a breach of a Constitutional right. They submit that only in one instance did two of the Stock applicants press trespassing charges and these charges did not authorise the SAPS to arrest people at will. There is

case law that the Trespass Act should not be used as means of securing evictions. It is their submission that the SAPS discharged its duties to the best of their abilities, and never shirked its duties. There is therefore no basis to suggest that the fact that the SAPS insisted on owners doing their bit to prevent occupations, amounted to an abdication of the SAPS's responsibilities.

[139] It is their case that the applicants could have secured their properties in any number of ways, and should have done so.

[140] It is further their submission that the applicants clearly misunderstood the extent of the authority given by the court orders they obtained. It is common cause that not all the applicants even obtained court orders.

[141] Also, it is submitted that none of the sections of the Constitution relied on by the applicants, i.e. ss12(1)(c), 25 and 26 assist them as against the **Ministers of Police**. It appears as if they base their claim on the Modderklip decision, where no order was made against the Ministers of

Police and the SAPS, as they had not been cited as parties to the case. It is therefore their submission that a request for a declaratory order as against the **Ministers of Police** is misconceived.

[142] They submitted that the request for constitutional damages requires that a breach of a constitutional right be shown and that the applicants have failed to do this. The court was reminded that constitutional damages is an exceptional remedy to be awarded only if it is appropriate on the facts and that even if the applicants had shown that the SAPS had breached their duty, the remedy would have been an ordinary common-law, one and not a constitutional one.

d. The Sheriff of the High Court, Mitchell's Plain North – (Coppermoon)

[143] The Sheriff did not oppose the application by Coppermoon.

e. Provincial Ministers

i. **Prov. Minister of Housing: Fischer – 4th Respondent; Stock – 3rd Respondent; Coppermoon – 5th Respondent.**

ii. **Government of the Western Cape Province: Stock - 9th Respondent.**

f. National Ministers

i. **National Minister of Housing: Fischer – 3rd Respondent; Stock – 5th Respondent; Coppermoon – 4th Respondent.**

ii. **National Minister of Rural Development and Land Reform: Stock – 6th Respondent.**

[144] The **National and Provincial Ministers** submitted that there are two sides to the issue:

144.1 a main application by private land owners for the purchase/expropriation of their properties, alternatively the eviction of the occupiers; and

144.2 a counter claim (in two matters) for certain relief from the state.

[145] The state respondents submitted that they will abide the outcome of an eviction order, but raise some questions regarding alternative accommodation. They are opposing all other relief sought.

[146] In respect of an eviction order, it is submitted that no survey has been done with respect to the Stock properties, while the surveys done on the Fischer and Coppermoon properties are by now substantially out of date. Accurate information would be needed for the purposes of the emergency accommodation, and a court order that the City obtain that information would not oblige the occupiers to give it. The court is requested to order that the occupiers (through their legal representatives) be instructed to make the information available to the City (who requires emergency accommodation, their details etc.).

[147] In respect of alternative accommodation, it is submitted that the circumstances under which occupation took place are relevant to an eviction order, and also to the declaratory relief sought. It is also submitted that, where extreme lawlessness has accompanied the occupation and the land owners have not acted with the required degree of promptness to

protect their property, the state should not be directed to provide immediate alternative accommodation. On their version, this is relevant to the buyout, expropriation and damages claims.

[148] In respect of the declaratory relief it is submitted that there is no basis for granting this relief.

[149] Only the **National and Provincial Ministers of Human Settlements** are cited in **Fischer** and **Coppermoon,** and it is submitted that neither of them is under any obligation to protect private property.

[150] Further, the **National and Provincial Ministers** are under no obligation to protect private property. Their roles are set out in the Act in ss 3 and 7. It is further submitted that none of the parties refer to a breach of any statutory provision. Moreover, there is no obligation on the state to provide the kind of protection the parties seek.

[151] The second item of relief sought, in the alternative, is the purchase of the property (buyout relief). The state respondents consider that there are two variations of this relief. Either that the relevant respondents be ordered

to conclude a contract with the applicants, or that the respondents be ordered to enter into negotiations with the applicants, with the view to purchase.

[152] It is submitted that an order directing the purchase outright would not be competent as it breaches the principle of separation of powers. In addition, the City has already indicated that the properties are not suitable for human settlement in particular, specifically housing development. And finally, that such an order would violate the freedom of contract principle, by directing the state to buy the property.

[153] In respect of the expropriation, it is argued that expropriation relief under s9(3) of the Act is subject to permission from the MEC. The question as to whether the court can order expropriation was expressly left open in the Modderklip matter. On behalf of the state respondents it is submitted that it is not appropriate, as:

153.1 it violates the doctrine of separation of powers; and

153.2 it is subject to permission from the MEC, who will consider all relevant factors, including how the occupation occurred.

[154] The declaratory order in the first respondents' counter claim, that the state's constitutional obligations were breached by not providing alternate land, raises the issue of the nature of the state's obligation in these cases. It is submitted that the National Housing Programme attempts to assist people who, for reasons beyond their control, require such emergency housing as it provides temporary relief. It takes the form of grants to municipalities to enable them to respond through provision of land, municipal engineering services and shelter. It includes possible relocation on voluntary cooperative basis.

[155] Once the need for assistance is identified, an application to the Provincial Department, for funding, should follow. Following the occupiers' argument, once it is clear that they will be rendered homeless, the state has an immediate and unqualified obligation to provide alternative housing. It is argued that this cannot be so. Dealing with the issue of alternative accommodation, the following must be borne in mind:

- the obligations of private land owners to protect their property;
- the condition of the property;
- the fact that the properties were not fenced;
- that interdicts were either not obtained at all, or only eventually;
- that private security was only employed at high risk periods, or not at all; and
- the circumstances under which the properties became occupied, in some cases involving extreme lawlessness.

[156] It is submitted that the above militates against the state being ordered to provide emergency alternative accommodation.

[157] The relief of constitutional damages can only arise after the right supposedly breached has been identified and the facts show that the right was in fact infringed. It is submitted that the facts of Modderklip are distinguishable from the facts in this matter.

[158] It is submitted that no order should be made against the **National** or **Provincial Minister**'s.

iii. Government of the Republic of South Africa: Stock – 8th Respondent.

[159] The Government of the Republic of South Africa did not oppose the application.

J. DISCUSSION

[160] In considering these applications, and taking into account case law dealing with the relevant legal principles, it is imperative for this court to

order appropriate relief. Should such remedies not exist, it is an established constitutional principle that this court is obliged to forge new and creative remedies in order to ensure effective relief where a constitutional right has been infringed. In this regard, see the **Fose** matter.[32]

[161] When considering these applications, I am faced with a historical, social and economic situation which cannot be ignored. The occupiers moved to these properties after being evicted from various areas where they lived under desperate conditions. Unlike many other people from Cape Town , these occupiers did not, at the time, and at present, have the luxury of choosing where to settle with their families. They settled on these properties out of desperation. When considering this matter I have therefore considered this historical context.

[162] I am in agreement with the first respondent that, through it's unreasonable conduct in this matter, the state has breached its duty in terms of s7(2) of the Constitution, as well as ss25 and 26, and as such, I am in a position to order appropriate relief in each of the matters, as stated

[32]supra

in the **Fose** and **Ekurhuleni Municipality** matters[33]. As emphasised in the **Fose** matter, the court is obliged to consider the specific circumstances of each case to determine what appropriate relief is.

[163] The few similarities between the **Ekurhuleni Municipality** matter[34] and the matter of Mrs. Fischer, are that both dealt with an eviction application that lead to a counter application seeking to enforce the right to housing in terms of s26 of the Constitution. The similarities between the **Ekurhuleni Municipality** matter and all three matters before me are that all of them dealt with destitute people, and with the slow reaction by the local authority to address the occupiers' plight.

[164] One of the distinguishing factors is the fact that the **Ekurhuleni Municipality** matter involved a very small number of people. The possibility of this small number of people being able to be relocated to other existing housing programmes was therefore very real. This is not the case in any of the matters before me.

[33]supra
[34]supra

[165] A further distinguishing factor is the fact that alternative accommodation was merely speculated on, whilst *in casu* it is undisputed that the City cannot provide alternative accommodation for the occupiers. Moreover, expropriation was not discussed and, unlike the facts before me, neither was there any detailed discussion of the Act.

[166] I am in agreement with the first respondent that none of the state respondents have given an acceptable reason why, instead of moving such a large number of people, they cannot simply acquire the land the people are currently occupying.

[167] The City has admitted that they may never be able to accommodate the occupiers elsewhere. This leaves the applicants and the occupiers alike in an untenable position. The only reasonable course of action is for the occupiers to stay where they are, thereby enforcing their rights in terms of s26. The question is how to do this without encroaching on the s25 rights of the applicants. Moreover, the question is how to achieve this goal without, by ordering the parties to perform in a specific way, overstepping the

boundaries of the doctrine of separation of powers, i.e. how to avoid the mistake made by the High Court in the **Ekurhuleni Municipality** matter. This is the balancing act that this court will have to perform.

[168] The City's position that they have placed the occupiers on lists for emergency housing, thereby fulfilling their constitutional obligations, is not reasonable as no indication is given of exactly what this means on a practical level, except that accommodation might be available to some of the occupiers in 2 years' time. Moreover, it is unlikely that the City will be able to accommodate all the occupiers at any point in time, which in my view further emphasises why the City's position is not a reasonable one to hold.

[169] The City's argument that, to accommodate the occupiers will disrupt existing efforts to provide housing within the their jurisdiction and it will interfere with housing plans and policies, in light of their constitutional obligation to, as a priority, make provision for emergency situations, is not reasonable. In my view, reasonable action would include acquiring the applicants' properties. It is by now an acceptable principle that the duty on

the state is to act reasonably by being flexible to emerging situations and to adapt plans and policies accordingly. In addition, the City makes specific provision for "reactive land acquisitions" in the event of unlawful occupation, therefore, in my view, assisting the occupiers would not operate as a disruption. The City's policy dealing with "reactive land acquisitions" would be subject to s25(3), which sets market value as only one of the factors to consider. There are also a number of specific funds that can be used for such acquisitions.

[170] I am in agreement with the first respondent that the City's contention that the land currently occupied is not suitable for permanent settlement also does not hold water as the Emergency Housing Program does not require permanence with relation to the housing provided.

[171] The City's submission that portions of the properties are authorised for an ESKOM power line project, as well as the submission that the City wants to use portions of the properties for transport infrastructure, does not take their case any further, as the City is currently not the owner of the properties and would have to acquire the land in order to use them for any

purpose other than that for which they are currently zoned. The same applies to the City's submission that the properties are situated in an industrial/agricultural development node.

[172] In respect of the submission that the properties are not suitable for the services necessary for human settlement, it is worth mentioning that the City is currently using a site close by for its TRA. What is needed at this this point in time is property to assist the City with land to be used for emergency accommodation. The responsibility to provide such emergency accommodation will always remain on the City.

[173] The submission that the properties are within the airport's noise corridor and noise insulation would make housing unaffordable, is also not sustainable as an excuse for not acquiring the properties, as the occupiers are currently residing there, the TRA is established there and millions of people reside in the adjacent townships. Moreover the settlement would be for emergency purposes only.

[174] The distinction made by the City between Mrs Fischer and the Stock and Coppermoon applicants, is correct in my view. The question to be answered is whether the relief granted to each of the set of occupiers should also be different. I am of the view that the distinction is only relevant in as far as the applicants are concerned and may have to be reflected in the manner in which any monetary relief is negotiated with each of them.

[175] What is undisputed, however, is that the relief in respect of the occupiers should be the same. When considering the appropriate relief, this court should bear in mind that the occupiers will be homeless if evicted, and that the property owners have currently lost the use and enjoyment of their property.

[176] It is accordingly the role of this court to consider and reflect on the differing circumstances of each of the applicants when determining appropriate relief as stated in the Ekurhuleni Municipality matter, and to ensure that the remedy is effective as stated in the Fose matter.

[177] As stated above, there is no distinction between the state's obligation to respect, protect, promote and fulfil the rights of both the occupiers and the applicants. That obligation remains the same. The fact that the state should give effect to these rights is undisputed.

[178] Mrs. Fischer inherited her property from her husband. Unlike the Stock and Coppermoon applicants, she did not acquire the property for commercial reasons, with the accompanying risks attached to such transactions. From the facts before me it seems as if this is the only immoveable property that she currently possesses. She is an elderly woman who is bearing the responsibility of the state by providing land to the first respondent. By failing to comply with its constitutional obligations to provide access to housing to the occupiers, the state has effectively encroached on her and the other applicants' right in terms of s25.

[179] Moreover, they will continue to do so as the lack of available housing for the poor will not be addressed effectively in the short term. The risk of further occupations will remain as well as the need for the city to provide emergency housing to poor and destitute homeless people. The migration

of poor people to cities is not unique to the City of Cape Town. This is a global phenomenon. People move to areas where there are economic opportunities. Local and Provincial authorities cannot plan their cities in denial of this reality.

[180] Mrs. Fischer cannot be treated in the same way as the applicants in the Stock and Coppermoon matters. It is the responsibility of this court to ensure that her rights are protected without any delay, even more so than that of the other applicants. Time is of the essence in Mrs. Fischer's case. She attempted to deal with the crisis the moment she became aware of it. She is entitled to an effective remedy that would allow her to enjoy her constitutional right to property during the last years of her life.

[181] For these reasons, the remedy granted to Mrs Fischer will be slightly different to those of the other two applicants.

[182] In respect of the claim for expropriation by the Stock and Coppermoon applicants, the Modderklip matter offers some guidelines. In

the Modderklip matter, it was argued that ordering expropriation would amount to a violation of the doctrine of separation of powers. The Constitutional Court found that it was not necessary to decide the point as it had no information as to whether there was alternative land available to accommodate the occupiers. Moreover, if such land was indeed available, that it would not be just to order the state to purchase specific land.

[183] *In casu,* the facts are distinguishable as it is undisputed that the City would not be able to provide alternative accommodation for all the occupiers and that the portions of land belonging to the applicants are the only land available at this time for this purpose, i.e. emergency housing for approximately 60 000 people.

[1834 The same applies to the buy-out relief. There was not enough information before the Constitutional Court as to why the municipality had not proceeded with negotiations. The lack of information on alternative accommodation was also a factor here. The Constitutional Court found that on the facts of that case, it could order damages for loss that followed the breach of a right enshrined in the Constitution.

[185] *in casu,* there was an attempt by the state respondents to shift the responsibility for the settlement of these occupiers from one sphere of government to the next. It is trite that the duty in respect of s26 falls on all three spheres of government. The three spheres should cooperate. In this regard see the Grootboom decision.

[186] Moreover, there is a duty on the City to pro-actively plan. Here, the City was aware of the situation on the applicants' land and has failed to pro-actively plan for the settlement, whether temporarily or permanently, of these occupiers. All three spheres of government have the benefit of a clear policy in the form of Chapter 13 of The National Housing Code[35] as well as Chapter 12 - Housing Assistance in Emergency Housing Situations of The National Housing Programmes[36]**.**

[187] It is clear from the facts before me that this situation qualifies as an emergency housing situation. In terms of the latter policy, the purchase of

[35]supra
[36]supra

land is allowed where the municipality has no alternative land. The fact that the City in the matter before me has no alternative land available is further common cause. Moreover, this policy stipulates that privately owned land may be acquired. The policy further stipulates how the price for the acquisition of privately owned land should be determined.

[188] The responsibilities of each of the spheres of government are clear. Moreover, the Act stipulates in no uncertain terms what the functions of municipalities are.

[189] As was decided in the Modderklip CC matter, considering the totality of the legislative scheme, I am of the view that the City does "*not simply has a derivative obligation to the occupiers, but a direct one*".

[190] I agree with the view that the Constitutional Court's finding in Modderklip that the City was unprepared with a situation of which they were aware for a considerable period of time, is similar to the City's attitude *in casu*. Here similarly, no provision was made, financially or otherwise to

deal with the situation. The City's last minute attempt to apply for funds cannot be considered reasonable in any manner, whatsoever.

[191] What we are therefore dealing with is not necessarily an unconstitutional policy but a municipality who has failed to give effect to the constitutional rights of both the applicants and the occupiers by not invoking the remedies in the policies at their disposal.

[192] The facts of the Odvest matter can be compared to that of the Coppermoon and some of the Stock applicants, as the purpose of acquiring the property were for industrial/semi-industrial development. This does not, however, negatively affect the constitutional rights of the applicants. As the eviction of the occupiers is not a viable option, the only other alternative i.e. the occupiers remaining on the applicants' property, will result in the applicants continuing to fulfil the state's responsibility, while their constitutional rights are infringed upon. The relief granted to these applicants should therefore also be appropriate and effective.

[193] In respect of the claim against the Ministers of Police by the Stock applicants, I am in agreement with counsel that the fact that there is no

record of court orders requiring action by the police, apart from trespass charges by only two of the applicants, is significant. The case against the Ministers of Police is based on inaction or insufficient action in the face of unlawful occupations.

[194] I am further in agreement with counsel for the Ministers of Police that it is not reasonable to expect the police to prevent people from moving onto large pieces of unfenced private property. Moreover, the responsibility to execute court orders, where they exist, rests on the Sheriff and the land owner. The SAPS should assist where court orders direct them to do so.

[195] *In casu,* the Stock applicants are asking for a finding that the Ministers of Police had infringed their constitutional rights. In my view, there was no such infringement by the SAPS. In the result I am not convinced that the Ministers of Police should be ordered to pay damages to the Stock applicants.

K. **ORDER**

a. Fischer **CASE NO: 9443/14**

[196] It is declared that the City, third and fourth respondents infringed Mrs Fischer's constitutional right to property in terms of s25 of the Constitution;

[197] In order to give effect to Mrs Fischer's rights in terms of s 25 and the rights of the first respondent in Fischer in terms of s26, the City is ordered to enter into good faith negotiations with Mrs Fischer in order to purchase her property within one month of this order;

[198] The third and/or the fourth respondents are ordered to provide the second respondent with the necessary funds to purchase Mrs Fischer's property, should such funds fall beyond the City's budget.

[199] Failing agreement between Mrs Fischer and the City, the City is ordered to report back to this court within one month of this order on the progress of the above negotiations and, in particular why the value of Mrs Fischer's property was not determined on the basis of the property being vacant land, thereby disregarding the informal settlement.

[200] The eviction application is herewith dismissed; and

[201] The counter application in the Fischer matter is granted in the following terms:

201.1 It is declared that the City, the third and the fourth respondents have infringed the s26 rights of the occupiers by failing to provide land.

[202] Costs of the application are for the second, the third and the fourth respondent's account, jointly and severally.

b. Stock **CASE NO: 11705/15**

[203] It is declared that the City, the third, the fifth, the sixth and the ninth respondents infringed the Stock applicants' constitutional right to property in terms of s25 of the Constitution;

[204] It is declared that the City, the third, the fifth, the sixth and the ninth respondents infringed the rights of the first respondents' in Stock in terms of s26 of the Constitution;

[205] In order to give effect to the Stock applicants' rights in terms of s25 and the rights of the first respondent in Stock in terms of s26 , the City is ordered to enter into good faith negotiations with the Stock applicants in order to purchase their properties within two months of this order;

[206] Should the parties be unable to reach an agreement as aforesaid, the City is ordered to report to this court within two months of this order

whether expropriation of the properties in terms of s 9(3) of the Housing Act was considered, and if not, why not;

[207] The third and/or the fifth and/or the sixth and/or the ninth respondents are ordered to provide the City with the necessary funds to purchase the Stock applicants' properties, should such funds fall beyond the second respondent's budget;

[208] The City is ordered to report within two months of this order as to the progress of such negotiations;

[209] The eviction applications are herewith dismissed;

[210] The costs of the application is for the City, the third and/or the fifth and/or the sixth and/or the ninth respondents' account, jointly and severally.

c. Coppermoon CASE NO: 14422/14

[211] It is declared that the City, the fourth and the fifth respondents infringed the Coppermoon applicants' constitutional right to property in terms of s25 of the Constitution.

[212] It is declared that the City, the third and the fourth respondents infringed the rights of the first respondents' in Coppermoon in terms of s26 of the Constitution;

[213] In order to give effect to the Coppermoon applicants' rights in terms of s25 and rights of first respondent in Coppermoon in terms of s26, the City is ordered to enter into good faith negotiations with the Coppermoon applicants in order to purchase their properties within two months of this order;

[214] Should the parties be unable to reach an agreement as aforesaid, the City is ordered to report to this court within two months of this order

whether expropriation of the properties in terms of s 9(3) of the Housing Act was considered, and if not, why not;

[215] The fourth and/or the fifth respondents are ordered to provide the City with the necessary funds to purchase the Coppermoon applicants' properties, should such funds fall beyond the City's budget;

[216] The City is ordered to report within two months of this order as to the progress of such negotiations;

[217] The eviction applications are herewith dismissed;

[218]The costs of the application is for the City, the fourth and the fifth respondents' account, jointly and severally.

_____

FORTUIN J