IN THE HIGH COURT OF SOUTH AFRCA
[WESTERN CAPE DIVISION, CAPE TOWN]

Case nos: 13946/15; 13947/15; 13951/15; 13952/15

In the matter between:

CHARNELL COMMANDO	First Applicant
NORMAN ANDREW CUPIDO	Second Applicant
GERALDINE STEPHANIE CUPIDO	Third Applicant
GICILLE VANESSA COMMANDO	Fourth Applicant
WILLEM NEL	Fifth Applicant
MEESHADE JACOBA NEL	Sixth Applicant
DAPHNE NEL	Seventh Applicant
PRISCILLA NEL	Eighth Applicant
DYLAN NEL	Ninth Applicant
MA AIDA ABELS	Tenth Applicant
SULAIMAN GOLIATH	Eleventh Applicant
FAIZA FISHER	Twelfth Applicant
GEORGE FARIA RODRIGUES	Thirteenth Applicant
NASHIET ABELS	Fourteenth Applicant
CHRASHANNA SMITH	Fifteenth Applicant
DELIA SMITH	Sixteenth Applicant
BRENDA SARAH SMITH	Seventeenth Applicant
MACHAL SMITH	Eighteenth Applicant
MEGAN SMITH	Nineteenth Applicant
ROSELINE SMITH	Twentieth Applicant
CHESLYN SMITH	Twenty-First Applicant
RASHIEDA SMITH	Twenty-Second Applicant
MARK NEIL SMITH	Twenty-Third Applicant
MOGAMAT TAURIQ SMITH	Twenty-Fourth Applicant
GRAHAM BEUKES	Twenty-Fifth Applicant
SOPHIE MASILO	Twenty-Sixth Applicant

and

WOODSTOCK HUB (PTY) LTD	First Respondent
THE CITY OF CAPE TOWN	Second Respondent

JUDGMENT DELIVERED (VIA EMAIL) ON 6 SEPTEMBER 2021

SHER, J:

1. This matter concerns a challenge to the constitutionality of the City of Cape Town's emergency housing programme and its implementation in relation to persons who will be rendered homeless, pursuant to evictions in Woodstock and Salt River. It brings to the fore the stark realities of the circumstances which persons who are evicted within the inner-City surrounds face in terms of the emergency accommodation which is offered to them by the State in the discharge of its constitutional obligations, and highlights complex and competing social problems and vexing legal issues which abound in this area of the law.
2. The applicants presently constitute a group of some 25 persons (of which approximately half are children) who remain out of an original community of approximately 43 persons in respect of whom orders were granted in March 2016 (per Hlophe JP) evicting them from premises which they occupy at nrs 120-130 Bromwell St, Woodstock.[1] Most, if not all, of the applicants have lived there for their entire life.
3. The premises which constitute their homes are 5 subdivided and partioned cottage units which are situated on a single erf number 10626, some 806 sqm in extent, which was purchased by the 1st respondent (a property development company) for R 3.15 million on 30 October 2013, from messrs Reza and Erefaan Syms. At the time tenant members of the community were renting the spaces they occupied with their families from the Syms brothers for amounts which ranged between R 300 and R 2000 per month, depending on their financial circumstances, in terms of intergenerational leases, some of which went as far back as their grandparents.

[1] Separate applications were launched in respect of family units and individual households under case numbers 13945/16, 13946/16; 13947/16; 13951/16 and 13952/16, in respect of which a consolidated eviction order was granted directing the applicants to vacate the premises they occupied on or before 31 July 2016. The order was later amended by agreement on 19 August 2016 per Weinkove AJ, to provide for a month's extension.

A chronology and the relevant facts

4. The matter has followed a long and winding road. Notice to vacate the property was given to the occupiers on 30 June 2014, even though 1st respondent only took transfer on 4 March 2015. Separate eviction applications were thereafter launched in respect of various family units and individual households, at the end of July 2015.

5. The applications were initially enrolled for 6 September 2015 but were postponed on a number of occasions in order to afford the applicants an opportunity to obtain legal representation and to file answering papers. On 10 December 2015 the applications were consolidated by Hlophe JP.

6. On 17 March 2016 Hlophe JP granted an eviction Order directing the applicants to vacate the property by 31 July 2016. According to the applicants the Order was taken by consent because they had wrongly been advised by their former attorney that they had no legal defence to the eviction application, and could only ask for time to vacate. It is common cause that at the time of the granting of the Order the applicants' individual circumstances were not properly before the Court and were not considered by it. [2]

7. On 4 August 2016 the applicants made application for the Order to be varied by granting them an extension until 31 November 2016 to vacate the property. The application was dismissed by Weinkove AJ, whereupon the applicants launched an application[3] to set aside alternatively to stay the warrant of ejectment, which was struck off the roll. The applicants then filed notices of appeal in respect of the eviction Order. These were subsequently withdrawn after the applicants arrived at an agreement with the 1st respondent, whereby they were granted time until 19 September 2016 to vacate.

8. Pursuant to correspondence from their current attorneys and extensive media coverage, between 3-19 September 2016 a series of discussions took place between the applicants and their attorneys and various City officials, including

[2] On the duty of a Court to satisfy itself that an eviction order is just and equitable notwithstanding that it is purportedly being sought by agreement vide *Occupiers of Erven 87 & 88 Berea v De Wet N.O & Ano* 2017 (5) SA 346 (CC).

[3] Under case no. 14050/16.

the Executive Mayor, Ms Patricia De Lille, as well as officials from the National Department of Human Settlements.

9. The discussions commenced after a letter was directed by the applicants' attorneys to City officials including the Mayoral Committee Member responsible for Human Settlements, in which the City's assistance was sought. It pointed out that the applicants would be rendered homeless pursuant to the eviction and the City consequently had a constitutional obligation to provide them with 'temporary and/or emergency alternative accommodation and land as close as feasibly possible' (sic) to the properties from which they were being evicted.

10. The letter indicated that amongst those who were subject to the eviction Order were a number of vulnerable persons including 17 children, 8 persons over the age of 50 and 5 'women-headed' households, as well as persons who suffered from a variety of medical ailments. The applicants said that although there were indications that 1st respondent was prepared to make a financial contribution of sorts[4] towards assisting them to find alternative accommodation, and to this end it had proposed that a without prejudice meeting be held on 8 September 2016, they were concerned that it would not be sufficient to prevent them from being rendered homeless without the City's intervention, and they therefore requested that a representative from the City should attend the meeting.

11. The City's Acting Executive Director: Human Settlements responded on 5 September 2016 in a letter in which she denied that the City had an obligation to provide emergency accommodation. In her view the Court must have considered that it was just and equitable that there should be an eviction Order after taking into account all relevant circumstances including the financial contribution which was to be made by the 1st respondent, and emergency accommodation was consequently not required as the Court had not made any Order in this regard. Given that it is common cause that the eviction Order was simply granted by

[4] First respondent offered to contribute an amount of R 50 000 to the applicants and initiated a public 'crowd-funding' campaign which raised a further R25 000. These monies were however not paid over to the applicants. First respondent requested the applicants' attorneys to take over the campaign, which they were not able to do at the time. They accordingly requested the first respondent to retain control over the campaign and the funds, which it was not prepared to do. According to an affidavit which was filed by first respondent's director in January 2017, the campaign was terminated by it in December and the contributors' funds were refunded to them.

agreement and without the applicants' personal circumstances being considered by the Court at the time, the view which was expressed was clearly misplaced. In any event, the Acting Executive Director stated (ironically), that the City did not have any emergency accommodation available for the applicants and they should apply to be placed on the waiting list for it.

12. On 7 September 2016 the Mayor and local councillor met with the applicants at the property. The Mayor undertook to look into possible solutions, including whether land could be made available for the applicants' relocation, and the following day their attorneys supplied City officials with detailed information relating to the applicants' circumstances and confirmed that a number of the applicants were on the City's housing waiting list. The applicants were then informed that the 1st respondent had agreed not to proceed with the execution of the eviction order until 26 September 2016 and City officials would assist those applicants who qualified, to apply for social housing. In addition, the applicants were told that they would have 'first option' to apply for housing in future social housing developments which were scheduled to be completed in about 18 months' time.

13. On 12 September 2016 the Mayor issued a media release in which she indicated that she had intervened in the hope of mediating an amicable solution between the parties and negotiating for an interim stay of the eviction order. She reported that the City was investigating the applicants' circumstances on an individual basis as its housing allocation policy did not allow for it to assist groups of persons. In this regard, in order to ensure the fair, transparent and 'systematic' (sic) delivery of housing opportunities the City made sequential allocations to qualifying residents who were registered on its housing database, in order to prevent queue-jumping and to protect those who had been waiting patiently on the housing list.

14. Insofar as 4 of the applicant families appeared to qualify for social housing City officials undertook to take this up with them. As far as the remaining residents were concerned the Mayor confirmed that the City had plans to build two social

housing developments in the area within the next 18 months and the applicants were encouraged to apply in due course to be allocated accommodation therein.

15. On 15 and 16 September 2016 the applicants' attorneys directed further correspondence to the City requesting it to provide details by 19 September 2016 as to when it would provide emergency accommodation to the applicants, failing which application would be made to Court for the necessary relief. In the absence of a response thereto the instant application was launched on 20 September 2016.

16. In its original form the notice of motion sought an order in Part A suspending the execution of the eviction orders which were granted on 17 March and 19 August 2016 pending the outcome of Part B, in which an order was sought declaring that the City was under a constitutional duty to provide the applicants with temporary emergency accommodation in a location 'as near as possible' to erf 10626 Bromwell Street, within 3 months. To this end the applicants sought an ancillary order directing the City to report to the Court within 2 months as to what accommodation it would make available and the nature and proximity thereof, together with an explanation as to why the particular location and form of accommodation had been chosen. The report was also to set out the steps which had been taken by the City to 'meaningfully' engage with the applicants in regard to such accommodation.

17. In their founding affidavit the applicants alleged that there were 'at least 45 parcels' of vacant land which were owned by the State (of which 15 were owned by the City and the remainder by the provincial government), within a radius of 5 kms of the property, which were zoned for residential development and which could be used for temporary emergency housing. A spreadsheet containing details of these properties was annexed to the papers. Included amongst these were a number of pieces of vacant and improved land in Woodstock and Salt River.

18. Between 23 September-9 November 2016 a series of postponements were effected by agreement, in order to afford the applicants an opportunity to apply

for various forms of social housing which might be available, and for the filing of a report and affidavits as to the outcome thereof.

19. Social housing is housing which is subsidized to a greater or lesser extent, depending on the financial circumstances of the applicant, and is not free.[5] It appears that as at September 2017 it was generally available in the inner City of Cape Town for households with a monthly income of between R 3501 and R 15 000.[6] Those earning less than R 3500 would therefore ordinarily not qualify. According to the Acting Executive Director: Human Settlements[7] some social housing projects outside of the inner City allowed for households with a lesser monthly income of between R 1500 and R7 500 to apply.

20. From the voluminous records which were filed in relation to this aspect it is clear that the applicants and their attorneys went to considerable effort to complete and submit the necessary application forms to a number of social housing companies that offered subsidized housing throughout the City metropole and surrounds, including the Madulammoho Housing Association, Communicare NPC, SOHCO Property Investments NPC, the Devmark Property Group's company Urban Rentals NPC, and the Cape Town Housing Company (Pty) Ltd ('CTHC').[8]

21. The outcome of this process was that (save for 3 units which were available from Communicare and which were offered to 3 of the applicant families) there was no social housing available in the greater Cape Town for the applicants, principally because they did not meet the basic affordability/income and other criteria to qualify for it.[9] The Director: Human Settlements subsequently confirmed in an

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[5] Social housing is regulated by the Social Housing Regulatory Authority, established in terms of the Social Housing Act 16 of 2008.

[6] Para 2.3 of *The Woodstock, Salt River and Inner-City Precinct Affordable Housing Prospectus*, issued on 25 September 2017.

[7] Para 53, at p 544.

[8] An affidavit reporting on the outcome of these applications was filed by the applicants' attorney in December 2016 *vide* pp 1714-1729 of the record.

[9] None of the applicants were earning enough to afford a home loan to purchase the GAP housing which was available (ie in excess of either R 6000 pm or depending on the circumstances R 7500 pm) or to apply for FLISP housing ('finance-linked individual subsidy' housing which is available to persons earning between R 3500 and R 15 000 pm). In addition, the CTHC had no subsidized stock available and Urban Rentals NPC had not yet constructed any units.

affidavit which was filed in March last year in response to the amended relief which is sought that, save for one of the Smiths, none of the applicants currently before Court qualify for social housing in the City.

22. The matter came before Weinkove AJ for hearing on 31 January and 1 February 2017, pursuant to which he requested further information from the applicants pertaining to the places of employment and working hours of those who were employed, the schools which the applicants' children were enrolled at, and any medical conditions the applicants suffered from and the health facilities they were attending for treatment.

23. This information was sought was because the City had offered the applicants emergency housing in the form of 26.5 sqm corrugated 'shack' structures in Wolwerivier, a so-called 'temporary relocation area' ('TRA') which is situated some 30 kms outside the City centre, near Melkbosstrand and Atlantis, and in the event that the applicants were relocated there they would have to commute to Cape Town and Salt River (a 37.5 kms trip one way) by means of a number of journeys by taxi, as there was no public transport available[10] and the City had indicated[11] that it was not prepared to offer the applicants assistance with transport to work and school. Thus, commuting would entail them having to catch a taxi from Wolwerivier to Du Noon in Milnerton, a second taxi from there to the central taxi rank at the Cape Town Station, and then a third taxi from there to their ultimate destination in Woodstock/Salt River or City surrounds, at a daily cost <u>each way</u> of about R 30 per person. Given the distances and logistics involved any single commute would entail a number of hours of travelling time. It is important also to point out that there were no schools in Wolwerivier, and the most likely nearest affordable schools for the applicants' children were probably situated in the Du Noon informal settlement, outside Milnerton.

24. In a letter from their attorneys dated 8 December 2016 the applicants recorded that a total of 27 persons (16 adults and 11 children) had not been able to secure

[10] In an affidavit by the Director of Informal Settlements dated 30 January 2017 the City confirmed that there was no public transport directly to Wolwerivier but 'should it be required' (?) the local bus company would be asked to place a bus stop there, on its route to Atlantis.

[11] *Id*, para 15 p 1974 of the record.

social or other housing and thus required emergency accommodation. They indicated that they had concerns about accepting the offer which the City had made to provide them with such accommodation in Wolwerivier, given the absence of schools, health facilities and work opportunities there and the distance between it and the City/Woodstock-Salt River area, which would adversely affect the applicants' ability to get to their current workplaces, schools and health facilities.

25. According to the City's 2016/17 review of its then Integrated Human Settlements 5 Year Plan (July 2012-June 2017), a copy of which was attached to the answering affidavit which was filed by the Acting Executive Director: Human Settlements, Wolwerivier was established to accommodate approximately 500 families who had been living in Skandaalkamp and Rooidakkies informal settlements on the Vissershok landfill site, near Durbanville. The review noted[12] that there was no infrastructure in the area where Wolwerivier had been established 'as yet' and alternative solutions for sanitation 'needed to be explored'(sic). The review recorded that as 'urbanisation, population growth and climate change' had caused an 'increase in demand' for the type of accommodation offered in TRAs the City had embarked on various initiatives to establish more of these 'temporary housing opportunities'.

26. Pursuant to certain remarks which were made by Weinkove AJ during the hearing on 31 January and 1 February 2017 an application was launched for his recusal, which was postponed for hearing together with the further hearing in relation to the applicants' circumstances and transportation needs, to 3 and 4 August 2017. Having considered the application, on 14 June 2017 Weinkove AJ acceded to the request that he should recuse himself.

27. On 20 July 2017 the matter was enrolled for hearing before this Court in respect of Part B of the application, and a timetable was agreed for the filing of further papers. The matter was thereafter postponed for further hearing from 12-14 September 2017.

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[12] At p 39 thereof, p 659 of the record.

28. In her original answering affidavit which was filed in October 2016 the Acting Executive Director: Human Settlements outlined how the City went about attending to the permanent housing needs of its residents, by carrying out various housing programs it was constitutionally required to.

29. She pointed out that in 2015 the City had devised a new so-called Integrated Human Settlements Framework policy (the 'IHSF') which is given effect to in 5 yearly tranches, which identified how the City's permanent housing delivery needs were going to be met from 2015 until 2030.

30. The extent of these needs is staggering and how the City will ever realistically be in a financial and logistical position to meet them stretches credulity, notwithstanding its best intentions. According to the Acting Executive Director it was estimated that in the 20-year period between 2012 and 2032 some 650 000 households in the greater Cape Town would need some support from the City in regard to housing. Approximately 315 000 people (i.e. some 49%) of the projected estimated total population of the City by 2032 would be earning below the top of the current earnings threshold for support (i.e. R 13 000 pm in present day terms), and would therefore be eligible for support.

31. As at the date of the Acting Executive Director's affidavit in 2016, some 5 years ago, about 143 000 people (i.e approximately 22% of the City's then total population) were living in informal settlements, 73 000 were so-called back-yard renters, about 12 000 were living in hostels and a further 150 000 (16% of the City's total population) were living in overcrowded conditions in formal housing. Anyone who has been living in the greater Cape Town area in the 5 years since then can attest to the exponential and extensive expansion in informal settlements.

32. The 2015 IHSF envisaged that a variety of projects would be undertaken by the City in the 20 years between 2012 and 2032 in order to address the housing 'plight' of the 650 000 households that will require support, which it estimated will cost in the region of R 100 billion i.e. some R 5 billion per year.

33. Faced with these already outdated figures one does not need to be an economist to shake one's head at the enormity of the challenges which the City faces and to

express scepticism about whether the laudable programs which it has set for itself will ever be implemented. In this regard the Acting Executive Director herself sounded a warning note in 2016, pointing out that the scale of delivery at the time was not meeting demands and the cost of delivering new settlements had become increasingly 'unbearable'.

34. For the purposes of this judgment it is neither appropriate nor necessary, at this stage, to traverse the range of housing programs which the City is currently engaged in or those which it intends to implement in the next 20 years, other than its emergency housing program. It is the emergency housing program, which is supposed to be a form of temporary housing for those persons who are rendered homeless, that is in issue in this matter, and not the other housing programs, which relate to permanent housing needs.

35. In this regard the Acting Executive Director stated that the City was 'amenable' to providing those applicants who did not qualify for any other form of housing assistance, with access to emergency housing[13] and to this end the City acted in accordance with Chapter 12 of the National Housing Code, which had been promulgated pursuant to the Housing Act.[14]

36. The Acting Executive Director noted the applicants' concerns about having to be relocated 'far away' to Wolwerivier and accepted that evictees should be relocated to areas in the vicinity of where they live, if possible.[15] However, this was a 'complex issue' as the City had 'limited options' available to it in the vicinity of where the applicants currently lived[16] and there were a number of factors which made it difficult for the City to provide accommodation for evictees in the inner City, including the high costs of land and development in the City, and the limited availability of land which was suitable for this purpose.[17]

37. Nonetheless, as regards land for emergency housing the City proactively, but also on an ad hoc basis identified suitably located sites where it could accommodate households in terms of the National Housing Programme for

[13] Para 97, p 559.
[14] Act 107 of 1997.
[15] Para 190, p 593.
[16] Paras 138 and 143.2, pp 573-574.
[17] Para 190, p 593.

Housing Assistance in Emergency Housing Circumstances, as identified in the National Housing Act and the Code. In this regard the City had 'conceptualized a process and product that (was) quicker to deliver and (which was) premised on being permanent albeit incremental' hence its name ie 'incremental development area' ('IDA)'. A number of possible locations for the development of such areas had been identified such as Sir Lowry's Pass and 'Bosasa' (in Blue Downs). These IDAs would be planned and developed in the forthcoming 3 years and additional sites would also be identified 'across' the city.

38. There was currently no IDA available in 'close proximity" to the City centre[18] and no available emergency housing in the immediate City centre and surrounds.[19]

39. There were however a range of housing programs which were targeted at these areas which were in the planning and preparatory phases and which were aimed at creating affordable inner-city housing and 'temporary housing' projects. Included amongst these was a mixed land-use development in the inner City known as the Cape Town Foreshore Freeways project (which was aimed at providing multiple-level income housing which would bring lower income earners closer to work opportunities in the City), and a proposed so-called 'transitional housing' development as well as a social housing development, in Salt River. In addition, a further 6 separate sites in Woodstock had also been 'targeted' for affordable housing projects. No details of these sites and projects were provided in the affidavit.

40. As far as the 45 parcels of vacant land which the applicants had identified were concerned, a number of these constituted public open spaces (such as parks and parking lots) or were too small in order to be viable for a housing project and some were not vacant and had houses or buildings on them, and could therefore not be used for emergency housing.

41. A further number of these pieces of land, including those situated around the former Woodstock hospital site, were earmarked for large-scale affordable housing developments. One of the smaller Woodstock sites, erf 12161, which

[18] Para 193, p 594.
[19] Para 66.2, p 551.

was situated in Pine Road, and which was some 366 sqm in extent, was jointly owned by the provincial government and the City and had been reserved for a social housing project.

42. The Acting Executive Director stated that the City was not in a position to provide individual tracts of land in the inner City to individuals or to small groups of beneficiaries as it was unaffordable, as the cost thereof would exceed the cost of development and in addition were the City to do so it would create a 'great unfairness' amongst residents in different areas. Thus, if such a policy were adopted beneficiaries in Khayelitsha would receive land and a structure thereon which would come in at a value of less than R 200 000 whilst beneficiaries of an equivalent-sized piece of land in the inner City would receive property to the value of up to 10 times that figure even without a structure on it, a result which was neither sustainable nor fair.

43. Shortly before the matter resumed for further hearing in September 2017 a number of important events occurred which were the subject of public announcements by a high-ranking official within the City's administration who was responsible for urban development, which were indicative of a material change in the City's policies.

44. On 18 July 2017, at the occasion of the fourth annual Affordable Housing Africa conference which was hosted in the City, councillor Brett Herron, the then Mayoral Committee Member responsible for transport and urban development, made a speech[20] in which he indicated that the need for housing for Cape Town's most vulnerable households was the single biggest challenge which the City was facing. He pointed out that apartheid spatial planning had consigned the majority of Capetonians to live in settlements which were far away from work and which had limited access to services and opportunities. He acknowledged that to date, efforts to radically transform Cape Town's spatial reality had fallen short, and said that he was proud to announce certain steps which the City intended taking in order to create new, affordable and well-located housing opportunities for its residents.

[20] The full text of which can be found at pp 2476-2483 of the record.

45. To this end the City had identified 10 City-owned sites in the City centre, Salt River and Woodstock which were to be used for affordable housing opportunities. Three of these sites had already been allocated to social housing institutions for social housing developments.

46. Two erven in Pine Road and six erven in Dillon Road, Woodstock had been allocated for the so-called Pine Road development, which would be carried out in two phases and would result in the construction of some 240 'studio', single and two-bedroom apartments. Secondly, the proposed Salt River Market development in Albert Road would result in a mixed income/mixed use development which would include some 476 affordable housing units.[21] In addition, the City intended to develop its very first inner-City 'transitional housing' project in Salt River. More information about this development would be available once Council approval for it had been obtained at the next council meeting.

47. There were also additional 'transitional housing' projects in the pipeline for Salt River and other areas in Cape Town, and officials were doing an audit of City-owned land parcels in Goodwood and Bellville. The City had also identified 5 additional land parcels which could be used for the further development of affordable housing opportunities in Salt River, Woodstock and the inner City.

48. Cllr Herron said that the manner in which the City was approaching these developments represented a '180-degree' change in how it intended to confront the urgent demand for affordable and inclusionary housing.

49. Importantly, he declared that apart from the commitment which was required from all roleplayers to make the City an inclusive and liveable space where there was room for everyone to share in equal access to opportunities and lower-income households could be situated on well-located land close to places of employment and social amenities, the City also had to 'militate against the displacement of residents *especially tenants in rental properties who have lived their entire lives in suburbs like Woodstock and Salt River* where high-end developments are rising at a rapid pace' because of their proximity to the CBD.

[21] From social housing units for household with a monthly income of less than R 15 000 pm, to GAP rental housing for households with a monthly income of between R 3 500 and R 20 000 pm.

50. Finally, he said that part of the 'undertaking' that the City was making was to provide, within its means, those who were facing *'*emergency situations' with safe, decent and affordable 'temporary' housing as close as possible to where they were working; or at least as close as possible to where they could get onto a bus, train or minibus-taxi (sic).

51. A week later, on 25 July 2017, Council approved a recommendation from the Transport and Urban Development Portfolio Committee dated 23 June 2017 that authority be granted for the implementation of a proposed 'transitional' housing development on erf 13814 in Salt River, a property located in Pickwick Road. In paragraph 4 of the report[22] which was submitted motivating the recommendation it was stated that the 'transitional' housing proposed was for 'temporary to semi-permanent' (sic) housing. The proposal was aimed at dealing with 'low-income' households that had been living for many years in informal settlements in the area, particularly in Pine Road and at the Salt River market. The existence of these settlements was delaying the development of affordable rental housing on these sites, which were earmarked for medium and high density affordable rental developments along the City's transport and development corridors, and which could yield more than 2000 affordable housing units 'as opposed to the current 50 informal settlement units'(sic).

52. There was already a 'transitional' housing scheme for 'street children' which was being operated from two buildings which were situated on a part of erf 13814, which were leased out to a welfare organization, which could be extended. According to the CRU ('Community Residential Unit') Feasibility Study for the development of the project[23] it was envisaged that once completed the scheme would provide a total of 42 units with 85 beds (in the form of 9 sqm single, 12 sqm two-bedroom and 14 sqm three-bedroom units, which would be serviced by

[22] Page 2487-2488 of the record.
[23] Pages 2494-2516 of the record.

13 toilets, 8 urinals, 18 showers and 18 basins and 2 communal kitchens, spread over two floors).[24]

53. As was previously pointed out, the project was targeted at the relocation of households living in informal settlements in Pine Road and the Stables (at the Salt River Market). In this regard it was recorded that there were some 117 people in 24 households living in 'informal shacks' in the Pine Road informal settlement, alone.[25] It was 'hoped' that the households living in the informal settlements could be supported into moving, and in this regard they would be consulted about social housing or GAP owned accommodation options which were available, as well as accommodation in TRAs (temporary relocation areas) or IDAs (incremental development areas), before those who could not otherwise be accommodated in such forms of housing, were placed in the scheme.[26]

54. Although the Feasibility Study defined the 'transitional housing' which was to be provided as housing for individuals and households that was 'temporary' and which helped them to prepare to move to more permanent housing 'solutions', it recognized that because of the shortage of alternatives for low-income households, some of them were likely to remain in the facility on a 'semi-permanent' basis.[27]

55. On the same day that council granted approval for the Pickwick development Cllr Herron issued a media release in which he stated that the project represented a new approach in terms of how the City intended to 'tackle the urgent demand for housing by those families who are displaced *or evicted from their homes due to rapid development,* amongst others'.[28]

56. He proceeded to reiterate the same undertaking which he had previously given on behalf of the City, to provide those who were facing 'emergency situations' with safe, decent and affordable temporary housing as close as possible to

[24] According to Cllr Herron the total cost for the project was R 11.1 million, of which it seems as if just short of R 5 million was to be funded from grants from the Communal Residential Budget, in terms of an approval which was granted in January 2017.
[25] Page 2499.
[26] Page 2501.
[27] Para 9, p 2498.
[28] Page 2521.

where they were working, and declared that in this regard the City had put an end to the development of so-called temporary relocation areas ('TRA's') on the outskirts of the metropole, far away from jobs and other opportunities.[29] The Pickwick transitional housing project confirmed the City's intent to honour this commitment, and the development would provide households who have been 'displaced or evicted' from their homes with temporary or semi-permanent housing, while opportunities for their permanent housing were procured.

57. As far as the project's operating model was concerned, the CRU Feasibility Study provided that although those taking up accommodation would be required to pay some monthly rent based on what they could afford, the City would subsidize those who required assistance, together with the operational costs of the facility, via its Rental Indigent Scheme.

58. On 13 September 2017 Cllr Herron issued a further media release, in which he announced the launch of the City's new inner-City social housing initiative, by making 5 City-owned sites in Pickwick Road, Salt River, New Market and Canterbury Streets Woodstock, and at the Woodstock Hospital, available for the development of inclusionary and affordable housing opportunities.

59. On 28 September 2017 the Affordable Housing Prospectus for the Woodstock, Salt River and Inner-City Precinct was issued. It called for bidders to submit proposals for the development of the 5 sites for the provision of 'affordable' housing i.e housing for households falling within the monthly income bracket of between R 3501 and R 18 000.

60. The proposed developments identified in the Prospectus included 1) the Pickwick development on erf 13814, a 3.3 ha social housing development which would provide 600 affordable social housing units together with 'transitional' housing on a small portion of the site 2) the large- scale Woodstock Hospital development (on 11 erven) over an area of 18 411 sqm, which envisaged a minimum of 700 social housing units 3) the Woodstock Hospital Park development adjacent to the Woodstock Hospital, which envisaged 200 social housing units; and 2 further

[29] Page 2522.

sites in Newmarket and Canterbury streets in Woodstock for which a further 350 social housing units in total were to be constructed.

61. Aside from erf 13814 the Prospectus also identified 2 further erven 12010 and 12011 in St James St, Salt River as sites for the development of a 42-room 'transitional' housing scheme, which was aimed at accommodating residents of 30 informal structures in an informal settlement on the Salt River market site.

62. In line with previous pronouncements, the Prospectus defined the 'transitional housing' which was to be provided as accommodation for individuals or families that had to be relocated, either as a result of evictions or because they had to be moved temporarily as a result of the upgrading of the sites on which they lived.[30]

63. In a supplementary affidavit which was filed by the Manager: Land Restitution and Social Housing, in November 2017, it was indicated that the estimated date of completion of the Pickwick site was December 2018 and she too confirmed that in the event that there were spare units left therein after allocations had been made for those who were to be relocated, these would be allocated for 'other emergency housing needs'(sic).[31]

64. As far as the St James Street sites were concerned, as at that date the City was still seeking a partner for the proposed developments and a feasibility study had not yet been conducted, and it was anticipated that the proposed rezoning which was required would result in legal challenges. In the circumstances the earliest date the St James development was expected to be completed was in late 2019 early 2020.

65. The Manager: Land Restitution and Social Housing said that although the City was trying to access other potential 'transitional' housing sites, on an ongoing basis, these were unlikely to be in the inner City due to the scarcity of land and the costs of development thereof. Consequently, the City would have to look to areas further afield such as Elsiesriver, Manenberg and Bellville. In 'due course' the City would develop a formal policy in respect of access to 'transitional'

[30] Page 2549.
[31] Para 17, p 2536.

housing, which would be adopted before the first 'transitional' housing development was completed in 2018.[32]

66. Pursuant to certain questions which were posed by the Court during the hearing on 12 and 13 September 2017, the City was given leave to file an explanatory affidavit by 1 November 2017, to which the applicants responded a month later. In doing so the applicants gave notice that in the light of the contents of the City's further affidavit they intended to amend their notice of motion to make provision for an order declaring that the City's housing program and its implementation in terms of its IHSF 5 year plan, was inconsistent with its constitutional and statutory obligations, to the extent that it failed to provide the applicants and residents of Woodstock and Salt River, who were at risk of homelessness due to eviction, with access to 'transitional' housing or temporary emergency accommodation in the immediate City centre and surrounds. Ancillary thereto the applicants sought an order declaring that the City was under a constitutional duty to provide them with such housing or accommodation in the Woodstock, Salt River and inner-City precinct (as identified in the Prospectus for Affordable Housing which was issued by the City on 28 September 2017), in a location 'as near as possible' to erf 10626 Bromwell Street.

67. In the affidavit which was made in support of the application to amend, applicants' attorney referred *inter alia*, to the contents of an interview which Cllr Herron had with a journalist in October 2017, during which he again repeated much of what he had previously said about the City's '180-degree change' in its housing policy. In this regard he reiterated the City's commitment to reversing the legacy of apartheid spatial planning which he said had been perpetuated after 1994 with the building of RDP settlements on large, cheap tracts of land on the outskirts of the City. He acknowledged that building such settlements effectively continued to penalize poor, mostly black communities, who were living on the fringes of the City.

68. He was reminded that he had previously announced there were plans for 'transitional' housing in the City which would provide 'spaces' for people who had

[32] Para 29, p 2543.

been evicted, and was asked how these would be allocated. In response, he said that the 2 ‘transitional’ housing sites in Salt River and Woodstock would initially house people who were living in settlements in Pine Road and at the Salt River market, where the City planned to build affordable social housing, and ‘when we’re finished the transitional housing facilities will remain for other families facing emergency situations.’(sic)

69. When he was asked what opportunities there were for housing people who were currently in living in emergency housing in Wolweriver and Blikkiesdorp (another TRA established by the City which is located in Delft), he responded that the City’s plans to build permanent homes at Wolweriver had been ‘set aside’ and people living there would ‘transition out’ as soon as ‘housing opportunities’ for them became available. Similarly, Blikkiesdorp would be closed (by the end of ‘this term of office in 2021’) as the City was building formal housing for families who were living there, at an alternative site.

70. The application to amend was opposed by both respondents. After a further delay, during which time answering and replying papers were filed and the proposed date in May 2018 for hearing the application was postponed, it was eventually heard on 13 August 2018, at which time after hearing argument I made an Order *ex tempore*, granting the amendment. For reasons which are not apparent from the papers before me, the grant of the amendment resulted in a further lengthy hiatus in the proceedings. A 54-page answering affidavit (together with annexures thereto totalling some 140 pages) in response to the amended relief which was sought, was eventually filed by the City some 2 years later, on 2 March 2020. In response the applicants filed a replying affidavit with annexures totalling 140 pages, some 3 months after that. Argument in respect of the amended relief which was sought was eventually heard over a period of 2 days, at the end of 2020.

71. In her answering affidavit to the amended relief which was sought the former Acting Executive Director: Human Settlements (who then held the title of Director: Human Settlements) dealt at some length with the relevant legislative, constitutional and policy framework in terms of which the City carries out its

obligations to provide housing to its residents. She sought to emphasize that both access to housing and access to emergency housing in the City needed to be evaluated against this framework and in the context of the City's burgeoning population, ever-increasing housing needs and its increasingly constrained financial resources, and could not be considered in isolation thereof.

72. She pointed out that, as at the date of her affidavit, the City's geographic area covered some 2487 sq kms, on which approximately 4 million people were living. Between 1996 and 2016 the City's population had grown by 56%. It constituted an amalgamation, which had occurred in December 2000, of metropolitan councils for the Helderberg, Oostenberg, Tygerberg, Blaauwberg, Cape Town and South Peninsula areas,.

73. As far as the legislative and policy framework was concerned, this was regulated by the Housing Act, the Transit Orientated Development policy, the Built Environment Performance Plan (which included the so-called 'Catalytic' Land and Project Development program), the IHSF: 5 Year Plan and the Emergency Housing Plan (the 'EHP').

74. It appears to have derived its name from the term 'emergency housing', as referred to in the Housing Act and the Code promulgated in terms thereof. The obvious anomaly which presents itself in relation to the term, and the flawed premise on which it is based, is that persons who are evicted will merely require, and thus need only to be provided with, temporary 'emergency' accommodation, when they are evicted. Whilst this may be true for the middle class, in the case of the poor and lower-income groups the accommodation which they will require will hardly be temporary. In these days of hard times with ever-increasing unemployment, less and less people earn enough even to feed and to sustain themselves, let alone to house themselves. Yet, in a twist of supreme and cruel irony, these are not the people who are offered support in the form of subsidized social housing. To obtain such support one needs to earn at least R 3501 pm.

75. According to the affidavit of the Director: Human Settlements, a socio-economic profile which was done as part of the Census in 2011 reflected that 47% ie just

under half of the households living in the City at that time earned below R 3200 pm, and a further 14% earned less than R 6400 pm.

76. The Director's affidavit revealed a further apparent change in policy that had taken place since 2016 which had not previously been revealed, either in the affidavits which the City had filed, or in the various media statements which had been made by Cllr Herron viz that the City was now 'developing' emergency housing within existing informal settlements. The Director provided lists[33] which set out the 'estimated' allocation of such housing (there is no indication of whether the figures which are set out therein represent units available or persons which could be accomodated) in various informal settlements, which were either in a planning or in a construction phase. In addition, contrary to what had been said by Cllr Herron in July and October 2017, the Director indicated that the City was continuing to develop TRAs and IDAs, for families in need of emergency housing.[34]

77. The Director also reiterated that, based on a range of factors, including the availability of land and the cost of development, the City was of the view that the developments which were proposed for Woodstock and Salt River 'best served the imperatives of social housing' as 'opposed' to emergency housing. Consequently, there were no available sites for such housing in the 'immediate' City centre. As far as 'transitional' housing developments in Woodstock and Salt River were concerned, the Pickwick project had been completed and all available rooms therein were occupied by persons who had been relocated from the Pine Road informal settlement, and construction of the St James Road development had not yet commenced. Thus, no accommodation was available for the applicants in any 'transitional' housing in Woodstock and Salt River.

78. As far as emergency housing was concerned the Director indicated that in the light of the complaints which had been raised by the applicants as to the suitability of Wolwerivier, particularly its distance from Bromwell Street, the City had embarked on a process to source an alternative option. It had identified a

[33] Pages 2790-2792.
[34] Para 93, p 2788.

site in Maitland at which it had offered emergency housing to the applicants in the form of 26 sqm prefabricated corrugated structures, but because of resistance from the local community the City had decided not to go ahead with this.

79. Consequently, they were now offering each of the applicant households emergency housing in Kampies (an informal settlement in Philippi which is 16.5 kms away from Woodstock), in the form of a 36 sqm plot with 'building materials' which included a door and a window, which could be used by the applicants to erect 18 sqm 'structures' thereon. The area was currently not serviced and water and sanitation i.e toilet facilities would only be provided (at a ratio of 1:5 and 1:25 persons respectively), if and when the applicants were relocated. As far as sanitation was concerned 'solid waste' collection would be provided in the form of 1 bag per household, once a week, from a 'communal container' which would be placed on the site.

80. The area for the proposed relocation was on an established bus and taxi route and was about 3 kms away from the Hanover Park day hospital, and there were a number of schools in Hanover Park. There were also a number of clinics and a police station nearby, in Philippi. In its offer the City indicated that when Kampies was upgraded in approximately 6 months time i.e by February 2020, the applicants would receive a 26 sqm structure consisting of a concrete platform and Nutec sides.

81. On 29 February 2020, some 6 months after the City's offer was made, the applicants and representatives of the City paid a visit to the proposed site in Kampies. Contrary to the City's promises, by that time the proposed upgrading had not taken place. This was still the case in May 2020, when the applicants' attorneys conducted a site visit.

82. Following the February visit the applicants requested certain further information including the cost to the City of the emergency housing kit and services which were to be provided, details of the plans which the City said it had to upgrade the site and confirmation that the upgrading would be in accordance with the relevant plan and policies which were applicable to the upgrading of informal settlements

in the City, and the EIA (environmental impact assessment) authorization for the development of Kampies. In response the City indicated that no planning or environmental approvals were necessary for the use of the site as an informal settlement and an EIA was not required, and the application for planning approval for the upgrading of the site was still underway.

83. The City indicated that the offer for accommodation in Kampies was open for acceptance until 7 April 2020. On 15 March 2020 the President announced the declaration of a national state of disaster as a result of the COVID-19 epidemic, and implemented a Level 5 'lockdown'. As at date hereof the state of disaster is still in place and a Level 3 'lockdown' is operative.

84. In their replying affidavit the applicants pointed out that according to data released by the provincial government, as at 20 May 2020 Philippi was listed as the suburb with the 6th highest number of Covid infections in the province. Consequently, in a letter which their attorneys addressed to the City dated 6 April 2020, the applicants indicated that they had elected not to accept the City's offer. They believed that given the circumstances which prevailed at the time in relation to the rate and spread of the Covid-19 virus, and the particular health conditions which certain of the applicants suffered from, which included asthma, diabetes, lung disease and high blood pressure, relocation to Kampies would pose a serious health risk to them. Furthermore, the applicants were of the view that the offer did not meet the City's constitutional and statutory obligations.

The law

(i) <u>The constitutional and statutory framework</u>

85. The principal provisions of the Constitution which are directly applicable to this matter are sections 25, 26, 9 and 7.

86. Section 25(1) provides that no one may be deprived of their property arbitrarily. It protects rights of ownership. Section 26(3) in turn provides that no one may be evicted from their homes arbitrarily. It protects occupancy rights. In terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act[35] ('PIE'), which seeks to give substance to this protection, an eviction can only be effected

[35] Act 19 of 1998.

by way of an order of court made after consideration of all the relevant circumstances.

87. As was explained in *Port Elizabeth Municipality* [36] the constitutional right not to be evicted arbitrarily is counterposed to the ordinary rights of possession, use and occupation which are incidents of the right of ownership. Because the expectations that go with ownership can 'clash head-on with the genuine despair of people in dire need of accommodation' (sic) the judicial function is not to establish a hierarchical arrangement between the competing interests involved, by 'privileging in an abstract and mechanical way' rights of ownership over the right not to be dispossessed of a home, or vice versa. It is to balance out and reconcile the opposing claims in as just a manner as is possible taking account of all the interests involved and the specific factors relevant in each particular case.[37]

88. The occupancy rights afforded by s 26(3) are but one of a subset of so-called 'housing rights', which are provided for by the section. In this regard s 26(1) provides that everyone has the right to have access to adequate housing, and in terms of s 26(3) the State must take reasonable legislative and other measures to achieve the progressive realization of this right. Progressive realization means, in effect, that the State is required to make housing more accessible, not only to a larger number, but also to a wider range of people.[38]

89. Importantly, as was pointed out in *Grootboom*[39] the right which is enshrined in s 26(1) of *access* to adequate housing is one that is distinct from and broader than a right *to* adequate housing. By encompassing a right of access, it recognizes that providing housing entails more than supplying 'bricks and mortar' and requires the provision of land and the supply of municipal services, as well as the necessary funding for this to be achieved. Section 26(1) therefore requires that the State should create and foster the necessary conditions for the

[36] *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC), para 23.
[37] *Id*.
[38] *Government of the Republic of South Africa & Ors v Grootboom & Ors* 2001 (1) SA 46 (CC), para 45.
[39] *Id,* para 35.

realization of housing rights, even though it is obviously not constitutionally enjoined to be the only or principal provider of housing.

90. *Grootboom* [40] held that this obligation to foster and promote access to housing means that state policy dealing therewith must take account of the different economic levels in our society. Thus, it must take account not only of those who can afford to pay for housing, either in part or wholly, but also those who cannot.[41]

91. In the case of the former the State's primary obligation lies in 'unlocking the system' by providing access to housing stock, laying out the necessary legislative and policy framework via planning laws and programmes, and providing access to finance to facilitate the construction of houses. In the case of those who are too poor to provide their own housing the State's obligations extend beyond this, and as the Constitutional Court has pointed out 'issues of development and social welfare' arise, because the poor are particularly vulnerable and their needs require 'special attention'.[42]

92. The State's obligation to realize these rights progressively will depend on the context and may therefore differ from one setting to another i.e from province to province, rural to urban, and city to city. What may be appropriate in one setting may not be in another.[43]

93. The right of access to adequate housing bears a close relationship to the other socio-economic rights which are provided for in the Constitution. It requires the State to take positive action to meet the needs of those living in extreme conditions of poverty, homelessness or 'intolerable' housing.[44]

94. It was pointed out in *Blue Moonlight*[45] that the provision of temporary or 'emergency' accommodation to persons who find themselves in situations of

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[40] *Id.*
[41] *Id,* para 36.
[42] *Id.*
[43] *Id*, para 37.
[44] *Id*, para 24.
[45] *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd & Ano* 2012 (2) SA 104 (CC), para 88.

crisis or emergency is an accepted part of the State's obligation to provide access to adequate housing, in terms of s 26.

95. Thus, although this does not appear to be an aspect that has been pertinently and directly dealt with by the highest Courts, as I see it there is no apparent reason in logic or law why the State's obligations in this regard should also not be realized in a progressive fashion, subject to the constraints referred to, including available resources.

96. I find support for this in the overview to Part A of the National Housing Code which deals with housing assistance in emergency circumstances. It states that in pursuance of its goal of recognizing everyone's constitutional right of access to adequate housing on a *progressive* basis, the State has instituted a National Housing Programme through which it endeavours to address the needs of households who, for reasons beyond their control, find themselves in an 'emergency housing situation', such as where their existing shelter has been destroyed or damaged, or their prevailing situation poses an immediate threat to their life, health and safety; or they have been evicted, or face the threat of imminent eviction.

97. It is important to note that in terms of s 9(1) of the Constitution all persons who have rights in terms of s 26(1) which may be affected (which in terms of the National Housing Code includes those evictees who may be rendered homeless), are entitled to be treated equally before the law and are entitled to the equal protection and benefit of the law. Equal protection under the law is central to the rule of law.[46]

98. Finally, it is trite that in terms of s 7 the State is obliged to respect, protect, promote and fulfil the rights which are contained in s 26.

99. As far as the principal statutory provisions which are relevant to this matter and which give effect to the State's constitutional obligations are concerned, these are set out in the Housing Act[47] and the National Housing Code which has been enacted in terms thereof, and PIE.

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[46] *Van Der Walt v Metcash Trading Ltd* 2002 (4) SA 317 (CC).
[47] Act 107 of 1997.

100. In expressly repeating the provisions of ss 26(1) and (2) of the Constitution the preamble to the Housing Act recognizes that 'housing as adequate shelter fulfils a basic human need'. The Act similarly obliges municipalities, as part of their process of integrated development planning, to take all reasonable and necessary steps within the framework of national and provincial housing legislation and policy to ensure that inhabitants within their areas of jurisdiction have access to adequate housing on a progressive basis.[48] To this end, every municipality must set housing delivery goals,[49] identify and designate land for housing development,[50] and initiate, plan, coordinate, facilitate, promote and enable appropriate housing development.[51]

101. The Housing Code contains the national housing policy, and as such, it sets the principles, guidelines and standards that are to apply to the various housing programs which are to be implemented by the State. Chapter 12 of the Code sets out the provisions of the National Housing Programme for Housing Assistance in Emergency Circumstances. The Programme applies to emergency situations of 'exceptional housing need', where persons have become homeless owing to circumstances beyond their control.

102. Included amongst these are situations involving not only natural or declared states of disaster but also situations where persons are living in dangerous conditions or in conditions that pose a threat to life, health and safety, as well as instances where people have been displaced or threatened with displacement either as a result of civil conflict or unrest or because they have been evicted, or are threatened with imminent eviction.

103. Funding for the Programme occurs by way of annual grants from the Minister of Housing to provincial governments.[52] Provincial governments are, in turn,

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[48] Section 9(1)(a)(i). These functions must be exercised in accordance with those set out in the Local Government: Municipal Systems Ac 32 of 2000. Section 4 (2)(j) thereof stipulates that a municipal council has a duty to contribute to the progressive realization of the fundamental rights contained in s 26 of the Constitution, and to ensure that the municipality's legislative and executive authority and its resources are used in the best interests of the local community (s 4 (2)(a)).

[49] Section 9(1)(b).

[50] Section 9(1)(c).

[51] Section 9(1)(f).

[52] Which are transferred in terms of the Division of Revenue Act

responsible for funding and implementing the Programme in partnership with municipalities.[53] If a municipality determines that a situation requires immediate or emergency assistance beyond its means, the MEC may approve ad hoc funding. And where necessary, national government must provide assistance with the release of state-owned land, for emergency purposes.[54]

104. It is the responsibility of a municipality to consider whether specific circumstances within its area of jurisdiction merit the submission of an application for assistance under the Programme, and to this end municipalities are required to initiate, plan and formulate applications for projects relating to emergency housing situations.[55]

105. The purpose of the financial assistance which is awarded is to enable municipalities to respond to housing emergencies by providing land, services and/or shelter, and to cover the costs of the possible relocation and resettlement of people in appropriate cases. Assistance should, wherever possible, only represent an initial phase towards a permanent housing solution. Where this is not possible housing assistance under the Programme can be provided on a temporary basis, through the development of a temporary settlement area,[56] while steps are taken to prepare and develop land for permanent settlement purposes.

106. Importantly, beneficiaries of the Programme include both households that comply with subsidy scheme qualifications i.e who are eligible for housing subsidies as well as those that do not. In the circumstances, the Programme is clearly intended to cover all affected persons who are not in a position to address their housing emergencies.

107. That brings us to the provisions of PIE, which sets out the process and procedures which apply to evictions. It repealed the Prevention of Illegal Squatting Act[57] ('PISA'). As was pointed out by Sachs J in *Port Elizabeth*

[53] Para 2.6.2 of Part A of Part 3 of the Code.
[54] *Id*, para 2.6.3.
[55] *Id*, para 2.6.1.
[56] It is on this basis that the City has established its so-called 'temporary relocation areas'.
[57] Act 52 of 1951.

Municipality,[58] in terms of PISA once it was established that an occupier had no permission to occupy land they were liable to be prosecuted criminally and, on conviction, to be evicted summarily. The circumstances as to how they came to occupy the land, and the length of time they had occupied it were irrelevant. Thus, as is the case in relation to some of the applicants in this matter, even if they had been born on the land and had spent their whole lives living on it, once they no longer had a right to occupy it they were effectively treated as criminals and could be rendered homeless.

108. PISA was one of a number of statutes that were used collectively to drive the forced removal of black people from land in the Cities to racially designated and segregated settlements, in accordance with the grand designs of apartheid spatial planning.[59] The result of the implementation of these laws was the expulsion of black people to the outskirts of cities.

109. PIE was adopted with the objective of overcoming these abuses and ensuring that evictions occur in a manner which is consistent with the new constitutional order. As Sachs J pointed out[60] PIE not only repealed PISA, but in a sense inverted it, by decriminalizing squatting and making the eviction process subject to a number of substantive and procedural requirements aimed at complying with the Bill of Rights. The legislative change of intention from one aimed at preventing illegal squatting to one aimed at preventing illegal eviction is evident from the preamble to PIE.

110. Section 4(6) of PIE provides that if an unlawful occupier has occupied land for more than 6 months at the time when proceedings are instituted, a Court may grant an order for eviction if it is of the opinion that it is 'just and equitable' to do so, after considering all relevant circumstances including whether land has been made available or can reasonably be made available by a municipality or other organ of state or another landowner, for the relocation of the unlawful occupier, and including the rights and needs of the elderly, children, disabled persons and households headed by women.

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[58] Note 36, para 8.
[59] *Id*, para 9.
[60] *Id*, para 12.

111. In *Port Elizabeth Municipality* the Constitutional Court held[61] that the phrase 'just and equitable' makes it plain that the criteria that need to be taken into account and applied are not of the purely technical kind, such as those which would ordinarily flow from the provisions of land law, and there is an emphasis on justice and equity as a central underpinning of the Act.

112. Thus, the Constitutional Court endorsed the approach which was adopted in *Port Elizabeth Municipality v Peoples Dialogue on Land and Shelter and Others*[62] that when deciding an eviction matter a Court is obliged to break away from a purely legalistic approach and must have regard for extraneous factors such as morality, fairness and 'social values and implications and circumstances', with a view to rendering an equitably principled judgment. It held [63] that the Court is required to infuse 'elements of grace and compassion' into the process. It is called upon to go beyond its traditional functions and may in appropriate cases have to engage in the active judicial management, according to equitable principles, of an 'ongoing, stressful and law-governed social process'.[64] By doing so it can at least attempt to soften and minimize the degree of injustice and inequity which the eviction of weaker parties in conditions of inequality will of necessity entail.[65]

113. Finally, it should be noted that the effect of PIE is not to expropriate ownership rights in private property. It serves merely to delay or suspend the exercise of such rights until a determination has been made as to whether or not a proposed eviction would be just and reasonable, and if so, on what terms and conditions it is to occur.[66]

(ii) <u>Rationality, reasonableness and judicial scrutiny</u>

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[61] Para 35.
[62] 2000 (2) SA 1074 (SECLD).
[63] Para 37.
[64] Para 36.
[65] Para 38.
[66] *Nlovu v Ngcobo; Bekker & Ano v Jika* 2003 (1) SA 113 (SCA), para 17; *City of Johannesburg v Changing Tides 74 (Pty) Ltd & Ors* 2012 (6) SA 294 (SCA), para 17.

114. As was pointed out in *Blue Moonlight,*[67] in a challenge to the constitutionality of a housing programme in terms of ss 26(2) and 9(1) of the Constitution, the concepts of rationality and reasonableness are central.

115. Insofar as rationality is concerned, where the challenge is directed at allegedly unfair differentiation between different categories of evictees, as is the case in this matter, it will have to be considered whether the differentiating measures bear a rational connection to a legitimate governmental purpose.[68] If they do not, they will be irrational, and measures that are irrational can hardly be said to be reasonable.[69]

116. In *Pharmaceutical Manufacturers* [70] we were also reminded that it is a fundamental principle of the law that the exercise of public power by the executive and other functionaries should not be arbitrary, failing which it will similarly be considered to be irrational. In *Makwanyane*[71] the Constitutional Court pointed out that by its very nature arbitrariness leads to the unequal treatment of persons: '*Arbitrary action or decision-making is incapable of providing a rational explanation as to why similarly placed persons are treated in a substantially different way. Without a rational, justifying mechanism, unequal treatment must follow*.'

117. Arbitrariness which leads to unequal treatment offends against the right to equality, which is considered a founding value of our Constitution.[72]

118. In relation to the issue of reasonableness, in *Grootboom* it was pointed out that in giving effect to its obligations in terms of s 26 the State is required not only to take reasonable *legislative* measures to advance access to housing, but also such *other* reasonable measures as may be required.[73] To achieve this the legislative measures it relies on must therefore be supported by 'appropriate and

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[67] Note 45, para 87.
[68] *Id*, citing *Harksen v Lane N.O & Ors* 1998 (1) SA 300 (CC), para 43.
[69] *Id*.
[70] *Pharmaceutical Manufacturers Association of South Africa & Ano: In re Ex parte President of the Republic of South Africa* 2000 (4) SA 674 (CC), para 85.
[71] *S v Makwanyane & Ors* 1995 (3) SA 391 (CC), para 156.
[72] *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd & Ano* 2011 (4) SA 337 (SCA), para 63.
[73] Note 38, para 42.

well-directed policies and programs'[74] and it must devise a 'comprehensive and workable' plan[75] and develop a 'coherent public housing programme'[76] which is directed at effecting a progressive realization of its obligations. But the formulation of reasonable plans or cogent programs will not be sufficient. These must also be implemented *reasonably*, otherwise there will not have been compliance with the obligations provided for in s 26.[77]

119. In this regard we are further reminded[78] that reasonableness must be understood in the context of the Bill of Rights as a whole and the other rights contained therein notably those pertaining to dignity and equality. It will therefore not be sufficient merely to show that measures have been devised which are capable of achieving a 'statistical advance' in the realization of the right of access to housing, be it permanent or temporary. If the measures though 'statistically successful' fail to respond adequately to the needs of those 'most desperate' they will not pass the test of reasonableness.[79]

120. In evaluating whether a set of measures is reasonable it is necessary to consider the particular housing problems or issues which they aim to address in their social, economic and historical context, and the capacity of the organ of state concerned to implement the measures i.e its financial and other resources.[80]

121. Although s 26 does not expect more from the State than what is achievable within its available resources, a task which the Constitutional Court held already 20 years ago was an extremely difficult one given the prevailing conditions in our country, despite these difficulties the State is obliged to do so the best it can with what it has, and in appropriate circumstances a Court must not hesitate to enforce these obligations.[81]

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[74] *Id*.
[75] *Id,* para 38.
[76] Para 41.
[77] Para 43.
[78] Para 44.
[79] *Id.*
[80] Para 43.
[81] Paras 46 and 94.

122. In *Blue Moonlight* the Constitutional Court also held[82] that the fact that in terms of the Housing Code funding for emergency housing is derived from provincial (and ultimately national) sources does not mean that a City's capacity to provide such housing is solely and only dependent on such funding, as this would effectively mean that no emergency housing could ever be provided, unless and until provincial or national government had granted funding for it, which would go against the very essence of providing housing when needed in emergency situations. Thus, local government is expected to budget and provide, as far as possible, for such eventualities, and it has both the power and the duty to finance its own activities and operations, which of necessity may include the provision of emergency funding from its own resources.[83]

123. Thus, in the determination of the reasonableness or otherwise of the measures which have been adopted by a municipality to provide for emergency housing, a Court cannot be stymied by budgetary, or financial or resource constraints, where the inability to provide such housing came about as a result of a lack of foresight or preparedness on the part of a municipality, or as a result of a mistaken understanding as to the nature and extent of its constitutional and statutory obligations. In such circumstances it will be no answer to say that there are no funds available for what is sought, because they have not been budgeted for or provided.[84]

124. Finally, something must be said about the ambit and limits of judicial scrutiny, in matters such as these. In the first place, a Court should caution itself against getting carried away in the exercise of its functions, thereby breaching the separation of powers and inadvertently intruding into the domains of the executive and legislative authorities, by virtue of the fact that the process that it is required to follow in eviction matters is one that goes beyond that which would ordinarily apply, and is one infused by notions of morality, fairness and equity.

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[82] Note 45, paras 63, 66 and 67.
[83] *Id*, para 67.
[84] Para 74.

125. As was so aptly said in *Treatment Action Campaign & Ors (No. 2)* [85] courts are ill-suited to adjudicate upon issues where their orders could have 'multiple social and economic consequences' for the community, and the Constitution envisages a restrained and focused role for them viz to require the State to take measures to meet its constitutional obligations, and to subject the reasonableness of such measures as are taken, to judicial scrutiny and evaluation.

126. In matters such as these the Court is required to consider whether, in formulating and implementing the measures it was required to take in respect of emergency housing in terms of s 26(2) of the Constitution, the State has given effect to its constitutional obligations. If it holds that the State has failed to do so it is obliged by the Constitution to say so, and insofar as that may constitute an intrusion into the domain of the executive, it is one mandated by the Constitution.[86]

The law applied

(i) Taking account of the social, economic and historical context

127. Lauren Royston, a professional development planner[87] and the Director of Research and Advocacy at the Socio-Economic Rights Institute, has provided an affidavit which sets out the context to the issues around housing in the inner City and the Woodstock and Salt River areas, and has explained the gentrification that is taking place there, which has led to the situation which the applicants find themselves in.

128. She points out that as at 2015 the housing backlog in the greater City for qualifying households was just under 400 000 homes. State-sponsored housing in the Cape Town metropole was still largely concentrated on the outskirts and there was an absence of subsidized i.e social housing close to the City centre. Unlike in Johannesburg, as at 2016 none of the developments that had been built

[85] *Minister of Health & Ors v Treatment Action Campaign & Ors (No.2)* 2002 (5) SA 721 (CC), para 38.

[86] *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd & Ano* 2011 (4) SA 337 (SCA), para 73.

[87] Ms Royston has an impressive *curriculum vitae*. Aside from an MSc in Development Planning, she has conducted research and presented a number of academic papers and published extensively on urban land tenure security, access to housing and the upgrading of informal settlements. She has wide-ranging integrated development planning experience and was involved in developing a housing planning model for the National Department of Housing (now Human Settlements). She has served as the member of a panel responsible for assessing municipal capacity and compliance for housing accreditation and making recommendations pertaining thereto, to provincial housing MECs.

under the social housing programme were in the inner-City precinct or surrounds. Furthermore, none of Cape Town's 'affordable' suburbs (based on land values) were situated in close proximity to the City centre, and living in the inner City was increasingly an exclusive privilege which was reserved for the wealthy. The apartheid spatial form continued to predominate, with poor black African and coloured families living on the outskirts of the City and commuting long distances, at great economic and personal expense, to workplaces and educational facilities.

129. During apartheid the Woodstock and Salt River areas were some of the only inner-City neighbourhoods in which coloured households managed to survive large-scale forced evictions, such as those which occurred in District 6, in nearby Zonnebloem, where some 60 000 people were forcibly evicted from the City.

130. Following the end of apartheid and the steady demise of the textile industry, residential demographics began to change, as the areas began to attract individuals from the arts and creative sector. The creation of a neighbourhood goods market at the Old Biscuit Mill in Albert Road, Woodstock in 2005 was one of the first creative-industry-led developments in the area and its success encouraged further developments.

131. A gentrification and regeneration process commenced, driven largely by private property developers who capitalized on rapidly increasingly property values and tax incentives they were afforded from 2012 onwards,[88] after the inner-City precinct which included Woodstock and Salt River, was declared an Urban Development Zone.[89]

132. This process was aided by the adoption of the Woodstock and Salt River Revitalization Framework ('WSRF') policy in 2003, and changes[90] to the zonings which applied to the area, which were introduced in 2012, whereby properties along Victoria and Albert Roads (which included the Bromwell street property),

[88] In the form of deductions in respect of capital expenditure for private residential or commercial developments, pursuant to the Taxation Laws Amendment Act 22 of 2012.
[89] The geographic area of the UDZ has been extended to include Maitland, Parow and Oakdale.
[90] Via amendments to the municipal planning by-laws and zoning schemes between 2012 and 2015.

which were previously zoned for ‘general commercial’ use were rezoned for ‘mixed use’.

133. According to the 2011 census, approximately 42% of households in Woodstock were earning R 6400 p.m. or less, at that time. Using the generally accepted affordability measure of 30% of household income, they could therefore afford rentals of R1920 p.m or less. Rental reports for the area for 2016 reflected that the average rental for properties in Woodstock for the preceding 2 years had risen to about R 5200 p.m. Based on the same affordability measure of 30% of household income, families in Woodstock would have had to be earning at least R 17 500 p.m. as at October 2016 in order for them to be able to afford the prevailing average rentals. Based on a demographic profile of the area this would most likely have been out of the reach of many, if not the majority, of households.

134. A director of the 1st respondent indicated during an interview which he held with a radio station in August 2016, that apartments which were to be erected on the Bromwell site were expected to be rented out at an estimated average rental of R 5000-R 9000 p.m.

135. He confirmed that property values in the City centre had risen quite extensively, and in Woodstock ‘the pricing certainly has outrun even the middle market in terms of their ability to afford the property’ (sic). In this regard, whereas in 2003 the average sale price for houses and apartments in Woodstock was between R 100 000 and R 300 000, as at 2015 it was about R1.6 million. According to data collected from the Registrar of Deeds, prior to 2004 the sale prices of properties on Bromwell Street had not exceeded R 750 000. As was pointed out earlier, the property on which the applicants are living was purchased by the first respondent in October 2013 for R 3.15 million.

136. Although the WSRF policy which was adopted in 2003 made provision for under-utilized public buildings in the Woodstock-Salt River area to be used for social programs and for public use, including accommodation for vulnerable groups such as homeless people and the elderly, and to this end it proposed rehabilitation subsidies for the conversion and maintenance of buildings as well as subsidies to ensure access to affordable accommodation, including interest-

rate and rental subsidies for low-income groups, these proposals have not been implemented to date.

(ii) Towards a finding

137. As was rightly pointed out by the applicants the City does not have a single, permanent housing program or policy, which is recorded in a single document. It has an overall housing delivery programme which is made up of a number of constituent and interrelated elements or parts. These are not in issue in this matter. What is in issue in this matter is the provision by the City of emergency housing to persons in the inner City and its surrounds, in particular Woodstock and Salt River, who are rendered homeless pursuant to an eviction.

138. In this regard the City does not appear to have a comprehensive, workable and coherent emergency housing plan or program, at least not its own one, and appears to have adopted inconsistent and contradictory stances and policies. And its implementation of its emergency housing program, such as it is, in relation to such persons, appears to be inconsistent and arbitrary.

139. In its original answering affidavit[91] in 2016, the City made reference to the 'Emergency Housing Programme' which is contained in Chapter 12 of the Housing Code, and said that it delivered on the Programme via 'temporary relocation' and incremental development' areas. It described the former as parcels of land that have been developed for families in need of emergency housing, in regard to which there were 'projects' at Mfuleni, Happy Valley, Blikkiesdorp, Wolwerivier, Sir Lowry's Pass and Bardale, and TRA 'units' at OR Tambo, Hangberg and Masonwable in Gugulethu. In addition, it had identified a further set of possible 'incremental development areas' which could be used for emergency housing.

140. Consistent with this approach, in its original answering affidavit it evinced a no-exceptions policy that all evictees from the inner City and surrounding areas such as Woodstock and Salt River could only be provided emergency housing in a TRA or IDA. It averred that, in the case of the applicants, the only emergency housing available was outside of the City in the Wolwerivier TRA near Atlantis,

[91] Paras 42-48, pp 540-542 of the record.

some 37 kms from where the applicants were living. It vigorously defended its allocation, and contended that there was no constitutional obligation on it to house the applicants in a location as near as was feasibly possible to where they were living, notwithstanding that its Acting Executive Director: Human Settlements accepted that evictees should be relocated to areas in the vicinity of where they lived, if possible, and notwithstanding that this is, in effect, what the Constitutional Court had ordered, in two matters which came before it.[92]

141. In contrast to the position the City set out in its original answering affidavit, in July and October 2017 the City's Mayoral Member responsible for urban development announced that it had made a '180 degree' change in its policy in regard to both permanent and temporary housing. It now undertook to provide those in the inner City and its surrounds who were facing 'emergency situations' (this would of necessity include evictees who might be rendered homeless) with temporary housing close to where they were working and living, and it intended to provide 'temporary' (or as it turned out 'semi-permanent'[93]) so-called 'transitional' housing in Woodstock and Salt River to people who had either been displaced or evicted. In addition, the Mayoral Member announced that the City intended to 'transition' people who had been relocated to the Wolwerivier and Blikkiesdorp TRAs, to permanent housing. In fact, Blikkiesdorp was going to be closed down, before 2021. In a later statement the Mayoral Member confirmed that the 'transitional' housing developments in Woodstock and Salt River would not only be used to house homeless evictees from the Pine Road and Salt River informal settlements, but would continue to be used in the future to house homeless evictees from Woodstock and Salt River, once the original occupants had moved on or there otherwise was capacity to do so.

142. In its further answering affidavit in 2020 the City claimed that it had an Emergency Housing Plan,[94] which had been explained 'elsewhere'. However,

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[92] In *City of Johannesburg Metropolitan Municipality v Changing Tides 74 (Pty) Ltd & Ors* 2012 (6) SA 294 (SCA it was ordered that accommodation be provided in a location 'as near as feasibly possible' to where the applicants were evicted, and in *Blue Moonlight* n 45 it was ordered to be 'as near as possible' thereto.

[93] *Vide* the definition of 'transitional housing' at para 3 of the CRU Feasibility Study, p 2498.

[94] Page 2790.

details of this Plan were not revealed in the affidavit and a copy of the Plan was not annexed to the answering papers.

143. In this affidavit the City said that it was developing emergency housing within existing and planned informal settlements within the greater City surrounds. Contrary to the seemingly intractable stance it had previously adopted in 2016, it said that it had sought to place the applicants at an undisclosed location in Maitland, but the community had resisted its efforts, It then announced (pursuant presumably to its policy of placing homeless evictees in informal settlements) that it was offering the applicants a site in Kampies, an informal settlement in Philippi, where it would provide them with some building materials with which they could erect their own shelters. (The offer which was made came despite the fact that, notwithstanding what was said by the Mayoral Member in 2017, neither Wolwerivier nor Blikkiesdorp have been shut down, and in fact, according to the Director: Human Settlements as at the end of 2020 the City was still relocating families to these TRAs, in the discharge of its duty to provide emergency housing.)

144. Thus, it appears, the policy which was being implemented as at 2020 was now one of relocating evictees from the inner City to informal settlements, and not one of relocating them to TRAs or IDAs. But, if I am wrong in this regard and the City was/is following a dual policy, it is because although much was said by it in its answering papers in regard to its permanent housing programmes, very little of substance and detail was said by it about its emergency housing programme/plan, other than that it followed the one which is set out in the Housing Code.

145. Most importantly, the City did not indicate, in either of its answering affidavits, how determinations and placements are made by its officials in emergency housing eviction cases i.e how and on what basis it is decided which evictees must go where, and how allocations of emergency housing in such instances are made. All we were told is that, in a supreme twist of irony, evictees must place themselves on a waiting list for the allocation of emergency housing. If there are

criteria and guidelines which are applied these have not been disclosed, and the process the City follows is entirely opaque.

146. In both of its affidavits the City justified its policy of relocating evictees from the inner City and its surrounds, to TRAs and IDAs, on the basis of the high costs[95] and unavailability of land in the inner City, the lack of the necessary financial resources and the 'prescripts of fairness', which did not allow it to provide emergency housing in the inner-City precinct. As the applicants correctly point out, and as was the case in *Blue Moonlight*, in pleading poverty the City provided scant detail, with reference to hard and actual numbers, of its financial position in regard to the provision of emergency housing, even on a macro level. Thus, for example, it did not provide any indication of the value of the funds which had been allocated and made available to it by provincial government in any of the years in question, let alone how much it had spent on providing emergency housing, and emergency housing in relation to evictions in particular. It never even gave an indication of how much it budgeted annually to spend on such housing. In short, it put forward very little by way of substance, in support of its claim of financial constraints.

147. Notwithstanding these deficiencies, in its further answering affidavit it said that based on a consideration of these factors it had adopted the view that the developments which were earmarked for Woodstock and Salt River 'best served the imperatives' of social housing 'as opposed to general emergency housing'. One of the added reasons it gave in support of the economic rationale for preferring the pursuit of social housing developments was that the accommodation they provided was not free and tenants who take it up are required to contribute to the costs thereof by paying rental, albeit in a limited amount. In contrast to this, in many, if not most instances tenants who require emergency occupation are persons who are unable to afford make any meaningful contribution by paying rent.

[95] Curiously, in this regard it also complained about 'high rates and taxes' which are applicable to land in the City. How these would be applicable to State or City-owned land, as opposed to privately-owned land, is not clear.

148. I have some difficulty with the City's assertions. As previously pointed out, during 2017 it announced that there were to be a number of so-called 'transitional' housing developments in Woodstock and Salt River, which were to be used to house persons, not only those who were to be relocated from informal settlements in the area, but also those who have been evicted, on a 'temporary to semi-permanent' basis. One of these developments, the Pickwick Road project, on a City-owned property, was subsequently completed at a cost of R 11 million, from funds budgeted and provided for by the City. In the circumstances, as in the case of the Court in *Blue Moonlight,* it is hard not to be somewhat sceptical about the claim that emergency accommodation cannot be provided to homeless evictees in the inner City and surrounds, because there is a scarcity of available land, and because the City is short of financial resources.

149. As it stands therefore, it seems to me that the current position in regard to homeless evictees in the inner City and its surrounds is anything but clear, and is entirely arbitrary. Such persons are as liable to be offered emergency housing in a TRA or an IDA as they are in an informal settlement (or possibly even 'temporary' housing close to where they live (if effect is given to the promise made by the Mayoral Member for urban development)), at the whim of officialdom, depending on the throw of the dice or the spin of the wheel. That is neither rational, nor reasonable. And future possible placements in 'transitional' housing facilities in Woodstock and Salt River, as and when spare residential capacity arises, will only add to the arbitrariness of the process. Once again, one is left to ask on what basis will evictees be allocated emergency housing in such facilities, and which evictees will qualify for such placements and what guidelines or criteria will apply, if any? How will the City ensure that evictees who are chosen are not preferred unfairly, over other persons who are in similar positions? Will it simply be a case of those who happen fortuitously to be in the right place at the right moment in time that will be granted such accommodation? None of these issues have been dealt with on the papers which are before me.

150. The City contends that its allocation of emergency accommodation in the Pickwick 'transitional' housing scheme to the 'evictees' from the Pine Road

settlement was not irrational and the applicants cannot complain of any unfair differentiation between them and the Pine Road 'evictees', because the allocation occurred in pursuit of a legitimate governmental purpose viz in order to allow for a social housing development to be built on the Pine Road site, and thus the necessary rational connection was present. On this basis too, they contend that any future allocations of housing which are to be made in respect of 'transitional' housing projects in the area, which are in the pipeline, can similarly not be challenged on the grounds of irrationality. I do not believe that this is a proper or complete answer to the challenge which has been levied against these allocations viz that they were arbitrary and unreasonable, and I have a number of issues with the way in which they were made, and the basis on which they were justified.

151. In the first place it appears that, unlike the applicants, none of the persons who were 'evicted' at the instance of the City from the informal structures they occupied in Pine Road and who were then given accommodation in the Pickwick development, were told they had to be relocated to a TRA or IDA or another informal settlement, nor were they required to do so, so that the area they occupied could be developed for social housing. In fact, from the 'rehousing' terms which were adopted by council for the Pickwick development it is apparent that in the event it had been suggested to them that they should move to a TRA or IDA they had the right to refuse, in which event the City would have to accommodate them in the Pickwick development nonetheless.[96] Thus, in their case the City clearly did not consider itself bound to apply the selfsame policy/policies which it claims were applicable to persons rendered homeless as 'evictees' in the City. It has given no reason for why it was not bound to apply its own policy/policies and could either disregard them, or choose selectively when to apply them.

152. Previously, in a number of instances where groups of people in the City have been evicted and relocated in order to make way for the development of social housing on land which they occupied, they were not given any preferential

[96] Para 6 of the CRU Feasibility Study, pp 2500-2501.

treatment or an option to relocate to emergency accomodation in the very area in which they were evicted from, and were required to take up such accommodation in, and to be relocated to IDAs or TRAs such as Wolwerivier and Blikkiesdorp. Not only were the Pine Road 'evictees' not subjected to the same policy regime, but in fact, they were preferred by being granted housing which was not of an equivalent emergency standard (i.e a corrugated structure or building materials) as other homeless evictees in the City could be expected to receive, but rooms in a building, and accommodation which was not necessarily temporary (as emergency accommodation by definition is expected to be), but 'semi-permanent'. In essence therefore, they were not dealt with at all in terms of the emergency housing Programme as provided for in Chapter 12 of the Housing Code, being the Programme which the City says it follows.

153. In the second place the allocation of such accommodation to the Pine Road 'evictees' and to other future homeless evictees, does not appear to fit in with the City's own stated economic rationale and its averment that it is unable to provide emergency housing to evictees in the inner City for financial reasons and the inner City is reserved only for social housing, inter alia because residents pay some form of rental and therefore contribute to the costs thereof.

154. Although the Pine Road 'evictees' are supposedly expected to pay some rental whilst they are accommodated in 'transitional' housing, in accordance with their means, the terms of the Pickwick development clearly provide that they will be subsidized insofar as they fall short, via the City's Rental Indigent Scheme.[97] In addition, the ongoing operating costs of the Pickwick project are also going to be subsidized. The definition of the 'transitional' housing which is to be provided to them recognizes that although it is intended to be temporary, given their financial circumstances it is likely that in many instances it will not be, and many of them are accordingly likely to be accommodated there on a 'semi-permanent' basis.[98]

155. Given the conditions in which the residents of informal settlements in Pine Road and Salt River market were/are living i.e in informal structures (the City has

[97] Para 8.2 of the CRU Feasibility Study, which was adopted as part of Council's resolution on 25 July 2017, pp 2508-2509 of the record.
[98] Para 3, p 2498.

referred to them as ‘shacks’), I think it is reasonable to say that, as in the case of the applicants, they are in all likelihood not going to be in a position to afford to pay any meaningful contribution in lieu of rental. Yet, despite this the City does not see this as a financial bar to them being given accommodation. Clearly, it must have considered that the cost of accommodating such persons (who actually qualify only for emergency housing, which as explained in *Grootboom* is a lower/lesser standard and cost of accommodation), in semi-permanent rooms in housing developments in Salt River and Woodstock, was affordable. In the circumstances one must again question the cogency of the assertion that emergency housing cannot be provided in the Salt River and Woodstock areas, because of financial constraints.

156. Although the persons living in informal structures in informal settlements in Pine Road were no doubt living in abject, cramped and confined circumstances there is no suggestion, on the papers before me, that they were compelled to have to move urgently under compulsion of an eviction order, or the imminent threat of one, unlike the applicants. This is also not a case where they had to be moved temporarily, to a nearby location, so that the area which they occupied could be upgraded for them and they could then move back to it. Given their financial circumstances they are, with all due respect, as unlikely as the applicants to be able to afford the housing which will be created in any of the proposed social housing developments in the area. Unlike the Pine Road residents the applicants are subject to an eviction order that was granted years ago, since which time the 1st respondent has been unable to exercise the full compendium of its rights in respect of its property. One would think that if anyone should be considered to rank first for the allocation of temporary accommodation in the ‘transitional’ housing developments in Woodstock and Salt River it should surely be the applicants, yet they were not even considered eligible for it, notwithstanding that it is supposed to be available not only for persons who have been relocated in order to give effect to State policy, but also to those in the area who are evicted.

157. To my mind, as was the case in *Blue Moonlight*, this differentiation in treatment in relation to evictees in Woodstock and Salt River is unfair and unreasonable. Evictees such as the applicants who have been living in Woodstock and Salt River for many years (in some instances since their birth) are at risk of having to be relocated either to the outskirts of the City or to informal settlements outside the City, away from their workplace, educational facilities, clinics and places of religious worship, whilst other evictees will not be subjected to these same disadvantages.

158. Consequently, in my view the differentiation in treatment which the City's emergency housing programme affords to homeless evictees in the inner City, and in Woodstock and Salt River in particular, is not only unreasonable but also irrational, because it is arbitrary in its implementation. In addition, I agree with the applicants' contention that the effect of the implementation of the programme in the inner-City precinct, and in Woodstock and Salt River in particular, is to give undue preference to social housing, at the expense of the City's constitutional obligations in relation to the provision of emergency housing.

159. Before I continue, I must make it clear that, as a matter of law, neither the applicants nor any other evictees in the City have a right to demand to be placed in temporary emergency housing in the area or location in which they live.[99] I also accept that it is beyond the remit of the Court's powers in matters such as these, even though they may be equity-based, to direct where social housing and emergency housing developments should be constructed. These are by definition matters of state and policy which require careful and weighty consideration, by those functionaries who are empowered by law and who are equipped with the necessary expertise, to deal with them. They are not matters which a Court can or should pronounce on. That would be in clear breach of the doctrine of separation of powers and would constitute an impermissible intrusion into the domain of the executive and legislative arms of state. Were a Court to ascribe such a power to itself it would place an impossible burden on the State, as it

[99] In *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes & Ors (Centre on Housing Rights and Another, Amici Curiae)* 2010 (3) SA 454 (CC), para 254 Ngcobo J (as he then was) pointed out that the Constitution does not guarantee a person a right to housing at government expense at the locality of his or her choice.

would result in it having to accommodate evictees who are going to be rendered homeless, in virtually every suburb or area in which they live. For obvious reasons this is untenable.

160. I further wish to make it clear that this judgement is not to be construed to afford evictees such rights, or to place such corresponding obligations on the State. This matter has not been decided on that basis, but on the basis of whether it is rational or reasonable for the applicants to be told that they must take up emergency housing either in a TRA or an IDA on the outskirts of the City, or alternatively in an informal settlement, whilst other similarly-placed persons do not face the same choice, because they may have the good fortune of being afforded 'transitional' housing or (as was promised by the City's Mayoral Member for urban development), 'temporary' housing, in the inner City and its surrounds.

Conclusion

161. It must accordingly follow, for the reasons set out above, that an Order should issue declaring that the City's emergency housing programme and its implementation, in relation to persons who may be rendered homeless pursuant to their eviction in the inner City and its surrounds, and in Woodstock and Salt River in particular, is unconstitutional.

162. In the light of such a declaration, I am enjoined to grant such relief as may be considered just and equitable. In my view the applicants are entitled to an Order directing the City to provide them with 'temporary' emergency accommodation or 'transitional' housing (as per the undertakings made by the Mayoral Member for urban development in July 2017 and as the Affordable Housing Prospectus for the Woodstock, Salt River and Inner-City Precinct which was issued on 28 September 2017 envisages) in Woodstock, Salt River or the Inner-City Precinct, in a location which is as near as feasibly possible to where the applicants are currently residing in Woodstock.

163. Having regard for the fact that years have gone by since the eviction Order was granted it is clearly in the interests of all concerned that the matter be brought to finality as soon as possible. (I say this cognizant of the fact that given the issues involved an appeal to the higher Courts is almost a certainty).

164. However, one must take into account that as at the date of filing of papers at the end of 2020, there was no spare accommodation in the Pickwick 'transitional' housing development as all its rooms were occupied, and the St James development was still in progress, and other 'transitional' housing developments which had been proposed for Woodstock and Salt River were still in the proverbial 'pipeline'. Although the position in regard to these and other possible 'transitional' developments or the existence of temporary accommodation in Woodstock and Salt River or the inner-City precinct, may have changed since then, it is not likely that the City will be able to comply with the Order on the turn, and it will need some time to do so.

165. One must also have regard for the fact that a state of disaster is still in existence as a result of the Covid-19 pandemic, which rages on, and it is likely to be extended for some time, and although encouraging, the number of persons who have been vaccinated in the Western Cape is still relatively low. Currently, a so-called level 3 'lockdown' is in place and before the eviction Order can be implemented it will have to have regard for the prevailing circumstances in relation to the rate, extent and locality of Covid-19 infections, at the time.

166. In the circumstances, it seems to me that the time period of 12 months, which has been suggested by the applicants in their amended notice of motion, within which the City is to comply with the Order, is both reasonable and appropriate.

167. For the rest, and subject to certain qualifications and the provision of certain ancillary relief, I am in agreement with the further terms of the Order, as proposed in the amended notice of motion, which seem to follow the terms of Orders that were made in similar matters, such as those which have been referred to above.

168. As far as costs are concerned, in my view these should follow the event. Inasmuch as first respondent made cause with the City in opposing the relief which was sought, in my view the fair and appropriate Order to make is that it should bear its own costs. I do not believe that it would be fair or appropriate that the City should be directed to bear its costs.

169. In the result I make the following Order:

169.1 It is declared that the second respondent's emergency housing programme and its implementation, in relation to persons who may be rendered homeless pursuant to their eviction in the inner City and its surrounds, and in Woodstock and Salt River in particular, is unconstitutional.

169.2 The second respondent is directed to provide the applicants and those of their dependents as may be living with them at the time, with 'temporary' emergency accommodation or 'transitional' housing in Woodstock, Salt River or the Inner-City Precinct (as defined in the Affordable Housing Prospectus for the Woodstock, Salt River and Inner-City Precinct which was issued on 28 September 2017), in a location which is as near as feasibly possible to where the applicants are currently residing at erf 10626, Bromwell Street, Woodstock; within 12 months of the date of this Order.

169.3 The second respondent is directed to deliver a report to the Court, within 4 months of the date of this Order, which is confirmed on affidavit, in which it details the emergency accommodation or 'transitional' housing that it will make available to the applicants, and the location thereof and the date when it will be made available, and in which it deals with the proximity of such accommodation or housing to 1) erf 10626, Bromwell Street, Woodstock and 2) to public and private transport, and educational and medical and health facilities, and explains why the particular location and form of accommodation/housing has been selected, and what steps were taken by it to engage the applicants regarding the provision of accommodation or housing in compliance with this Order.

169.4 The applicants may serve and file affidavits, if any, dealing with the contents of the report referred to in the preceding paragraph, within 10 court days of the date of the service and filing of the aforesaid report, whereafter the matter may be re-enrolled on a date to be determined by the Registrar in consultation with the presiding Judge, for determination as to such further and/or additional relief as may be necessary or appropriate.

169.5 Pending the final outcome of this matter, execution of the Order which was granted for the eviction of the applicants (as extended) shall be suspended.

169.6 Second respondent shall be liable for the costs of this application, including the costs of two counsel (insofar as two counsel may have been employed).

M SHER

Judge of the High Court

(Digital signature)

Appearances:

Applicants' counsel: S Magardie and S Khoza
Applicants' attorneys: Ndifuna Ukwazi Law Centre
First respondent's counsel: R Randall
First respondent's attorneys: Marlon, Shevelew & Associates Inc
Second respondent's counsel: K Pillay SC
Second respondent's attorneys: Fairbridge Wertheim Becker