CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 143/13

In the matter between:

JOHANNA MALAN Applicant

and

CITY OF CAPE TOWN Respondent

Neutral citation: *Malan v City of Cape Town* [2014] ZACC 25

Coram: Moseneke ACJ, Skweyiya ADCJ, Cameron J, Dambuza AJ, Froneman J, Jafta J, Khampepe J, Madlanga J, Majiedt AJ, Van der Westhuizen J and Zondo J

Heard on: 20 February 2014

Decided on: 18 September 2014

Summary: Lease agreement – public rental housing – right to have access to adequate housing – constitutionality of clauses in public rental housing lease agreement – notice of cancellation – right to be afforded opportunity to rectify breach

Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998

ORDER

On appeal from the Western Cape High Court, Cape Town (Dolamo J):

1. Leave to appeal is granted.

2. The appeal is dismissed.

3. There is no order as to costs.

JUDGMENT

DAMBUZA AJ (Froneman J and Madlanga J concurring):

Introduction

[1] This is an application for leave to appeal against an eviction order granted by the Western Cape High Court, Cape Town (High Court). The eviction order resulted from allegations of breach of a lease by the applicant (Ms Malan) and consequent cancellation of that agreement by the respondent (the City).

[2] In 1994 the democratic government inherited a legacy of a segregated national housing system in terms of which very little housing had been built for black people by

the apartheid government. In the new constitutional dispensation, the right of access to housing for all citizens of this country was placed within the realm of fundamental constitutional and human rights. The country has made great strides in providing housing and basic services to indigent persons but there are still huge backlogs.

[3] The right of access to adequate housing is entrenched in section 26 of the Constitution which provides:

> "(1) Everyone has the right to have access to adequate housing.
>
> (2) The State must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.
>
> (3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions."

[4] The national, provincial and local spheres of government share the responsibility of concretising this right by providing housing to deserving individuals. To implement this constitutional mandate, Parliament passed the Housing Act (Act). Under this Act and the National Housing Code of 2009, the national government determines the national housing policy which must be adhered to by the provincial and local governments. Delivery of housing has been achieved through various forms of acquisition. The lease that is central to the issues in this case is one example of acquisition. However, the agreement in this case was concluded long before the advent of democracy and was assimilated into the new constitutional dispensation. Nevertheless it still serves the

function of regulating the exercise of the right to housing. Some of its terms, however, are still reminiscent of the language and rigidity of the times during which it was concluded, some of which may not be consistent with the level of respect accorded to all members of the South African society today.

The parties

[5] The applicant, Ms Malan, is a widow who is about 74 years old and resides at 100D Sonderend Road in Manenberg, Cape Town (property). The respondent, the City, is a metropolitan municipality established in terms of the Local Government, Municipal Structures Act.

Factual background

[6] Ms Malan has been occupying the property since 1979 when she took occupation by virtue of a lease between her husband and the predecessor in title of the City. After the death of her husband in 1982, she concluded a lease with the City in respect of the same property. She continued living there with her three children who were her co-respondents in this matter before the High Court.

[7] The City cancelled the lease in a letter dated 31 October 2008, delivered to her on 23 November 2008. She was given until the end of December 2008 to vacate the property. The reasons for cancellation of the agreement, as set out in the letter of cancellation, were that first, as at the end of April 2008, Ms Malan was in arrears with

rental payments in the amount of R8 290.90. Second, that the South African Police Service (SAPS) had reported to the City that, on numerous occasions, drugs, liquor and illegal firearms had been confiscated from the property and arrests had been made for illegal activities conducted on the property. In terms of the letter of cancellation, the lease was cancelled with effect from 31 December 2008.

[8] Ms Malan did not vacate the property on 31 December 2008. On 24 January 2009 another letter was delivered to her from the City's legal representatives. The letter advised her that the lease had been cancelled and legal proceedings would be instituted to evict her from the property. She still remained in occupation of the property.

Before the High Court

[9] On 1 October 2009 the City approached the High Court seeking an order of eviction against Ms Malan, her children and whoever else might be in occupation of the property. This application was brought on the basis that she and her family were unlawful occupiers as the lease had been cancelled for the reasons stated in the letter of 31 October 2008. The City contended that, even if Ms Malan had not been in breach of the agreement, it was entitled to terminate the agreement by giving her a month's notice to vacate the property. In this regard, the City relied expressly on clause 2 of the agreement.

[10] In the High Court, a further ground on which the City sought eviction was that Ms Malan had effected structural alterations to the property in breach of clause 22(a) of the agreement.

[11] Ms Malan opposed the eviction application, disputing the validity of the cancellation of her lease. She admitted that in April 2008 she was in arrears with rentals in the amount of R8 290.90. It was common cause that in July 2008 she made arrangements with the City to settle the arrears in instalments of R50 per month. It was not in dispute that, even after she had made the arrangements to pay her arrears, Ms Malan again defaulted in her rental payments, including payment of the R50 agreed on. In her answering papers before the High Court she stated that as at 28 February 2009 the total amount of rental payable (to the City) was R1 208.40 and as at 6 November 2009 it was R396. She also contended that the letter of cancellation was invalid for ambiguity. She further denied that she had allowed illegal activities to be conducted from her house. She insisted that, although numerous raids had been conducted by members of the SAPS at her house, no one had been charged and convicted of a criminal offence. She challenged the validity of clause 24 of the agreement – on which the City relied regarding the "illegal activities" – on the basis that it is inconsistent with sections 9, 10, 14, 25 and 26 of the Constitution. Her further contention was that clause 2 is against public policy as it detracts from a lessee's security of tenure; and clause 28, which provides for cancellation of the agreement in the event of failure to pay rent, is unconstitutional because it does not afford a tenant an opportunity to rectify such a breach.

[12] Regarding the unauthorised buildings on the property, Ms Malan contended that these enhanced the value of the property, rather than detract from it.

[13] The High Court found that the contents of the letter of cancellation were clear, and that the agreement had been properly cancelled in terms of clause 2. It reasoned that the acceptance of Ms Malan's offer to settle the arrears, in July 2008, constituted a notice affording her an opportunity to rectify the breach. Having failed to adhere to the accepted terms of the July offer, she could not be heard to complain that she was never afforded opportunity to rectify her breach. There was therefore no merit in her complaint that the failure to give her notice rendered the application of clause 2 contrary to public policy.

[14] The High Court held further that the numerous police raids on the property had (or must have) alerted Ms Malan to the illegal activities that were taking place on the property in breach of clause 24 of the agreement. In any event, so it held, clause 24 did not require that she be given prior notice of breach of the agreement. The agreement correctly provided for summary eviction in the event of a breach. The High Court also found that structural alterations had indeed been effected to the property in breach of clause 22(a) of the agreement.

[15] An order of eviction was granted against Ms Malan and her family. They were given two months to vacate the property. Accommodation would be secured for Ms Malan at an old-age home as tendered by the City. Leave to appeal against the judgment of the High Court was refused by both the High Court and the Supreme Court of Appeal.

In this Court

[16] Ms Malan seeks leave to appeal against the judgment of the High Court. In the main, she denies having breached material terms of the lease. She contends that any breach she might have committed did not justify cancellation of the lease. She insists that clauses 2, 24 and 28 of the lease which are implicated in the cancellation are against public policy are unconstitutional and are therefore unenforceable.

[17] At the hearing, counsel for Ms Malan informed us that she had abandoned her contention that the notice of cancellation was ambiguous. He conceded that the letter was, at least in form, a clear notice of cancellation of the lease.

[18] Further, before us, all parties accepted that the unauthorised alterations are not an issue on appeal. I may add that the alterations were never cited as a basis for cancellation of the lease in the letter of cancellation.

[19] Therefore, the issues are whether—

(a) leave to appeal should be granted;

(b) clauses 2, 24 and 28 of the lease are against public policy or unconstitutional, either as they stand or in their application;

(c) Ms Malan was in breach of the lease and the City was entitled to cancel the lease;

(d) the provisions of PIE are applicable; and

(e) PIE was properly applied.

Should leave to appeal be granted?

[20] Although the core issue is whether the agreement had been breached when it was cancelled, the inquiry into whether the agreement is consistent with the spirit and provisions of the Constitution cannot be ignored. At the hearing, the City submitted that the constitutionality of the clauses need not be decided by this Court because the City had invoked clear grounds of cancellation, all premised on Ms Malan's breach of the lease. However, Ms Malan contends that the clauses on which the City relied in cancelling the agreement are against public policy and offend fundamental rights guaranteed in the Constitution.

[21] The fact that the agreement serves a public purpose is of significance in the consideration of the issues. The lease cannot be viewed as a pure exercise of private contractual power. This is so in respect of both the lessor and the various lessees. It is the instrument through which the City fulfils the constitutional obligation on the state to

provide housing to Ms Malan and millions of other persons of similar social standing and through which indigent persons exercise their rights to housing. These leases are central to the building of communities and regulating the lives of members of those communities. If certain clauses offend public policy as Ms Malan contends, they are unenforceable. The manner in which these contracts are crafted and enforced is of important public interest. The issues raised by Ms Malan are of considerable public interest and she bears prospects of success on the merits. Leave to appeal should be granted.

Constitutionality of the clauses

[22] On the papers before us, Ms Malan pursued largely the same challenge to her eviction as in the High Court. First, she contended that the clauses invoked by the City to cancel the agreement are, in any event, unconstitutional; clause 2 insofar as it provides for a 30-day notice period for termination without providing any reason therefore (thus detracting from a lessee's security of tenure); and clause 28, insofar as it is inconsistent with sections 9, 10, 14, 25 and 26 of the Bill of Rights. Finally, she contended that even if the clauses pass constitutional muster, it is not just and equitable to evict her in the circumstances.

[23] The test for determining whether a contractual clause passes constitutional muster was laid down in *Barkhuizen*:

"There are two questions to be asked in determining fairness. The first is whether the clause itself is unreasonable. Secondly, if the clause is reasonable, whether it should be enforced in the light of the circumstances which prevented compliance with the time limitation clause.

The first question involves the weighing-up of two considerations. On the one hand, public policy, as informed by the Constitution, requires in general, that parties should comply with contractual obligations that have been freely and voluntarily undertaken. This consideration is expressed in the maxim *pacta sunt servanda*, which, as the Supreme Court of Appeal has repeatedly noted, gives effect to the central constitutional values of freedom and dignity. Self-autonomy, or the ability to regulate one's own affairs, even to one's own detriment, is the very essence of freedom and a vital part of dignity. The extent to which the contract was freely and voluntarily concluded is clearly a vital factor as it will determine the weight that should be afforded to the values of freedom and dignity. The other consideration is that all persons have a right to seek judicial redress. These considerations express the constitutional values which must now inform all laws, including the common-law principles of contract.

The second question involves an inquiry into the circumstances that prevented compliance with the clause. It was unreasonable to insist on compliance with the clause or impossible for the person to comply with the time-limitation clause. Naturally, the onus is upon the party seeking to avoid the enforcement of the time limitation clause. What this means in practical terms is that once it is accepted that the clause does not violate public policy and non-compliance with it is established, the claimant is required to show that in the circumstances of the case there was a good reason why there was a failure to comply." (Footnotes omitted.)

[24] A clause in a contract may be constitutionally offensive for various reasons. For example, it may be included in the contract for immoral or illegal purposes; it may be intrinsically offensive to public policy; or, although not in itself illegal, unconstitutional or against public policy, it may become so in its application. Ms Malan's contention, as I understand it, falls within the last category.

[25] At common law, a clause in a lease giving the lessor the power to cancel the agreement for non-payment of rent is enforceable strictly according to its terms. The court has no equitable jurisdiction to relieve the debtor of automatic forfeiture where there is breach. Once the breach is committed, its seriousness – even objectively judged – is irrelevant. However, in the new constitutional dispensation, fairness is often central in the determination of whether a clause in a contract is against public policy. In *Brisley v Drotsky*, the Supreme Court of Appeal held:

> "The jurisprudence of this Court has already established that, in addition to the fraud exception, there may be circumstances in which an agreement, unobjectionable in itself, will not be enforced because the object it seeks to achieve is contrary to public policy. Public policy in any event nullifies agreements offensive in themselves – a doctrine of very considerable antiquity. In its modern guise, 'public policy' is now rooted in our Constitution and the fundamental values it enshrines. These include human dignity, the achievement of equality and the advancement of human rights and freedoms, non-racialism and non-sexism.
>
> It is not difficult to envisage situations in which contracts that offend these fundamentals of our new social compact will be struck down as offensive to public policy. They will be struck down because the Constitution requires it, and the values it enshrines will guide the courts in doing so. The decisions of this Court that proclaim that the limits of contractual sanctity lie at the borders of public policy will therefore receive enhanced force and clarity in the light of the Constitution and the values embodied in the Bill of Rights."

[26] State organs must be able to rely on undertakings given by beneficiaries of public rental housing schemes that they will honour their obligations as stipulated in the

agreements they conclude. Apart from this being a fundamental principle of contract law, performance of obligations under these contracts is necessary for state organs to be able to continue to provide services to communities and for the effective exercise by all members of communities of their right of access to housing. Occupants of public rental housing schemes, therefore, owe it to themselves and to other community members to exercise their right of access to housing responsibly, in a manner that promotes law and order and good neighbourliness. Local authorities have an obligation to regulate and even monitor the exercise of the right of access to housing for the benefit of all members of communities.

[27] On the other hand, local authorities should be mindful that their primary role in this context is provision of homes to qualifying members of the public, and that crime fighting and prevention must be done within the parameters of the rights and obligations arising from the leases concluded with tenants.

[28] It is an inescapable feature of agreements relating to public rental housing that they are not negotiated. Practicality does not allow for agreements that would be "tailor-made" for each of the millions of beneficiaries. Within this context features the unequal bargaining position of the parties to the agreement. This much is self-evident. These agreements are a consequence of extremely adverse financial circumstances. Qualification for public rental housing reveals the beneficiary's compromised economic and social status. In the context of the public function served by these contracts, the

lessees' limited scope to negotiate the terms must be a weighty factor in the determination of the reasonableness of the terms of these agreements. It is against this background that the constitutionality of the clauses implicated in this matter must be viewed.

Clause 2

[29] Clause 2 of the agreement provides:

> "This lease shall be terminated on one month's notice in writing given by either party to the other and shall be deemed to have been duly given—
>
> (a) By the Lessor if signed by the Town Clerk or his nominee and handed to the Lessee personally or to some person apparently over the age of sixteen years residing upon the premises, or sent by prepaid registered letter addressed to the Lessee at the premises;
>
> (b) By the Lessee if signed by him and handed to the official in charge of the Estate in which the premises are situate or sent by prepaid registered letter addressed to the Director of Housing, P O Box 298 Cape Town."

[30] This clause is not, in and of itself, inconsistent with the Constitution. It is also not unfair between freely contracting parties. However, insofar as the City contended that this clause entitles it to terminate the agreement on notice, without cause, its application would be unfair and against public policy. In the context of its subject-matter, public housing, the application of the clause as contended can easily facilitate arbitrary evictions

by public officials. The result would indeed be erosion of the lessees' security of tenure. In this sense its application would be unconstitutional.

[31] The City submitted that clause 2 must be read with clause 28. I do not agree. Clause 28 provides:

> "If the Lessee shall fail to pay the rent or any other charges or amounts due under this lease punctually on due date or if he shall commit or permit any other breach of the conditions of this lease or of any laws relevant thereto, this lease may be cancelled forthwith by the Lessor and the fact of such cancellation shall be conveyed to the Lessee by an order in writing under the hand of the Town Clerk which order shall require him to vacate the premises forthwith and to give the Lessor quiet possession thereof."

[32] The word "forthwith" in clause 28 renders a reading of clauses 2 and 28 together, irreconcilable. Whilst clause 2 provides for termination on a month's notice, clause 28 provides for immediate cancellation and eviction. The two clauses can therefore not be read together as the City suggests. Again, clause 28 may be enforceable between freely contracting parties. But it would be unfair for the City to invoke it to summarily evict Ms Malan or any public rental housing lessee for failure or delay in rental payments.

[33] On a strict application of this clause, it being common cause that as at the end of April 2008 Ms Malan was in arrears with rental payments, the City was entitled to summarily cancel the lease. The extent of the breach is irrelevant. Moreover, under clause 28 Ms Malan was obliged, upon receipt of an order made in writing by the Town

Clerk (read Municipal Manager) "to vacate the property forthwith and to give [the City] quiet possession of [the property]." In *Jaftha* this Court held that "any measure which permits a person to be deprived of existing access to adequate housing limits the rights protected in section 26(1)." The City's entitlement to cancel summarily and the concomitant order that the Town Clerk may issue requiring a lessee to vacate the property, have the effect of altering the position of a lessee from one of a lawful occupier with a measure of security of tenure to the tenuous position of an unlawful occupier whose last protection are the provisions of PIE read with section 26(3) of the Constitution. That summary cancellation in terms of clause 28 violates the provisions of section 26(1) and is at variance with this Court's decision in *Jaftha* is manifest. It bears mention that in *City of Cape Town v De Bruin and Others* a replica of clause 28 was held to be contrary to public policy and unconstitutional to the extent that it allowed a landlord to cancel a lease without affording a tenant opportunity to rectify a breach.

[34] It is also significant that clause 29 of the agreement confirms the right of the City to evict a tenant summarily. The clause provides:

> "Forthwith upon delivery of [the order of the Town Clerk] such order referred to in clause 28 the Lessee's rights under this lease shall terminate and he shall give quiet possession of the premises to the Lessor in a state of good order and repair, fair wear and tear excepted."

[35] Most striking, on a strict application of both clauses 2 and 28, at no stage is the lessee given an opportunity to protest the City's conclusion on a perceived breach or to

rectify the breach prior to cancellation of the lease. Once a notice in terms of either clause is delivered, the right to occupy the leased property terminates, either at the end of one month (clause 2) or with immediate effect (clause 28). In the case before us, although the City wrote a further letter to Ms Malan on 14 January 2009, that second letter was not a letter of cancellation; it only served to advise Ms Malan that her lease had been cancelled. In fact, by 14 January 2009 Ms Malan was already holding over, her rights under the agreement having ceased on 31 December 2008, as per the letter of 31 October 2008.

[36] However, clauses 2 and 28 are capable of application in a manner that is fair and which does not offend public policy. This is so if the clauses are invoked in the following manner: the affected lessee's attention must be drawn to the breach prior to cancellation of the agreement, to the details of the alleged breach and the lessee must be afforded an opportunity (a reasonable period) within which to rectify the breach, failing which the lease may be cancelled.

[37] The City accepts that notification of breach to a lessee is necessary. According to the City, its policy is that cancellation of leases concluded with beneficiaries of public rental housing, where they default with rental payments, is a matter of last resort. I can only assume from this that the City also accepts that in these cases reasonable notification of breach entails affording a lessee who is in breach opportunity to rectify that breach. It is not the City's case that its policy of tolerance towards arrear rentals was applied in this

case. The conclusion must be that the arrear rentals were not the real reason for cancellation of the agreement.

[38] From the record it is clear that cancellation was, in fact, an attempt at assisting the SAPS in its crime combating endeavours. This much was also evident from Ms Bawa's (counsel for the City) introductory submissions before us. Indeed, a copy of the written resolution by the City, for institution of legal proceedings against Ms Malan and other tenants, reveals that the decision was made because those tenants had been identified as "illegally dealing in drugs and alcohol in the properties they occupy". This explains why, despite Ms Malan having made fairly regular payments from January 2009 until the balance owing on her account with the City was R396 as at 21 October 2009, the City insisted that she should be evicted from her home.

Clause 24: Illegal activities

[39] The City relied on clause 24 of the agreement in respect of the allegation of illegal activities. The High Court dealt with this issue on that basis. Clause 24 deems breach of the agreement in the event of a conviction. The clause, entitled "[c]riminal offences", provides:

> "In the event of the Lessee or any other person, whether residing upon the premises or not, being convicted of unlawfully selling, supplying or possessing intoxicating liquor as defined in the Liquor Act, 30 of 1928, or Bantu beer as defined in the Bantu Beer Act, 63 of 1962, or dagga or any other habit-forming drug upon the premises or in the event of the Lessee being convicted of any offence under the Arms and Ammunition Act, 28 of

> 1937, the Tear Gas Act, 16 of 1964, or the Dangerous Weapons Act 71 of 1968, or of assault in any form or any other offence involving violence, the Lessee shall be deemed to have committed a breach of this lease and the provisions of Clauses 28 to 31 shall apply."

[40] I will not enter the debate on all the possible ramifications of the full import and possible implications of clause 24. Suffice it to say that the clause provides that a conviction on one of the listed offences results in the lessee being deemed to be in breach of the lease, with the further result that clauses 28 to 31 become applicable. That means the deemed breach entitles the City to terminate in the summary manner provided for in clause 28, a subject I have dealt with above. That summary cancellation is at variance with the provisions of section 26(1) of the Constitution.

[41] It may be that, as raised with counsel for the respondent at the hearing, clause 23 (rather than 24) was the more appropriate clause for the City to invoke. Clause 23 provides:

> "The Lessee and all persons, whether residing upon the premises or present upon the premises by the invitation or permission of the Lessee for whose conduct the Lessee is hereby made responsible, shall at all times conduct themselves in a decent, quiet and orderly manner and shall abstain from any conduct which may materially interfere with the ordinary comfort, convenience, peace or quiet, or adversely affect the safety or health of any other Lessee; provided that the Lessor shall in no case be responsible to any person for any breach of this Clause whether by the Lessee or by any other Lessee."

[42] The letter of 31 October 2008 properly informed Ms Malan of the allegations of breach. At common law it is not a requirement that a notice of cancellation must correctly identify the cause of cancellation or the breached clause in the lease. The absence of reference, in the cancellation notice, to a particular clause in the agreement is not unfair, although preferable. The requirement is that the notice must be "clear and unequivocal". The relevant portion of the notice of cancellation in this case reads:

> "In further breach of the lease she has allowed illegal activity to take place at the property. Our client advises us further that the South African Police Services have reported to them that on numerous occasions drugs, liquor and illegal firearms have been confiscated from the property and, inter alia, arrests have been made for illegal activities conducted at the property. As a result of the arrears and the illegal conduct at the property our client has decided to cancel the lease agreement and hereby gives you one month's notice of their intention to cancel the agreement."

[43] The notice adequately informed Ms Malan of the allegations and details of illegal activities complained of with sufficient particularity, such that she would be able to determine whether the allegations were true and whether they constituted a breach of the agreement. Therefore, indeed clause 23, being a general "good behaviour" clause, could be implicated. I, however, do not think that it would be fair and proper to decide the matter on the basis of clause 23 given that the parties had dealt with the matter on the basis of a clause 24 breach and the High Court had considered the issues on the same basis.

[44] Even if cancellation was premised on clause 23, having found that it is imperative that lessees in public rental housing schemes be afforded opportunity to rectify a breach, the question would be whether Ms Malan was afforded such opportunity in respect of the illegal activities prior to the lease being cancelled. I did not understand it to be the City's case that she was; and I can find no legal basis for a conclusion that she was not entitled to a notice affording her an opportunity to rectify the breach of "allowing illegal activities". It seems to me that opportunity to rectify was particularly necessary in this case since cancellation was based on the conduct of third parties rather than Ms Malan's conduct, even though some of the real culprits are her own children.

[45] The notice of cancellation expressly provided that the effective date of cancellation of the lease was 31 December 2008. It provided:

> "As a result of the arrears and the illegal conduct at the property, our client has decided to cancel the lease agreement and hereby gives you one month's notice of their intention to cancel the agreement. Please be advised that the lease agreement will be cancelled with effect from 31 December 2008 and Ms Malan and all who hold title under her are to vacate on that date."

[46] The letter did not call upon Ms Malan to either pay rental or to ensure that the activities complained of were stopped. It rather informed her in no uncertain terms, that as a result of the specified conduct a decision had been taken to cancel her lease and she had to vacate the property on a specified date; her right to occupy the property would cease on that day. On the City's own evidence the last incident of arrest for illegal

activities was on 14 October 2008. As I have stated, the letter of cancellation dated 31 October 2008 was received by Ms Malan on 23 November 2008. Cancellation was confirmed on 24 January 2009. The fact that in January 2009 the City confirmed cancellation of the lease without there having been further complaints of "illegal activities" in the intervening period is evidence that the City never intended to afford Ms Malan opportunity to rectify the breach.

[47] Ms Malan contended that the breached clause 24 was applied unfairly in that the City never communicated with her regarding the allegations of unlawful conduct prior to cancellation. Can it be said that the requirement to afford her an opportunity to rectify the breach was satisfied because she was aware of the police raids and drugs and firearms found on the leased property? I do not think so. The City was never part of police raids conducted on the premises. It never discharged its obligation of warning her that she was at risk of losing her home. On the evidence, the City's first communication with her regarding the illegal activities was when it cancelled the agreement based on allegations made by the SAPS (the letter of 31 October 2008).

[48] Neither Ms Malan's awareness of the police raids and drugs found on the property nor her denial that illegal activities took place there disentitled her of the right to rectify the breach. In the context of leases that relate to occupation of public rental housing, the right of a lessee to be afforded opportunity to rectify a breach is not available only to

innocent lessees. The requirement recognises that a lessee could, in fact, be in the wrong as alleged; it then ensures that even such a lessee is given a chance to retain the right to occupy her home. Further, where there is an obligation to first demand that a lessee rectify a breach, it seems to me that it would be anomalous to say that investigations done by a third party (SAPS) who is not a party to the lease absolves the lessor from complying with that obligation.

[49] A demand that Ms Malan rectify the breach would have served the important purpose of pertinently alerting her that the conduct complained of had become a threat to her continued occupation of her home. A conclusion that her awareness of the raids disqualified her from that right would be unjust. I also do not agree with the conclusion that such a notice would have served no purpose given her denial that the illegal activities took place. The fact remains that she was not afforded the opportunity to rectify and therefore the cancellation was premature. It is for this reason that, in my view, the failure by the City to afford Ms Malan a proper opportunity to rectify the breach rendered the cancellation invalid and contrary to public policy.

[50] For these reasons I would have upheld the appeal.

MAJIEDT AJ (Moseneke ACJ, Skweyiya ADCJ, Cameron J, Jafta J, Khampepe J and Van der Westhuizen J concurring):

Introduction

[51] The City of Cape Town (City) seeks to evict an elderly lady from her home. That, alone, alerts us to the rights and values of the Constitution that are at issue. These are, primarily, the right not to be evicted from one's home without an order of court made after considering all the relevant circumstances, and, behind that right, the foundational right to dignity. But also at stake is the obligation the City, as an organ of state, bears to take reasonable measures, within its available resources, progressively to realise the right everyone has to access adequate housing. The City convincingly demonstrated in its papers the huge challenges it faces in meeting these responsibilities. One of the methods it employs is to provide public rental housing at a nominal charge.

[52] The property from which the City seeks to evict Ms Malan is part of what is known as the City's "rental stock", that is, subsidised houses rented to people who meet the City's qualifying criteria. There were some 55 000 housing units in the City's rental stock when the City deposed to its evidence, but the waiting list for state housing was up to 400 000 households. So there is a huge demand for rental housing units, which the City cannot meet from its present rental stock. It has to act diligently and responsibly in ensuring this scarce resource is properly utilised. It is in the exercise of this responsibility that it seeks to evict Ms Malan. The question is whether it should succeed.

[53] I am in respectful disagreement with the judgment of my Colleague, Dambuza AJ (main judgment), regarding the outcome on the merits and the underlying reasoning. My

view is that leave to appeal should be granted but that the appeal should be dismissed with no order as to costs.

[54] Before turning to the facts, which are set out in the main judgment, it is appropriate to make a few general observations regarding the right to housing. My Colleague has already placed this important right in its historical perspective. I agree with those views. But it would be remiss to ignore the significant hurdles a rapidly expanding metropolis like the City faces to meet its constitutional obligations in respect of housing delivery.

[55] In *Grootboom*, this Court described the state's constitutional obligations in respect of housing as "a constitutional issue of fundamental importance to the development of South Africa's new constitutional order". And it sketched the historical inequality and iniquities of the apartheid regime's policy of influx control in the Western Cape, resulting in the acute housing shortage there. In *Port Elizabeth Municipality*, Sachs J alluded to the worldwide phenomenon of landless and destitute rural poor people flocking to the cities in search of a better life and job opportunities.

[56] Section 152 of the Constitution sets out the objects of local government, while municipalities' developmental responsibilities are provided for in section 153. Section 9(1) of the Housing Act is of particular importance insofar as the obligations placed upon

municipalities to realise their inhabitants' right of access to housing are concerned. For present purposes section 9(1)(a)(i) and (ii) is apposite.

[57] The qualifying criteria for the 55 000 units of rental accommodation at the City's disposal include that the applicant or tenant and her spouse or partner earn less than R7 000 per month, be South African citizens and own no other property. In respect of every rental property the City has a tenant file that is usually kept at the local housing office in the area where the particular property is located. A tenant file would ordinarily contain all records of correspondence, personal interviews and telephonic communications between the tenant and the relevant housing official(s).

[58] The City says that it strives to fulfil its constitutional duty in respect of granting its inhabitants access to housing through, among other things, a policy not to terminate leases with lessees of public rental housing units who are in default of their obligations to pay rental (usually at a nominal rate), unless as a last resort. But, given the huge demand, the City has adopted a zero-tolerance approach to drug dealing being conducted at any of its rental housing units. It says this stems from the need to fulfil its constitutional obligation to provide adequately habitable crime-free housing to its citizens.

[59] The uncontroverted facts bear out these assertions. It is against this backdrop that we must consider the merits of the cancellation and subsequent eviction application.

And it will be apparent from the common cause facts that the City was fully justified in cancelling the lease agreement with Ms Malan and in seeking her eviction together with all those occupying the property through her.

The breach and cancellation of the lease agreement

[60] My Colleague, Dambuza AJ, correctly mentions the responsibility that occupants of public rental housing units have to honour their obligations under the lease agreements. I agree that the parties enter into these lease agreements on the basis of vastly disparate bargaining powers. But the second proposition must not be understood to detract from the first. Here, the City showed, on the uncontroverted facts, that Ms Malan was in breach of the lease agreement in that she was in arrears with her rent. In addition, there were widespread criminal activities on the property, of which she could not have been ignorant.

[61] The City justified cancelling Ms Malan's lease agreement on the reasons set out in its letter dated 31 October 2008 and on the basis that it had validly cancelled the agreement on one month's written notice, as provided for in clause 2. As the main judgment explains, both parties now accept that the City's letter expressed an unambiguous notice of intention to cancel the lease agreement. The City's attorneys wrote to Ms Malan:

> "Our client instructs us that in breach of the lease agreement Ms Malan is in arrears with rental payments in the amount of R8 290.90 as at the end of April 2008. In further breach of the lease she has allowed illegal activity to take place at the property.
>
> Our client advises us further that the South African Police Service [has] reported to them that on numerous occasions drugs, liquor and illegal firearms have been confiscated from the property and, inter alia, arrests have been made for illegal activities conducted at the property.
>
> As a result of the arrears and the illegal conduct at the property, our client has decided to cancel the lease agreement and hereby gives you one month's notice of their intention to cancel the agreement. Please be advised that the lease agreement will be cancelled with effect from 31 December 2008 and Ms Malan and all who hold title under her are to vacate on that date."

The letter ends by advising that failure to vacate by the deadline set out would result in eviction proceedings. It is important to note that this letter is not, in itself, a letter of cancellation. It is, instead, a letter giving Ms Malan one month's notice of the City's "intention to cancel the agreement". The cancellation itself was only intended to take effect one month later, on 31 December 2008. The letter thus served as a warning to Ms Malan of an intention to cancel on the basis of the illegal activities at the premises, mentioned in the letter.

Cancellation on mere notice – clause 2

[62] Clause 2 of the lease agreement provides that either party may terminate the lease on one month's notice. The City relied on this clause in terminating the agreement. But, in argument, the City correctly conceded that it could not properly terminate on the

basis of the power in clause 2 alone. The City thus accepted that to terminate a lease agreement in public rental housing on one month's notice would be oppressive and unconstitutional on the second leg of the test for contractual validity in *Barkhuizen*.

[63] The City's concession is correct. Read and applied on its own, the power of mere cancellation in clause 2, without further justification, does not pass constitutional muster. This is because it enables either party to terminate the lease agreement without any cause, provided only that one month's written notice is given. For a public authority to cancel a lease agreement with a poor tenant on mere notice, for no further reason, is unreasonable and against public policy. This is because it would be an abuse of contractual power. Apart from infringing the tenant's security of tenure, it would create the possibility of arbitrariness and abuse.

[64] Tenants in public housing thus may not be evicted merely on notice. There must be something more: either further breaches of the lease agreement, or the necessity to secure vacant premises for other pressing public reasons. It is unnecessary to decide in this case what those pressing public reasons may be. It is sufficient to say that, absent good cause, the Constitution forbids a government agency from using a contractual power of termination against a tenant in need of public housing.

Arrears and opportunity to remedy arrear rentals

[65] Was the City entitled to cancel the lease agreement on the ground of arrear rentals? The first question is whether Ms Malan was in fact in arrears and whether she was given an opportunity to pay her arrears. When the lease agreement commenced in 1982, the monthly rental was R17.38. It increased over the years to R345.50 at the time of the eviction application. The City's case is that Ms Malan breached her rental obligations so that she was in arrears to the tune of R8 290.90 at the end of April 2008. Records from the tenant file for the property indicate that Ms Malan had a meeting on 21 July 2008 with a City housing official about the arrears. She disclosed her monthly income (a state pension). She also signed an arrangement, undertaking to pay the arrears in monthly instalments of R50. A note in her tenant file further indicates that she visited the housing office again on 21 September 2008 when she paid an amount of R450.

[66] But not only was Ms Malan afforded an opportunity to remedy her default, it is common cause that she failed to do so, not even keeping up with the arrear payments of the R50 per month as arranged. Her continued default resulted in the letter dated 31 October 2008. She did not dispute the fact that she was in default. What she took issue with was the precise amount of arrears at the time of the eviction proceedings.

[67] The letter was hand-delivered at the property on 23 November 2008 by two of the City's law-enforcement officers. The second respondent in the eviction proceedings, Mr Dennis Malan, signed to acknowledge receipt. The cancellation, indicated in the letter

dated 31 December 2008, occurred by way of further letter from the City's attorneys, dated 14 January 2009. This informed Ms Malan that her lease had been cancelled and that eviction proceedings would follow. A handwritten note on this letter records that it was handed to Ms Malan personally at 17h05 on 24 January 2009, but that she refused to acknowledge receipt. During the period of just over two months, between 23 November 2008 and 24 January 2009, Ms Malan did not settle the arrear rentals, nor did she attempt to do so.

[68] At the time when the City launched the eviction proceedings—

(a) Ms Malan was in arrears on her own version;

(b) she had been afforded an opportunity to remedy the default, but had failed to do so;

(c) the City had given due and proper notice of cancellation based, among other things, on these arrears; and

(d) Ms Malan had not taken any steps to settle her arrears in the period of just over two months between the date of notice of cancellation and the cancellation itself.

[69] May a public authority properly cancel a lease agreement on the ground of arrear rentals alone? I think it may. The contrary conclusion would be untenable. It would mean that a poor tenant, once she took occupation of public housing, could decline to pay any rent, assured in the knowledge that no amount of arrear rentals would provide a

reason for eviction. This cannot be. The City is the custodian of an exceptionally scarce public resource and is surely entitled to ration it according to just principles of payment. The City has important constitutional obligations to fulfil in providing housing. It faces enormous challenges to meet them, as a result of historical deprivations and the continuing flood of people from rural areas pouring into the City in pursuit of employment and a better life. The City is duty-bound to make the most of a very scarce resource for which there is massive demand. It must fulfil its constitutional obligations fully cognisant of the need to allocate housing to the needy and deserving on a fair and equitable basis.

[70] But the City first had to afford Ms Malan proper notice to settle her arrear rentals. It would have contradicted important constitutional values had it not done so. These include the duty of procedural fairness a public authority owes its poor housing tenants. But a fair process was followed in this case. Nevertheless, it is not necessary for us to decide whether the arrears, in and of themselves, would have been a sufficient ground for eviction, taking into account considerations of constitutionality and fairness. This is because there is a further strongly compelling ground for cancellation and subsequent eviction: the wide-ranging illegal activities that were being conducted on Ms Malan's property.

Illegal activities

[71] The City's letter dated 31 October 2008 did not summarily cancel the lease. Instead, it gave Ms Malan "one month's notice of [the City's] intention to cancel" on the basis of illegal conduct on the property. The cancellation itself took effect more than two months later, on 24 January 2009. In both the letter of cancellation dated 31 October 2008 and in its eviction application, the City claimed that widespread, serious criminal activities were being conducted on the property. In her answering affidavit, Ms Malan gave a bare denial. But she also challenged the City to prove that any convictions had flowed from the alleged illegal conduct. This proved a mistake. For, in reply, the City met this challenge, as I explain below, by enumerating extensive instances of illegal activity on the property. Its replying affidavit detailed at length exhaustive attempts by the police to intervene against a high volume of criminal activity taking place at Ms Malan's premises, including unlawful possession of ammunition and possession of and dealing in drugs. The City expressly invited Ms Malan to file a further set of affidavits. This invitation was, the City said, "to mitigate any potential prejudice" to Ms Malan because of its new, more detailed allegations.

[72] What is more, the City afforded Ms Malan a further chance. This arose in the following way. The City's replying affidavit was late. Ms Malan opposed the admission of the affidavit on this ground. Condonation proceedings ensued. Eventually, the City obtained an order from the High Court, to which Ms Malan ultimately acquiesced, admitting its affidavit.

[73] Significantly, Ms Malan never took up the opportunity to respond to the allegations made in the City's replying affidavit. Faced with the City's overwhelming evidence of crime perpetrated on her property, Ms Malan filed no further affidavits. Instead, she put up a feeble attempt to have the extensive new material excluded as being inadmissible hearsay, emanating as it did mostly from the police and from dockets in their possession. This half-hearted challenge was eventually aborted. The City's extensive allegations, left unanswered, were damning. A litigant is required to engage fully and seriously with allegations in an affidavit, more so when all or some of those allegations are sought to be disputed. A bare denial in circumstances where the relevant facts are peculiarly within the litigant's knowledge does not suffice. Absent a detailed and motivated answer or countervailing evidence from Ms Malan we are bound to accept the City's uncontroverted allegations. It fully justified the cancellation of the lease. A brief recital of the various instances of illegal conduct will bear testimony to this fact in that—

(a) on at least five occasions, people were arrested at the property for being in possession of and selling mandrax tablets and other drugs;

(b) cash and drugs were repeatedly seized and forfeited to the state as the proceeds of crime;

(c) ammunition was confiscated;

(d) Ms Malan's son was twice convicted, in 1999 and 2000, for the possession of drugs and her daughter was convicted of the same offence in 1999; and

(e) a third party was convicted for the possession of drugs, on 14 October 2008, seized at the property (although Ms Malan's son was arrested and charged at the same time, the charges against him were withdrawn).

[74] The City had held extensive consultations with the police to garner information on the illegal activities the founding papers mentioned as one of the grounds for cancellation. Affidavits by various policemen were attached. The uncontroverted evidence establishes that the illegal activity continued beyond the date of the notice of cancellation, dated 31 October 2008: illegal activities occurred on 20 December 2010 and on 9 June 2011.

[75] Ms Malan decided to live with the City's replying affidavit. All this puts her in a precarious position. The City's evidence is strong. The absence of a reply strengthens it. The almost ineluctable inference is that she knew of, and condoned, criminal activity on her premises. The City's uncontroverted evidence establishes that widespread criminality occurred on the property even after notice of cancellation was given. Ms Malan offered only a bare denial in her answering affidavit, in which she claimed she was unaware of these activities. That assertion the High Court correctly rejected as untenable. These illegal activities constituted a serious breach of the lease. Ms Malan did not aver that she was unaware of these activities or that she had tried to put an end to them. Instead she contented herself with a bare denial in circumstances where that denial must be rejected outright on the papers.

[76] Were cancellation and eviction warranted in these circumstances? Ms Malan claimed that, in reliance on clause 24 of the lease, the City had to prove *convictions* ensued from the various arrests before it could evict. This is misplaced. Clause 24 provides that, upon conviction of certain offences, there is a deemed breach of the lease. It does not provide that the lease agreement is breached only upon conviction. It merely contains a deeming clause that is meant to assist the City by deeming a criminal conviction to be a breach of the lease.

[77] The clause makes reference to the application of clauses 28 to 31 when a breach in terms of clause 24 occurs. Clause 28 must be read in conjunction with clause 24. Clause 28 is applicable here. In addition, clause 23 is pertinent. It places an obligation on the lessee, and persons for whose conduct she is responsible, to "conduct themselves in a decent, quiet and orderly manner". It requires that they abstain "from any conduct which may materially interfere with the ordinary comfort, convenience, peace or quiet, or adversely affect the safety or health of any other lessee".

[78] Read together, as they must be, clauses 23 and 24 are sensible and sound provisions in public-housing contracts. They provide for both the tenant's own, and other tenants', rights to dignity and secure living. They afford all residents of public housing the entitlement to dignified and safe housing.

[79] When then is it legitimate for a public authority to enforce "illegal activities" clauses in public housing rental contracts? It would be unfair to impose more onerous burdens on poor people simply because they are reliant on social housing. Their unequal bargaining power is a factor here. These clauses and reliance on them are, in my view, legitimate as long as (1) they make it clear what conduct is prohibited; (2) the tenant has the means to control the prohibited conduct; and (3) the tenant has an opportunity to rectify a breach before cancellation.

[80] These conditions were fulfilled here. Ms Malan was well aware of what was happening on her property and at no stage averred that she could not control the prohibited conduct. Her denials, in light of the long history of criminal activity on the property, are untenably disingenuous. If nothing else did, the frequent police raids on the property must have put her on notice of the gravity of the situation at the centre of which she was living. What is more, the City's letter dated 31 October 2008 expressly relied on the illegal activities at the property, and gave Ms Malan a warning, on one month's notice, that the City intended to cancel the lease on 31 December 2008 on the ground of illegal activities being conducted at the property. The cancellation itself took effect just under a month later, on 24 January 2009. That period enabled her, if so minded or able, to protest the allegation that there were illegal activities, or, if it was admitted, to take steps to bring them to an end. She did neither. In the face of this bare, unsubstantiated denial and the continuation of the illegal activities beyond the date of the

notice of cancellation, the unavoidable conclusion is that Ms Malan has failed to remedy the breach.

[81] The City thus complied with the requirements of section 26(3) of the Constitution.

[82] In summary: the City lawfully and validly cancelled the lease agreement on the ground of the illegal activities on the property. I will now consider whether the High Court was correct in finding that it was just and equitable to evict Ms Malan and all other persons who occupied the property through her.

Just and equitable

[83] Ms Malan's eviction from the property must occur within the requirements of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (PIE). The High Court granted the City an eviction order in terms of section 4(8) of PIE. Since the City is an organ of state, the eviction should have been granted in terms of section 6(1) of PIE, but nothing turns on this. PIE, in accordance with section 26(3) of the Constitution, requires a court to balance the opposing interests of landowners and occupiers. What is just and equitable therefore bears consideration in respect of both parties. Factors including fairness, social values and the implications of the eviction have to be considered.

[84] In the present instance the City's enormous challenges in meeting its constitutional obligations to provide public housing have been highlighted. On the other hand, as the main judgment explains, Ms Malan is an elderly and widowed pensioner. But the City offered to make alternative accommodation available to Ms Malan. The eviction order against the other occupiers (her children and their offspring) was not appealed against (this much was expressly conceded by Ms Malan's counsel at the hearing), so we are only concerned with Ms Malan's circumstances at this juncture. The City's tender entails accommodating Ms Malan in a home for the aged, which the City controls. A list of the possible homes was annexed to the replying affidavit.

[85] Counsel for the City informed us that all these homes are located within a radius of 8 to 10 kilometres from the property. This is a very reasonable offer. It firmly tilts the scales in the City's favour when considering whether it is just and equitable to evict Ms Malan. Another compelling reason is that scarce housing stock should be put to the best possible use by the City. A further persuasive consideration in respect of an eviction is the effect of the provisions of the Prevention of Organised Crime Act (POCA). For instance, in 2009 a preservation order was granted against residents of the property and a subsequent forfeiture order was granted in 2011. As a result of the illegal activities occurring on the property, it may well become the subject of further preservation and forfeiture orders, being the instrumentality of an offence under POCA. As Ms Malan will be adequately accommodated as proposed, there is no good reason

why the property should not be made available to a deserving, needy family. We were informed by counsel for the City that there are many thousands of people waiting to be accommodated. The City must also bear in mind the rights and needs of these people. I am satisfied that the High Court was correct in ordering the eviction.

Costs

[86] Ms Malan has raised an important constitutional issue pertaining to housing. She should not be mulcted with costs.

Order

[87] I make the following order:

1. Leave to appeal is granted.
2. The appeal is dismissed.
3. There is no order as to costs.

ZONDO J:

Introduction

[88] I have had the benefit of reading the judgment by my Colleague, Dambuza AJ (main judgment) and the judgment by my Colleague, Majiedt AJ. Majiedt AJ concludes that the City of Cape Town (the City) was entitled to cancel the applicant's (Ms Malan's)

lease and that her eviction would be just and equitable. Accordingly, he takes the view that the appeal should be dismissed. Dambuza AJ concludes that the City was not entitled to cancel the lease as it was obliged to give Ms Malan the opportunity to rectify the breach but failed to do so. Accordingly, she would have upheld the appeal.

[89] With respect, I am unable to agree with the conclusion that the City was entitled to cancel Ms Malan's lease and that her eviction will be just and equitable. Ultimately the real reason for the City's decision to cancel Ms Malan's lease was that it alleged that Ms Malan allowed certain illegal activities to take place on the property. In my view the City failed to show that Ms Malan allowed such activities and that there was any breach of the lease on her part in regard to those activities. However, I take the view that, even if Ms Malan did allow the illegal activities to take place on the property and even if this constituted a breach of the lease, the City was not entitled to cancel her lease without first taking certain procedural steps, including giving her the opportunity to rectify the breach. I say that, since the City failed to take such procedural steps, it was not entitled to cancel the lease when it did.

[90] Dambuza AJ also takes the view that the City was obliged to afford Ms Malan the opportunity to rectify the alleged breach before it could cancel the lease but failed to do so. She concludes that, for that reason, the City was not entitled to cancel the lease and that, therefore, she would have upheld the appeal. Although Dambuza AJ and I are agreed that the City was obliged to afford Ms Malan the opportunity to rectify the breach

before it could cancel the lease, I go a step further. I also hold that, even if the City was entitled to cancel the lease, it was not entitled to an order of eviction because Ms Malan's eviction would not be just and equitable. My reasons and approach appear below.

Background

[91] The City has low-cost housing units that it leases to people within its municipal area. These housing units are subsidised by the City. It calls them its rental stock. Ms Malan lives in the house at 100D Sonderend Road, Manenberg, Cape Town. That house is part of the City's rental stock. She is an elderly woman, aged 75, a pensioner, grandmother and widow. She suffers from ill-health. She has lived in that house since 1979 when her late husband, Mr Cecil Malan, leased it from the City.

[92] After her husband had died, Ms Malan took over the lease of the house. Prior to 1979 Mr Malan had been living in another property that he had leased from the City since 1968. It seems that Ms Malan lived with him on that property but it is not clear from when she had done so. Ms Malan lives with some of her adult children on the property. They are Shaun, Bradley and Amanda. She also lives with three grandchildren aged 12, 8 and 4. They are Amanda's children. The fact that Ms Malan has lived in the house since 1979 means that she has spent more than half of her life in that house.

[93] During the second half of 2008 the City purported to cancel Ms Malan's lease and required her and her family to vacate her home. When she did not accept the

cancellation and did not vacate her home, the City brought an application in the Western Cape High Court (High Court) for an order evicting her and her family from the property. She opposed that application. The High Court concluded that the City was entitled to cancel the lease and issued an order for her eviction and the eviction of others who lived on the property through her.

[94] This matter raises constitutional issues. This Court has previously said that matters that relate to socio-economic rights raise the issue of human dignity. As I hope to show below, there are important issues that arise for determination in this matter. The appeal has reasonable prospects of success. It is, therefore, in the interests of justice that leave to appeal be granted.

[95] The lease between Ms Malan and the City was for an indefinite period. Clause 2 provided that either party could terminate the lease on one month's notice. Clause 22 precluded Ms Malan from making structural alterations to the property. Clause 24 is important. It reads:

> "In the event of the Lessee or any other person, whether residing upon the premises or not, being convicted of unlawfully selling, supplying or possessing intoxicating liquor as defined in the Liquor Act, 30 of 1928, or Bantu beer as defined in the Bantu Beer Act, 63 of 1962, or dagga or any other habit-forming drug upon the premises or in the event of the Lessee being convicted of any offence under the Arms and Ammunition Act, 28 of 1937, the Tear Gas Act, 16 of 1964, or the Dangerous Weapons Act 71 of 1968, or of assault in any form or any other offence involving violence, the Lessee shall be deemed

to have committed a breach of this lease and the provisions of clauses 28 to 31 shall apply."

Clause 28 reads:

"If the Lessee shall fail to pay the rent or any other charges or amounts due under this lease punctually on due date or if he shall commit or permit any other breach of the conditions of this lease or of any laws relevant thereto, this lease may be cancelled forthwith by the Lessor and the fact of such cancellation shall be conveyed to the Lessee by an order in writing under the hand of the Town Clerk which order shall require him to vacate the premises forthwith and to give the Lessor quiet possession thereof."

Clause 29 reads:

"Forthwith upon delivery of such order referred to in Clause 28 the Lessee's right under this lease shall terminate and he shall give quiet possession of the premises to the Lessor in a state of good order and repair, fair wear and tear alone excepted."

[96] On 31 October 2008 the City's attorneys wrote a letter to Ms Malan giving her notice of the cancellation of the lease. Its terms are important. The letter read as follows:

"*Our client instructs us that in breach of the lease agreement Mrs Malan is in arrear with rental payments in the amount of R8 290.90 as at the end of April 2008. In further breach of the lease she has allowed illegal activity to take place at the property*.

Our client advises us further that the South African Police Services have reported to them that on numerous occasions drugs, liquor and illegal firearms have been confiscated from the property and, inter alia, arrests have been made for illegal activities conducted at the property.

> *As a result of the arrears and the illegal conduct at the property, our client has decided to cancel the lease agreement and hereby gives you one month's notice of their intention to cancel the agreement. Please be advised that the lease agreement will be cancelled with effect from 31 December 2008 and Ms Malan and all who hold title under her are to vacate on that date.*
>
> *If you do not vacate on that date and make suitable arrangements for the payment of the monies due to our client, our client will, without further notice to you, institute legal proceedings for your eviction and for the recovery of the amounts due, the cost of which shall be claimed from you.*" (Emphasis added.)

[97] The third of the quoted paragraphs of the letter conveyed that the City had made a decision to cancel its lease with her and required her to vacate the property. It was referring to a decision that had already been taken. That is why it said: "our client has decided to cancel the lease agreement". It is true that later that sentence contains the words "and hereby gives you one month's notice of their intention to cancel the agreement". Indeed, it is also true that in the next sentence the letter informed Ms Malan that "the lease agreement will be cancelled with effect from 31 December 2008" which, if read in isolation, may give the impression that the decision to cancel was yet to be taken. However, I think that, if one reads that sentence and the second part of the one before it with due regard to the whole letter, there can be no doubt that a decision to cancel the lease and require Ms Malan to vacate her home had already been taken.

[98] The first sentence of the third paragraph of the letter says so. The second part of the second sentence of that very paragraph instructed Ms Malan and her family to vacate the property on 31 December 2008. Why would the City instruct Ms Malan to vacate

the property on that date if it had not yet taken a final decision to cancel the lease? In the fourth paragraph the City made it clear that, if Ms Malan did not vacate the property on the given date, it would go to court to force her out of the property. Accordingly, any proposition that that letter did not reflect that a final decision had been taken is without any justification.

[99] The third paragraph of the letter reveals that there were two reasons upon which the decision to cancel the lease and require Ms Malan to vacate the property was based. They were that Ms Malan was in arrears with her rental payments and that she had allowed illegal activities to take place on the property. The letter made it clear that the cancellation would take effect on 31 December 2008 and that Ms Malan and her family were required to vacate the property on that date. It is important to point out that in the letter the City did not invite Ms Malan to make any representations to the City concerning the alleged illegal activities or the alleged breach of the lease.

[100] On 14 January 2009 the City's attorneys wrote another letter to Ms Malan in terms of which they confirmed that the City had cancelled the lease. The letter read as follows:

> "We refer to the above matter and confirm, subsequent to our letter of 31 October 2008 that your lease has now been cancelled by the City of Cape Town. Our instructions are to proceed with court proceedings for your eviction."

This letter did not mean that the City had made any new decision. It was meant to say no more than that the cancellation of the lease had taken effect on 31 December 2008 as had been contemplated in the letter of 31 October 2008. The City's attorneys also said that they had been instructed to institute proceedings for Ms Malan's eviction and the eviction of others who live on the property through her. By way of a letter dated 26 January 2009 Ms Malan's attorney disputed the City's right to cancel the lease. He pointed out that Ms Malan denied the allegations in the letter of 31 October 2008.

[101] After the letter of 26 January 2009 nothing of significance happened for about nine months. In October 2009 the City instituted an eviction application in the High Court. In the City's founding affidavit, the Director: Legal Services, Mr Lungelo Mbandazayo, said that it was the City's policy that property that is part of the "rental stock" could not be utilised for illegal activities and leases were cancelled if they were used for such activities.

[102] Mr Mbandazayo also said the following about the policy of the City and the eviction of lessees from the City's rental stock:

> "[The City] has approximately 55 000 housing units in its rental stock. [The City] only evicts people from these dwellings as a last resort and accordingly few houses become available from the rental stock. [The City] has several measures in place in an attempt to keep rental defaulters in their homes rather than evict them. There is considerable demand for rental housing units which [the City] cannot service on its existing rental

> stock. [The City's] policy not to evict rental defaulters other than as a last resort, places a further strain on its available resources."

[103] In the founding affidavit the City's case was that its cancellation of the lease was a consequence of Ms Malan's breaches of that lease. It said that in terms of clause 2 of the lease and by letter dated 31 October 2008 it had given Ms Malan "one month's notice that the lease would be cancelled with effect from 31 December 2008". The City also said: "In terms of clause 2 of the lease agreement the [City] can cancel the lease on one month's notice and on this basis alone the lease was validly cancelled." The illegal activities upon which the City relied related, mainly, to the alleged possession and use of illegal drugs on the property by some of Ms Malan's adult children and other persons.

[104] In the founding affidavit the City added a third ground to justify its decision to cancel the lease and require Ms Malan to vacate the property. It said that she had effected certain structural changes to the property without its consent and contended that this was in breach of clause 22 of the lease. In her answering affidavit Ms Malan admitted having made certain structural changes to the property without the City's consent but she contended that she had tried to obtain the City's consent in vain.

[105] In her answering affidavit Ms Malan repeatedly complained that "[o]n not one single occasion" had the City ever had a meeting with her or called her to complain that there were illegal activities taking place in her home. In complaining that "on not one

single occasion" had the City written her a letter or held a meeting with her about its complaint concerning illegal activities, she in effect was complaining that the City had not engaged her on its complaint. In the founding affidavit the City had averred that its staff had received a report on 10 September 1996 that "[u]ndesirable persons were allowed to congregate on the property and that liquor was being sold unlawfully". In response to this averment Ms Malan repeated her complaint that the City had never called her or held a meeting with her to complain about the alleged illegal activities. After complaining that the City's averment in this regard was inadmissible hearsay evidence, she said:

> "Secondly and more importantly, I again have never received a letter of complaint from [the City] regarding this issue and nor has a staff member of [the City] come to see me about it. All I received-some 12 years later, was a letter stating that there was illegal conduct taking place at the property".

This was a reference to the notice of cancellation of the lease.

[106] Lastly, Ms Malan had the following to say about the alleged illegal activities on the property as a basis for the City's decision to cancel her lease and seek her eviction from her home:

> "I find it most strange that if the authorities were of the view that illegal activities [were taking place] on the property—
>
> 31.1 why I have never been consulted about the issue either by way of a letter or a meeting. After all [the City] knows full well that I and I alone am the tenant of the property."

Ms Malan also said that she was—

> "wholly unaware of any illegal activities, whether they related to drugs or firearms or any other similar activity, that have taken place on the property. Most certainly I would never allow so-called gang activities to take place on my property, even if my son (Third Respondent) was a member of a gang. For the record I am totally unaware of the suspicions of the authorities that the Third Respondent is a so-called gangster".

[107] The City detailed many incidents based on the information it got from the South African Police Service relating to illegal activities which had allegedly taken place on the property. The City also referred to incidents in which some of Ms Malan's children had been arrested in connection with the use of drugs. However, there were only few incidents of convictions of some of Ms Malan's children in a court of law arising from those activities. The only convictions that the City produced in regard to Ms Malan's children were convictions that related to about 9 or 10, 12 years prior to the notice of cancellation of which the City was itself not aware at the time of the cancellation of the lease.

[108] In its replying affidavit the City also tendered to accommodate Ms Malan in one of the old-age homes run by the City but it did not specify which one nor did it specify the terms and conditions that would govern Ms Malan's stay. Whether she would be required to pay anything or not and, if so, how much, is also not clear. The validity or otherwise of the City's decision to cancel the lease and require Ms Malan to vacate the

property must be tested as at the time when that decision was taken. That decision was made in October 2008. At that time there was no offer to accommodate Ms Malan at an old-age home. Indeed, that offer was made more than two years later when the replying affidavit was filed in court.

[109] The City did not deny Ms Malan's version that it had not raised the issue of illegal activities with her before it made the decision to cancel the lease and require her to vacate the property. Nor did it dispute the assertion that it made its decision to cancel her lease and to seek her eviction without having sent her any letter complaining about such activities and without having had any meeting with her to discuss the matter. Ms Malan also complained that the City had made its decision without having afforded her an opportunity to rectify whatever breach of the lease there may have been on her part.

[110] The City referred to the fact that Ms Malan had been allowed to enter into an agreement with it for the payment of rental arrears. It contended that through that agreement she had been given an opportunity to rectify the breach. However, it was not the City's case that it had afforded Ms Malan the opportunity to rectify the breach in so far as such breach had taken the form of the illegal activities which is the real reason for the City's cancellation of the lease and for seeking to evict Ms Malan.

In this Court

[111] Although one of the grounds upon which the City based its decision to cancel the lease and seek Ms Malan's eviction was that she was in arrears with her rental payments, before us counsel for the City conceded, quite properly in my view, that this ground would not be sufficient on its own to justify the City's decision to cancel the lease and seek Ms Malan's eviction. This concession must be seen against:

(a) the fact that the City's policy is not to evict tenants because of rental arrears except as a measure of last resort; in this regard the City admitted that it gives tenants opportunities to rectify their defaults in paying their rent; the City referred to its policy in terms of which it even allows tenants to live in the housing units and pay a monthly rental as low as R10 when, for example, they are unemployed.

(b) Ms Malan's undisputed evidence that the City's representatives at the Rent Office had assured her that the City would not evict her because of rental arrears and that, if she found it difficult to pay the monthly rental that she had undertaken to pay, she should go back to them and the amount could be reduced further.

[112] Counsel for the City also took the position that the City did not rely on the structural alterations to justify the cancellation of the lease and eviction of Ms Malan. This leaves the illegal activities as the ground upon which we should focus in this matter.

For purposes of this judgment I am prepared to accept that certain illegal activities did take place at various times on the property.

[113] The result of the City's concessions is that the focus in deciding this matter must be on whether, having regard to the other grounds relied upon by the City and all the relevant circumstances, it can be said that the City was entitled to cancel the lease and require Ms Malan to vacate the property as it did.

[114] At this stage it is appropriate to make three observations that are quite important in the adjudication of this matter. The first is that it is not the City's case that Ms Malan's alleged breach of the lease is constituted by her participation in illegal activities. Its case is that Ms Malan "allowed" illegal activities to take place on the property. That this is the City's case is supported by the fact that in the notice of cancellation of 31 October 2008 the City wrote thus to Ms Malan:

> "In further breach of the lease [Ms Malan] has *allowed* illegal activity to take place at the property." (Emphasis added.)

The second is that Ms Malan denied that she had allowed any illegal activities to take place on the property. The third is that, in deciding whether Ms Malan had acted in breach of her lease with regard to the alleged illegal activities, the High Court ought to have appreciated that there was a genuine dispute of fact on whether Ms Malan had allowed illegal activities to take place on her property.

[115] As the City had not applied for the matter to be referred to oral evidence on this dispute of fact, and as Ms Malan's version could not be said to be far-fetched and untenable, on the application of the *Plascon-Evans* approach the matter should have been decided on Ms Malan's version. The result thereof is that Ms Malan had not allowed illegal activities to take place on her property. That being the case, there had been no breach of her lease in regard to the alleged illegal activities. However, even if it can be said that Ms Malan's breach of the lease has been established, that is not the end of the matter.

[116] In his submissions counsel pursued Ms Malan's complaint articulated in her answering affidavit that, when the City made the decision to cancel her lease and require her to vacate her home, it had never alerted her that she had acted or was acting in breach of the lease. Nor had the City alerted her that there was any conduct on anybody's part that it believed rendered her in breach of the lease and that such conduct could lead to the cancellation of her lease and her eviction from her home.

[117] For the above submission counsel for Ms Malan relied upon the decision of the Western Cape High Court in *City of Cape Town v De Bruin and Others*. He also referred to a statement in the judgment of this Court in *Port Elizabeth Municipality* that "[w]here the need to evict people arises some attempts to resolve the problem before seeking a court order will ordinarily be required." He argued that the City did not place

any evidence before the court that it had made any attempts to address its concerns with Ms Malan before it made the decision to cancel the lease and require her and her family to vacate the property. He, therefore, submitted that the City was not entitled to have Ms Malan evicted.

[118] This matter must be decided on the basis that the City did not raise the issue of illegal activities with Ms Malan, did not consult with her on its concern about them, did not in any way discuss the illegal activities with her, did not afford her the opportunity to be heard and did not afford Ms Malan the opportunity to rectify such a breach before it could decide to cancel the lease and seek her eviction. For convenience I shall refer to these steps collectively simply as "the procedural steps" or "procedural requirements". The question that arises, therefore, is whether the City was obliged to take those steps before it could make its decision to cancel her lease and seek her eviction. To answer these questions, it is necessary to have regard to the constitutional and statutory framework within which the City's decision to cancel the lease and to require Ms Malan to vacate her home must be evaluated.

Constitutional and statutory framework

[119] As the City is an organ of state, section 7(2) of the Constitution applies to it. It reads:

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

Section 26 of the Constitution is part of the Bill of Rights. It reads:

> "(1) Everyone has the right to have access to adequate housing.
>
> (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.
>
> (3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions."

As the City brought the eviction proceedings in terms of the Prevention of Illegal Evictions from and Unlawful Occupation of Land Act (PIE), the relevant provisions of that statute must be considered as well. Section 4(1) of that statute reads:

> "*Notwithstanding anything to the contrary contained in any law or the common law*, the provisions of this section apply to proceedings by an owner or person in charge of land for the eviction of an unlawful occupier." (Emphasis added.)

The provisions of section 4(2) to (6) are not relevant in the present case. Section 4(7) reads:

> "If an unlawful occupier has occupied the land in question for more than six months at the time when the proceedings are initiated, *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 the relevant circumstances*, including, except where the land is sold in a sale of execution pursuant to a mortgage, whether land has been made available or can reasonably be made available by a municipality or other organ of state or another land owner for the relocation of the unlawful occupier, and including the rights and needs of the elderly, children, disabled persons and households headed by women." (Emphasis added.)

Section 4(8) reads:

> *"If the court is satisfied that all the requirements of this section have been complied with and that no valid defence has been raised by the unlawful occupier*, it must grant an order for the eviction of the unlawful occupier, and determine—
>
> (a) a just and equitable date on which the unlawful occupier must vacate the land under the circumstances; and
>
> (b) the date on which an eviction order may be carried out if the unlawful occupier has not vacated the land on the date contemplated in paragraph (a)." (Emphasis added.)

[120] Section 6(1) permits an organ of state to institute proceedings for the eviction of an unlawful occupier from land which falls within its area of jurisdiction, subject to one exception that is not relevant in this matter. It then provides:

> *"*[*T*]*he court may grant such an order if it is just and equitable to do so, after considering all the relevant circumstances, and if—*
>
> (a) the consent of the organ of state is required for the erection of a building or structure on that land or for the occupation of the land, and the unlawful occupier is occupying a building or structure on that land without such consent having been obtained; or
>
> (b) it is in the public interest to grant such an order." (Emphasis added.)

[121] Section 6(3) provides for some factors to which a court is enjoined to have regard in deciding whether it would be just and equitable to grant an eviction order. Section 6(3) reads:

"*In deciding whether it is just and equitable to grant an order for eviction, the court must have regard to—*

(a) the circumstances under which the unlawful occupier occupied the land and erected the building or structure;

(b) the period the unlawful occupier and his or her family have resided on the land in question; and

(c) the availability to the unlawful occupier of suitable alternative accommodation or land." (Emphasis added.)

[122] Section 4(1) is significant. It says that the provisions of section 4 apply to proceedings by an owner or person in charge of land for the eviction of an unlawful occupier "notwithstanding anything to the contrary contained in any law or the common law". This means that the provisions of section 4 prevail over any principle or rule of common law or provision of another statute to the extent that such principle or rule of common law or provision of another statute is inconsistent or in conflict with section 4. At common law the owner of land is entitled to cancel a lease in accordance with the strict terms of the lease or upon agreed or reasonable notice of cancellation with or without a good reason and, indeed, even for a bad reason. Section 4(1) means that, to the extent that that common law right may be inconsistent with or in conflict with any provisions of section 4, it will not apply or may not be given effect to. The view that a rule of common law yields to the provisions of section 4 of PIE is consistent with the pronouncement by this Court in *Port Elizabeth Municipality* that, unlike its predecessor,

PIE seeks "to temper common law remedies with strong procedural and substantive protections".

[123] The provisions of section 4(7), (8) and section 6 also require that an eviction be just and equitable before it can in effect be approved by a court. Those provisions also say that, in determining whether an eviction will be just and equitable, a court must "consider all relevant circumstances" and must pay special attention to the elderly, children, disabled persons and households that are headed by women. From this it is clear that unlawful occupiers who fall into these categories of persons require special consideration. We must, therefore, give special consideration to Ms Malan's situation because she is elderly and hers is a household headed by a woman.

[124] As the right in section 26 falls within the rights in the Bill of Rights, it is one of the rights that an organ of state such as the City (as a municipality) is obliged by section 7(2) to "respect, protect, promote and fulfil the rights in the Bill of Rights." The question that arises within the context of an organ of state as a lessor in respect of a person's home is: what does an organ of state's obligation to protect and promote a lessee's right of access to adequate housing entail when the organ of state becomes aware of an alleged breach of the lease and contemplates a decision to cancel the lease and have the lessee evicted?

[125] In *Tsebe* this Court held that it would be a breach of the state's obligation to respect, protect, promote and fulfil Mr Tsebe's right to life and other rights if the South African government extradited him to Botswana to face a charge of murder and the real risk of the imposition and execution of the death penalty if he was convicted unless it first secured an undertaking from the Botswana government that the death penalty would not be executed if imposed.

[126] In my view, in adopting the approach that it adopted in *Tsebe*, this Court sought to strike a fair balance between the state's obligation under section 7(2) to protect and promote Mr Tsebe's right to life and Botswana's legitimate expectation that those who flee to South Africa to escape charges of serious crimes such as murder would be extradited back to Botswana to face those charges. The balance was that South Africa could hand Mr Tsebe over to Botswana to face such charges provided that the Botswana authorities gave South Africa the requisite undertaking. If South Africa had handed Mr Tsebe over to the Botswana authorities without securing such an undertaking, that would have been a breach by the state of its section 7(2) obligation to protect and promote Mr Tsebe's right to life, right to human dignity and right not to be treated or punished in a cruel, inhuman and degrading way.

[127] Having a home is very important to the dignity of any person. It would be inconsistent with the obligation to protect and promote the right of access to adequate housing if an organ of state were to resort to the cancellation of a lease or the eviction of

a lessee on the grounds of a breach of the lease without first making an effort to try and avoid the cancellation or eviction. In my view, in such a case an organ of state should only resort to the cancellation of the lease or to the eviction of the lessee as a measure of last resort and after affording the lessee the opportunity of rectifying the breach.

[128] If one accepts that an organ of state has an obligation under section 7(2) to protect and promote everyone's section 26 right, it seems to me that under the present constitutional dispensation, such an organ of state cannot, simply make a decision to cancel the lease in the same way as it would have done at common law. In other words, it cannot simply adopt the attitude that there is a breach of the lease and, therefore, it is entitled to cancel the lease and go ahead and cancel it. That is what the City did in this case. It became aware of what it believed to be a breach of the lease by Ms Malan and, without first raising the issue with her or discussing it with her, or affording her an opportunity to rectify the breach, decided to cancel the lease and sent her a notice of cancellation. That is what a landlord would have done at common law in the absence of our Constitution and PIE.

[129] Under the Constitution that is no longer enough. Something more is required of an organ of state. The question that arises is: what is that something more? In my respectful view, at a minimum what is required is that the organ of state, as a lessor, should raise the alleged breach with the lessee, discuss it with him or her, hear his or her side of the story and give him or her the opportunity to rectify the breach before it can

decide to cancel the lease. For convenience, I shall refer to these steps collectively simply as "the procedural steps" or "procedural requirements".

[130] Although the section 7(2) obligation of an organ of state means that an organ of state may not simply cancel a lease in respect of a home in the same way as it could do at common law, it also does not mean that the organ of state may not cancel a lease in respect of a home when there is a breach of the lease. It only means that an organ of state must delay exercising its right to cancel the lease until it has allowed for an opportunity for steps to be taken to avoid taking away the lessee's home from her if at all reasonably possible. In *Glenister II* this Court held that "implicit in section 7(2) is the requirement that the steps the state takes to respect, protect, promote and fulfil constitutional rights must be reasonable and effective." In my view the procedural steps referred to above that the City should have taken before it could make the decision to cancel the lease and seek to evict Ms Malan are all reasonable.

[131] An organ of state should, generally speaking, have no difficulty in taking the procedural steps referred to above in order to protect or promote a lessee's section 26 right in respect of a home. It, therefore, seems to me that the cancellation of a lease in respect of a home by an organ of state without taking these steps is a breach of its obligation to protect and promote the lessee's section 26 right. As Didcott J said in a different but relevant context in *Sibiya*: "The lawful exercise of the right depended on the way in which it was exercised, on the procedure that was then followed. In the

meantime the existing rights of the applicants remained intact." Didcott J said this in respect of the Administrator's exercise of the right to terminate the contracts of employment of the applicants in that case on notice when viewed against the Administrator's obligation to afford them a hearing before he could exercise that right.

[132] The City made the decision to cancel Ms Malan's lease without taking the procedural steps referred to earlier. It was not entitled to cancel the lease in those circumstances. There is a suggestion that the City did give notice of the illegal activities to Ms Malan by way of the letter of 31 October 2008. This is not correct. By writing her that letter, the City was not giving Ms Malan a notice of the illegal activities in order to invite her to discuss the issue or in order to enable her to take steps to rectify the breach and avoid the cancellation of the lease. The City referred to illegal activities only to give Ms Malan one of its reasons for the decision it had already taken to cancel the lease and to instruct her to vacate the property on 31 December 2008. In any event, even if the contents of the letter did alert Ms Malan to the illegal activities, it was too late as the City had made its final decision and the letter could not serve the purpose of giving her the opportunity to rectify the breach. The horse had already bolted.

[133] It is appropriate to invoke what Corbett CJ said in *Traub* in rejecting a contention that it was in compliance with the *audi alteram partem* rule that a meeting had been held, and, some representations had been made, after the relevant decision had been taken. The learned Chief Justice said:

> "*Generally speaking, in my view, the audi* [*alteram*] *principle requires the hearing to be given before the decision is taken by the official or body concerned, that is, while he or it still has an open mind on the matter*. *In this way one avoids the natural human inclination to adhere to a decision once taken. Exceptionally, however, the dictates of natural justice may be satisfied by affording the individual concerned a hearing after the prejudicial decision has been taken*. This may be so, for instance, in cases where the party making the decision is necessarily required to act with expedition, or where for some other reason it is not feasible to give a hearing before the decision is taken. But the present is, in my opinion, not such a case. There is no suggestion that the decision whether or not to appoint the respondents to the posts applied for by them had to be taken in a hurry: in fact all the indications are to the contrary. Nor is there any basis for concluding that for some other reason a hearing prior to the decision was not feasible." (Citations omitted and emphasis added.)

[134] No exceptional circumstances existed why the decision to cancel the lease could not be delayed while the City took the steps that it was required to take before making such a decision. Indeed, it took the City about a year after it had made that decision before it instituted eviction proceedings in court and nowhere does it even attempt to explain why it was so quick to make the cancellation decision if such a long time would lapse before taking the matter further.

[135] In any event the very formulation of the maxim: *audi alteram partem* makes it clear that the opportunity to be heard should, generally speaking, be before the relevant decision is taken. In *Traub*, Corbett CJ formulated the principle thus:

> "The maxim expresses a principle of natural justice which is part of our law. *The classic formulations of the principle state that, when a statute empowers a public official or body*

> *to give a decision prejudicially affecting an individual in his liberty or property or existing rights, the latter has a right to be heard before the decision is taken . . . , unless the statute expressly or by implication indicates the contrary*." (Citation omitted and emphasis added.)

[136] Even if it cannot be said that section 7(2) required the City to take the steps referred to above before it could cancel the lease, it seems to me that the requirement of justice and equity provided for in section 4(7), (8) and section 6 of PIE dictated that the City should have taken those steps before it could seek to have Ms Malan evicted. Those provisions enjoin a court dealing with an eviction application to only grant an eviction order if it is of the opinion that the eviction will be just and equitable when regard is had to all the relevant circumstances of the case. Absent its satisfaction that an eviction will be just and equitable, a court may not grant an eviction order.

[137] A court must be satisfied that an eviction will be just and equitable. Some circumstances may render an eviction substantively unjust and inequitable, others procedurally unjust and inequitable. That the justice and equity requirement may have components of a substantive and procedural nature, even though they may not always be easy to separate, was acknowledged by this Court in *Port Elizabeth Municipality*. There this Court made the point that "the procedural and substantive aspects of justice and equity cannot always be separated".

[138] It may well be that, in the case of the eviction of an unlawful occupier whose occupation has never been lawful, an eviction might not be substantively unjust and inequitable. However, I think that, in a case such as the present, where the occupation was lawful for a long time, an eviction may well be substantively unjust and inequitable. The requirements of procedural and substantive fairness in respect of the termination of contracts of employment are well known in our law.

[139] I have difficulty with the proposition that the City had no obligation to discuss the issue of illegal activities with Ms Malan before it could seek to evict her from her home of over 30 years on the basis that there were illegal activities taking place on the property. In my view, absent exceptional circumstances, which are not present in this case, the City was obliged to at least raise the issue with her, discuss it with her and give her an opportunity to rectify the alleged breach. Ms Malan's eviction from her home of over 30 years on the basis that she allowed illegal activities to take place on the property cannot be just and equitable in a case where the City did not take these procedural steps before such a decision. The City never raised its complaint about illegal activities with her. It never discussed the matter with her and never gave her any opportunity to take whatever steps she could have taken to avoid losing her home. To lose one's job or one's home must be two of the most traumatising experiences for anyone. To lose either without being afforded even the opportunity to discuss the reason for losing your job or home is, to say the least, procedurally unfair.

[140] It is important that a court dealing with an eviction application under PIE should appreciate its role and function. This Court has already articulated that role in its judgment in *Port Elizabeth Municipality*. It has said that—

(a) that role is one of ensuring that "justice and equity [prevails] in relation to all concerned."

(b) a court must "hold the balance between illegal eviction and unlawful occupation."

(c) that role "is not to establish a *hierarchical arrangement between different interests involved*, privileging in an abstract and mechanical way the rights of ownership over the right not to be dispossessed of a home or vice versa. Rather it is to balance out and reconcile the opposed claims in as just a manner as possible taking account of all the interests involved and specific factors relevant in each particular case". (Emphasis added.)

(d) the court "must take account of all relevant circumstances, including the manner in which occupation was effected, its duration and the availability of suitable alternative accommodation or land."

(e) "[i]t is the duty of the court in applying the requirements of the Act *to balance these opposing interests and bring out a decision that is just and equitable.*" (Emphasis added.)

(f) the court is "called upon to decide whether, bearing in mind the values of the Constitution, in upholding and enforcing land rights, it is appropriate to issue an order which has the effect of depriving people of their homes."

[141] In *Port Elizabeth Municipality* this Court also set out some of the important principles or guidelines that must be taken into account in determining whether an eviction is just and equitable. Those that appear to be applicable to the present matter are that—

(a) "justice and equity require showing special concern when settled communities or individuals are faced with being uprooted. The longer the unlawful occupiers have been on the land, the more established they are on their sites and in the neighbourhood, the more well settled their homes and the more integrated they are in terms of employment, schooling and enjoyment of social amenities, the greater their claim to the protection of the courts."

(b) "justice and equity would take account of the extent to which serious negotiations had taken place with equality of voice of all concerned."

(c) "[i]t is the duty of the court in applying the requirements of the Act to balance these opposing interests and bring out a decision that is just and equitable".

(d) "[g]iven the special nature of the competing interests involved in eviction proceedings launched under section 6 of PIE, absent special circumstances it would not ordinarily be just and equitable to order eviction if proper discussions and, where appropriate, mediation, have not been attempted."

(e) whether mediation has been tried is relevant to the question whether an eviction order would be just and equitable.

(f) whether the municipality has made attempts "to listen to and consider the problems of [the occupier or occupiers]". In *Port Elizabeth Municipality* this Court found that the municipality had not made any attempts to listen to and consider the problems of the particular group of occupiers and this was one of the important factors that persuaded this Court to conclude that the eviction would not be just and equitable.

(g) section 26 of the Constitution is aimed at creating a new dispensation in which every person has adequate housing and in which the state may not interfere with such access *unless it would be justifiable to do so*.

(h) a "potentially dignified and effective mode of achieving sustainable reconciliations of the different interests involved is to encourage and require the parties to engage with each other in a proactive and honest endeavour to find mutually acceptable solutions."

Application of the above principles or guidelines

[142] The principle in paragraph 141(a) shows part of the purpose of PIE. Under the Prevention of Illegal Squatting Act (PISA) the law of eviction operated too unjustly against black people and was over-protective of property owners who were, mostly, white; part of the purpose of PIE was to change this so as to strike a fair balance between the interests of property owners and those of unlawful occupiers. The principle in

paragraph 141(b) that justice and equity require showing special concern when settled communities or individuals are faced with being uprooted is relevant to this case because the Malan family has been settled on this property for over three decades. The principle or guideline in paragraph 141(b) is to the effect that the longer the unlawful occupiers have been on the land, the greater their claim to the protection of the courts.

[143] The principle or guideline in paragraph 141(c) is to the effect that taking into account the extent to which serious negotiations had taken place with equality of voice of all concerned is required by considerations of justice and equity. In *Port Elizabeth Municipality* this Court required compliance with this guideline or principle in a case where the unlawful occupiers had never had the right to occupy the land in the first place. It seems to me that, in a case such as the present where the unlawful occupier's original entry into the property was lawful and, indeed, in a case where, for three decades, the unlawful occupier's occupation was lawful, this Court would even be firmer in requiring compliance with this guideline.

[144] In my view a situation cannot be allowed where the owner of property cancels the lease, and seeks the eviction, of someone who has lived on the property lawfully for three decades without even first having had any discussions or negotiations with such a person on the issue which is the reason for the cancellation or eviction. Such a person certainly deserves a better treatment. In the present case there was not even a single attempt by the City to engage in any form of discussion or consultation or negotiation with Ms

Malan despite the fact that she had been a lawful occupier of the property for so long and despite the fact that, by the City's own admission, she had never taken part in the illegal activities that were a concern to the City.

[145] The principle or guideline in paragraph 141(d) is the overall principle governing the role of every court required to decide whether or not to grant an eviction order under PIE. When all is said and done, the court must ask itself the question: will an eviction in this particular case and in these particular circumstances be just and equitable? If the answer is in the negative, the court may not grant an eviction order. If the answer is in the affirmative, it may grant an eviction order.

[146] The principle or guideline in paragraph 141(e) links up with the principle or guideline in 141(c). The principle in paragraph 141(e) is to the effect that, unless there are special circumstances justifying the contrary, an eviction without any attempt to have proper discussions or, where appropriate, mediation will ordinarily not be just and equitable. In the present case the City made no attempts whatsoever to have any discussions or negotiations with Ms Malan or to attempt mediation before it took the decision to cancel her lease and require her to vacate her home. In my view there were no special circumstances that justified the City's failure to do so.

[147] In considering whether Ms Malan's eviction would be just and equitable a number of factors need to be taken into account. These include that she had lived on the

property for over three decades as a lawful tenant, the City had never complained to her about the illegal activities, in the light of her age and poor health, she may not have known the full extent of the illegal activities, the City accepts that she herself had not taken part in the illegal activities and that she had been offered accommodation at an old-age home. In my view the fact that she has been offered accommodation at an old-age home would not outweigh all the other factors because to live in one's home and to live at an old-age home are two vastly different things. In any event the terms and conditions of living at the old-age home offered by the City are not known as yet.

[148] I have decided this matter on the basis that the City was obliged to take the procedural steps referred to above before it could make the decision to cancel the lease and seek Ms Malan's eviction but failed to do so. This is in line with the jurisprudence of this Court. This is so because those procedural steps form part of the content of the duty of engagement that this Court has articulated in a number of housing or eviction cases.

[149] In *Occupiers of 51 Olivia Road* this Court, following upon similar statements in *Grootboom* and *Port Elizabeth Municipality*, said:

> "The Constitution therefore obliges every municipality to engage meaningfully with people who would become homeless because it evicts them".

In my view that duty of engagement is not limited to persons who would be homeless once evicted. There is no reason in principle or logic why it should be restricted in that way. I also do not think that this Court had intended to restrict the duty in that way. In my view the duty applies whenever a municipality becomes aware of conduct or a state of affairs that may lead to an eviction of a person or people from their homes. In any event, in the present case, when the City decided to cancel Ms Malan's lease and seek her eviction in 2008, it did not make any offer to accommodate her anywhere. That remained the case for the next two years or so because it was only when it filed its replying affidavits that it made the offer to accommodate her in an old-age home.

[150] The duty of engagement that a municipality is obliged to observe entails that the municipality should raise its concerns with persons whose eviction it may seek, discuss possible solutions with them and try and find ways of accommodating their concerns if it can do so within its available resources. That falls squarely within the steps I have said above the City was obliged to take in this matter which it failed to take. The result is that my conclusion that the City was obliged to take the procedural steps to which I have referred above before it could cancel Ms Malan's lease or before it could require her to vacate her home can be explained on the basis of not only section 7(2) of the Constitution but also of a breach of its duty to engage with Ms Malan before it could seek her eviction from her home. In this regard I understand the duty of engagement to also form part of the content of the requirement of justice and equity prescribed by section 4(7), (8) and section 6 of PIE.

[151] The connection between section 7(2) of the Constitution and the City's obligation to take the steps to which I have referred above finds support in the judgment of this Court in *Occupiers of 51 Olivia Road*. There this Court connected the section 7(2) obligation to respect, protect, promote and fulfil rights in the Bill of Rights with the duty of engagement. The Court said:

> "Most importantly [the Municipality] must respect, protect, promote and fulfil the rights in the Bill of Rights. The most important of these for the present purposes is the right to human dignity and the right to life. In the light of these constitutional provisions a municipality that ejects people from their homes without first meaningfully engaging with them acts in a manner that is broadly at odds with the spirit and purpose of the constitutional obligations set out in this paragraph taken together." (Footnotes omitted.)

[152] The facts suggest that, had the City raised the issue of alleged illegal activities with Ms Malan prior to taking the decision to cancel the lease and require her to vacate the property, Ms Malan may have taken steps to address the issue of the illegal activities in which some of her children allegedly took part. That is that, subsequent to Ms Malan becoming aware of the City's decision to cancel her lease and to require her to vacate the property, she increased her rental payments over the year of 2009. Whereas, before the cancellation, she had not paid for at least the five months before January 2009 when she received the letter of cancellation, the schedule of payments that she provided in her answering affidavit reveals that, from January to December 2009, she effectively paid for all the months.

[153] In conclusion I refer to how Ms Malan expressed her attitude to finding herself in a situation where the City sought to evict her from her home because of the illegal activities allegedly committed by, among others, her son, Shaun, without discussing its concerns with her in this regard. She said:

> "The fact of the matter is that the police seem hell-bent on having my son arrested for whatever reason as they believe he is a gangster. *My attitude is a simple one. If the police produce the necessary evidence, then the law must take its course. But I have never and will never approve of illegal activities taking place in my house. This whole story seems like a ghost to me and I do not know what I am supposed to have done which has resulted in me facing eviction from my home. If this is how the law operates in this country then there is no point in living*". (Emphasis added.)

In my view our law does not operate in such a way that the City is entitled to evict Ms Malan from her home without first raising its concerns with her in order to enable her to rectify whatever breach of the lease she may have committed and, thus avoid eviction.

[154] In the premises Ms Malan's eviction is not just and equitable. It seems to me that the High Court did not take proper account of all the above principles or guidelines as well as the provisions of section 7(2) in coming to the contrary conclusion. I would allow the appeal, set aside the decision of the High Court and replace it with an order dismissing the City's application with costs.

For the Applicant:

For the Respondent:
D Stephens instructed by Mario Walters & Associates.

N Bawa and U K Naidoo instructed by Fairbridges Attorneys.