IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: A5008/2012

(1) REPORTABLE: **YES**
(2) OF INTEREST TO OTHER JUDGES: **YES**
(3) REVISED.
(4) DATE: **9 November 2016**

SIGNATURE

MTSHALI, THOKOZANI	1st Appellant
THE OCCUPIERS OF 238 MAIN AND BEREA STREETS	2nd to 230th Appellants
And	
MASAWI, TAYENGWA	1st Respondent
MASAWI, IRENE RUMBIDZAI	2nd Respondent
MAKHAYA, PHUANGELAKHE	3rd Respondent
CITY OF JOHANNESBURG METROPOLITAN MUNICIPALITY	4th Respondent
NATIONAL COMMISSIONER; SOUTH AFRICAN POLICE SERVICES	5th Respondent

JUDGMENT

SPILG, J:

INTRODUCTION

1. On 19 December 2012 and pursuant to a court order the appellants were evicted from the warehouse they were occupying. The first and second respondents are the joint registered owners of the property.

2. The appeal arises from the subsequent refusal by Molahlehi AJ to rescind the eviction order or to vary parts of the order which required the City of Johannesburg Metropolitan Municipality (the fourth respondent) to provide the appellants with temporary housing. The Supreme Court of Appeal (SCA) granted the appellants leave to appeal to this court.

   There was however a delay in filing the appeal record. The appellants have provided an acceptable explanation in their application for condonation. The application is unopposed and is granted.

3. The appellants claimed before the court *a quo* that they had never been served with either the eviction application or with the notice required under section 4(2) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 19 of 1998 (*'PIE'*). They also contended that their occupation was pursuant to oral lease agreements with another person who claimed to be the owner.

4. The appellants argued that the failure to serve the requisite statutory notice or the eviction application deprived them of the ability to exercise their rights under PIE. The appellants also tendered, if occupation was restored, to pay the monthly rentals which they allegedly had been paying of not less than R400 per month per room.

5. It was contended that the court order which directed that the appellants be provided with temporary emergency accommodation should not have required the adults who had the means to pay a rent of R10 per person per day. It was in this context that the appellants raised for the first time in a replying affidavit to

their petition before the SCA that the City had impermissibly outsourced its constitutional obligation to provide emergency accommodation.

6. The appellants furthermore argued that the court *a quo* should have stipulated in its order a time period until when the City was to provide the temporary emergency accommodation and should have provided a mechanism to regulate the ongoing provision of graduated alternative accommodation. It was contended that as a result of these failures the order granted "*is open ended and leaves the parties uncertain as to their rights and obligations*". They also submitted that the City should have been directed to engage meaningfully with the appellants and to report back to the court.

   This will be referred to as the '*structural order*' issue.

7. The final aspect of the appeal relates to the costs of the rescission application which the appellants had been ordered to pay.

8. In order to appreciate how the rescission application was transformed into an order against the City to provide temporary emergency accommodation, it is necessary to consider the original eviction application brought by Mr and Mrs Masawi. They are the first and second respondents in the appeal.

THE EVICTION APPLICATION

9. In December 2011 the Masawis brought an application to evict those who were in occupation of their property. The City was cited as the second respondent in that application.

10. The owners explained in the papers that they could not provide details of the number of occupants or their names because when Mr Masawi went to the property the people he found living there "*were very reluctant to give me any*

information other than to say they were paying rent". The occupiers claimed that rent was being paid to an "*unknown woman*" who they alleged claimed to be the owner.

The occupiers were therefore cited as: "*The unknown occupiers of erf 550 City and Suburban, described as 238 Main Street Johannesburg.*" This was also how they were described in the body of the founding affidavit.

11. The papers alleged that a letter had been addressed to the occupiers on 22 May 2011 advising them to vacate the property, shortly after which a response was received from V.M Mashele Attorneys. The attorneys wrote that their client, the Makhaya family, had purchased the property from a Mr Ozen sometime during 2002 or 2003.

    The attorneys also claimed that their client was occupying the "*flat*" and requested a week to rectify what was said to be an irregularity in the transfer of the property. A schedule was also provided which reflected sporadic payments varying from R4 500 to R16 000 that had been made by "*Exclusive Services*" during the period June 1999 through to May 2003.

12. The owners' replied to this letter by asserting their rights as the registered owners and challenged the Makhayas to demonstrate any competing right. Neither the Makhayas nor their attorneys responded.

13. In the meanwhile the owners had obtained a confirmatory affidavit from Mr M Katz, a director of Procus CC from whom they had bought the property. He confirmed that in 1999 an installment sale agreement had been concluded with Exclusive Services which had taken occupation from the beginning of June 1999. However transfer was never effected as the sale was cancelled for failure to pay the amounts due.

14. At this stage it should be pointed out that despite a number of opportunities presenting themselves during the litigation, and despite Makhaya's attorney being

invited to do so, nowhere was it ever alleged that the Makhayas had an interest in Exclusive Services. Moreover Molahlehi AJ's finding that the building was hijacked was not put in issue.

15. On 13 January 2012 the application was served upon;

> "*Tenten the occupier ostensibly a responsible employee… and in control of and at the place of business of The unknown occupiers of erf 550 City and Suburban, described as 238 Main Street Johannesburg* ".

16. In order to comply with the provisions of PIE the owners subsequently brought an application in February 2012 to serve a notice under s 4(2) of that Act on the *"first respondent"* as described in the main eviction proceedings, with service to be effected "*in accordance with Uniform Rule 4*". The order was granted on 22 February and served on 8 March 2012.

As with the original application the s 4(2) notice was also served on Tenten.

17. On 28 March 2012 Kathree-Setiloane J granted an eviction order against the first respondent, being as stated earlier '*The Unknown Occupiers of Erf 550 City and Suburban, described as 238 Main Street Johannesburg*" , and also against "*all those who occupied the property in question through and by virtue of the first respondent's occupancy*". Costs were also granted.

18. The sheriff's return records that the eviction order was served on 5 May 2012:

> *"By affixing a copy thereof to the residents of the residents of THE UNKNOWN OCCUPIERS OF ERF 550 CITY AND SURBURBAN… 238 Main Street, Johannesburg which is kept locked thus prevents alternative service. Rule 4(1) (a) (iv).*
>
> …
>
> *Copy of court order affixed to principle door. Illegal unlawful occupiers are violent."*

(emphasis added)

19. On 19 December 2013 those who were still in occupation of the property were evicted by the sheriff with the assistance of the Red Ants. Their plight immediately drew the public's attention since they and their children were left stranded and were living on the street under a bridge near to the property. An attempt was made to regain occupation of the building but the appellants were again removed on 21 December after which they continued to live under the bridge.

20. The appellants initially claimed that 127 people had been evicted of whom 76 were adults. By the time the appellants delivered a supplementary affidavit during February 2013 their number was reduced to 33 in total of whom 25 were responsible for paying rent. By the time the appellants brought their petition to the SCA their number was claimed to be 35 of whom eight were children. There is no explanation provided for either the reduction in the number of those paying rent or the subsequent increase in the total number of evictees.

APPELLANTS' HIGH COURT APPLICATIONS

21. In January 2013 the appellants brought an urgent spoliation order against the person whom they believed had effected their forced removal; namely Mr P Makhaya, the third respondent in the present proceedings.

22. Kgomo J postponed the application for two weeks and directed personal service on the third respondent. The appellants claim that they then realised that Makhaya had not evicted them and withdrew the application. On 23 January 2013 they instituted a fresh application, which is the subject matter of this appeal, against the first and second respondents.

23. The application was instituted by Mr Mtshali as the 1st applicant and "*The Occupiers of 238 Corner Main and Berea Street*" as the 2nd to 230th applicants. They are the appellants before this court.

The application was brought urgently for hearing on 29 January 2013. The relief sought was to declare the appellants' eviction unlawful and to direct that they be restored to undisturbed possession of their rooms *ante omnia* pending the finalisation of an application to rescind the eviction order granted on 28 March 2012.

The City was joined. However, at that stage no substantive relief was sought against it.

24. Although the appellants brought the application as the 1st to the 230th applicants the case made out in the founding affidavit was that the appellants comprised approximately 127 individuals of whom 51 were children. Three of the children were under six months of age.

Nonetheless details of only 40 adults were provided. They were the only ones who deposed to affidavits.

25. The appellants claimed that prior to their eviction they had no knowledge of any notice or court order. They only admitted to being aware of a notice to vacate given sometime in 2011 but alleged that they continued to pay rental and that Makhaya permitted them to occupy the building.

26. It was also alleged that all the occupiers "*have been paying regular rental*" to Makhaya. These amounts varied from R400 to R650 per month save in the case of Mr Thobani Zwane who did not mention whether he had a lease.

27. Most of the occupiers said that they worked either as cleaners, domestic workers, truck drivers or security guards. Many others said that they were not employed in the formal sector but performed piece work. Zwane in a supporting affidavit said that he resided on the property with his spouse and 16 year old daughter and that he was undergoing treatment for tuberculosis.

28. The appellants claimed that each of the 45 partitioned-off rooms in the warehouse was let and that the main occupier of each room was obliged to pay a monthly rental to the third respondent.

29. In their affidavits the appellants sought to explain the failure to take any steps to oppose their eviction. It was claimed that they had verbal leases with Makhaya who had told them that he was the owner of the building. The leases had not been concluded with Makhaya personally but with a person who the appellants said was the caretaker identified only as Never and who, it is further alleged, claimed that he represented Makhaya.

    It was alleged that none of the appellants received notice of, or were aware of, the eviction proceedings or order authorising their eviction. It was further claimed that they did not know a person by the name of Tenet (being the person who received both the eviction application and the s 4(2) notice). The appellants pointed out that the notice of intention to oppose the eviction application was filed by Mashele Attorneys who represented Makhaya.

30. In advancing the basis of urgency for restoration to the building, the appellants contended that the City would not provide them with emergency temporary shelter.

    The appellants therefore blamed Makhaya for misrepresenting to them that he was the true owner. They aver that Makhaya's attorneys continued to hold out that he was the owner even when the initial application for restoration had been brought against him.

31. Although the appellants attached the owners' application for eviction they did not challenge the allegations which were made in it that when Mr Masawi approached them they were reluctant to provide any information, that the appellants had at the time claimed that a woman held herself out to be the owner, that she was unknown to them and that they were paying rent to her.

It is evident from the appellants' affidavit that they knew Mr Makhaya. Moreover they claimed that they gave him the letter to vacate of 22 May 2011. The appellants however failed to deal with why they did not inform Masawi of this fact when he sought to engage them if they genuinely believed that Makhaya was the owner or that the person to whom they were allegedly paying rent was a representative of Makhaya. They also failed to deal with why they fobbed off Masawi by claiming that the owner was an unknown woman particularly when one would expect persons genuinely claiming the protection of a legitimate right of occupation to have done so.

32. In their answering affidavits the owners relied on the regularity of the eviction order that was granted on 28 March 2012.

They also mentioned that the property is located in an area zoned for business and commercial use and contended that it was unfit for human habitation; there being an unprecedented high risk of fire, disease, contamination and the possibility of social unrest due to the limited or non-existent public services.

33. In support of these allegations the owners relied on the report of Mr Nkhonyane, a qualified architect. The report, which Nkhonyane confirmed under oath, indicated that the building, described as a warehouse, was at some stage occupied as dwellings and that partitions were erected to create separate quarters within an essentially brick structure. As a result over 80% of the rooms were windowless. The partitioning consisted of abandoned dry walling which was not secured or fastened. Doors to individual partitioned-off areas were also not properly installed.

34. It is evident from the report that the building was not constructed for habitation. Accordingly the water and electricity installations were inadequate. Hoses provided for fire-fighting were used to access water and the main distribution board was vandalised to re-route electricity while electrical cabling in a number of *'rooms'* hung unprotected. Skirting was also ripped out and left hanging.

The report further mentioned that the existing sewage facilities in the warehouse could not support the number of inhabitants. There was water seepage from the ceilings and garbage was left uncollected on the first floor while the main staircase was also littered. Although the architect's report was challenged in part, the above observations were not placed in dispute, nor was the conclusion that there existed an unprecedentedly high risk of fire, disease and contamination.

35. In the answering affidavit the owners again claimed that the appellants did not want to talk to them when approached and were hostile, accusing the first respondent of being a foreigner.

The owners also described that on 19 December 2012 and immediately after the appellants were evicted the five security guards posted at the building were violently attacked and chased away with bottles and knobkerries. Two of the guards were hospitalised and required their injuries to be stitched. Replacement security guards were also attacked and stoned which necessitated police intervention.

36. The appellants' replying affidavit generally consisted of bald denials to the contents of the answering affidavit.

In regard to service of the eviction application and the section 4(2) notice, the appellants simply claimed that Tenten, who received service, was unknown to them. They did not deal at all with the sheriff's note to the return of 5 May 2012 (in respect of the eviction order) that service could not be effected on any person because the doors were locked, thereby denying access, and that the occupiers were violent.

Mtshali who also deposed to the replying affidavit claimed only that a copy of the order might have been removed and suggested that Makhaya had an incentive to ensure that the order did not come to the occupiers' attention.

Many of these allegations are hearsay. There are no confirmatory affidavits to support Mtshali's contention that none of the occupiers was aware of the legal processes and the s 4(2) notice that were served, or of the existence of Tenten.

37. Although there is a denial of subsequent acts of violence it was conceded that *"certain of the occupiers may have acted improperly during the eviction"* but that the acts of a few individuals cannot be impugned to all.

38. When the case was called before Mokgoatlheng J on 29 January 2013 the court indicated that Part B of the application, which was for final relief, should also be determined. The parties then agreed to exchange supplementary affidavits before the next hearing.

39. On 7 February 2012 the appellants filed a supplementary affidavit dealing with the efforts of the evictees to obtain alternative accommodation, the conduct of the City and the issue of final relief. It was at this stage that the appellants for the first time sought orders against the City. This was initiated through a comprehensive amendment to their notice of motion which now included the additional following orders to those originally sought (of declaring their eviction unlawful and for restoration to the building);

    a. Directing the individual appellants "*to pay rental amounts to the first and second respondents in respect of their occupation ....as set out in the schedule attached as Annexure 'A', in accordance with their tender to do so*"; (emphasis added)

    b. In the event of any further proceedings for eviction after the appellants are restored to the building; that the City engages meaningfully with them and the owners regarding a number of issues related to the consequences of the eviction such as the risk of homelessness, alternatively directing the City to provide those persons identified in an annexure (marked "*B*") or any other occupier with temporary emergency shelter provided that such shelter is;

i. suitable for the accommodation of families without separation;

ii. located as near as feasible to the area where they were evicted from;

iii. for a period of not less than six months from the date of the order.

c. *"Permitting"* the City to engage with each individual appellant and subsequently review the entitlement of each to receive temporary accommodation, provided that the City may only withdraw the provision of accommodation on reasonable notice and after affording an opportunity for representations to be made.

40. Annexure *"A"* to the amended notice of motion contained a list of 28 adults and reflected that each paid rental in an amount of not less than R400 per month. The names of a further three other persons had been crossed off the list.

Annexure *'B'* which purports to reflect all those who had been evicted contained the names of 33 people and, according to the supplementary affidavit of Mtshali, included 10 children. As mentioned earlier this meant that there were only 23 adults although 25 were claimed to be paying rent in terms of Annexure *'A'*. The appellants failed to explain the discrepancy in the number of adults reflected on the respective lists.

41. The supplementary affidavit confirmed that in their meetings with the City the appellants were advised that no temporary emergency shelter was available. The appellants however complained that the City *inter alia* failed in its legal duty to engage with them as required under PIE.

42. The affidavit also explained that all 33 evictees were living under the bridge as they were unable to find alternative affordable accommodation in the City and that the children included three infants and a three year old child.

43. The affidavits of Prof Huchzermeyer and Ms Tissington were attached. The former is a Professor in the School of Architecture and Planning at the University of the Witwatersrand. She is an expert in the field of housing policy with specialist knowledge of urban land tenure in the City. The other is a senior researcher and advocacy officer at the Socio-Economic Rights Institute of South Africa whose research has focused on housing policy, access to land for the poor and the residential property market in the Johannesburg inner city.

44. The experts confirmed that there was a serious shortage of low cost rental accommodation and other forms of cheap accommodation in and around the inner city with rentals ranging from R1000 to R2700. In the result the appellants could not afford such accommodation. However, for their livelihood, the evictees depended on being able to reside in the inner City as they did not earn enough to commute from the periphery of the CBD. Tissington concluded that it was unlikely that the appellants would easily access housing or basic shelter "*which is lawful, adequate and affordable to them, within the inner city of Johannesburg*".

45. Prof Huchzermeyer confirmed the scarcity not only of low rental accommodation in the inner city but also of emergency temporary accommodation that was accessible to the City. She stated that there are 189 "*informal settlements*" within the City of which 58 were still undergoing a township establishment process.

    She added that very few new informal settlements have been permitted and that existing ones suffered from overcrowding. In residential areas such as Alexandra and elsewhere the City was prohibiting the construction of shacks on properties. According to her the City was also enforcing its prohibition on the construction of new shacks in informal settlements or on open land by dismantling them; this despite not having a viable program to provide alternative accommodation.

    The professor stated that to the best of her knowledge there were no reception areas with available space to provide temporary occupation for those migrating into the metropolitan area for the first time or who had nowhere else to go after being evicted within the urban area. She added that the Diepsloot reception area which housed 18 000 households in 2007 was now severely overcrowded.

These statistics indicated that the evictees would not be able to find informal work in the burgeoning areas on the City's outskirts where accommodation would be substantially cheaper. The City did not suggest otherwise.

46. It was the professor's view that the City had only recently implemented an emergency housing project under Part Four of the National Housing Code (previously Chapter 12) to cater for those who had been evicted under PIE. She stated that the City only made alternative low cost rental accommodation available where it was ordered to by the courts.

Prof Huchzermeyer also observed that initiatives by the authorities were directed at the provision of temporary accommodation but did not seek to solve the longer term housing needs of evictees who were extremely poor. In amplification, the professor stated that the allocation of formal subsidised housing, the so-called RDP[1] houses, would not be accessible to the appellants as it involved waiting lists and several years of project preparation. This meant that rental housing was the most likely alternative, but the City had not implemented a policy whereby evictees could access accommodation at affordable rates.

The professor however confirmed that low rent housing was offered by the City to those relocated from specific buildings and pursuant to court orders to this effect.

47. In her opinion the appellants would "*struggle to access lawful affordable housing whether from the State or from any private housing provider, in and around the inner-city*" and that if they found alternative lawful accommodation then it would be at the expense of their incomes and livelihood. Prof Huchzermeyer concluded that:

> "*The livelihood strategies developed by the occupiers of the property depend crucially on living at a site in, or adjacent to, formally established townships in the urban core. Relocation to an informal settlement or a township at the*

[1] Reconstruction and Development Programme

outskirts of the City would accordingly destroy many of the livelihood strategies developed by the occupiers of the property

Many of the occupiers do not earn enough to pay the costs of commuting from the urban periphery every day. Those who do earn enough to commute in this way will see their incomes diminish significantly".

48. The appellants contended that due to the serious predicament they and their children had found themselves of being thrown out in the street the process for determining whether each individual evictee actually qualified for temporary emergency housing should be held over until after the City provided them with temporary accommodation.

In this regard, deferring an assessment of who actually qualified for emergency shelter until the City provided all evictees with temporary accommodation was authoritative sanctioned in *City of Johannesburg v Changing Tides 74 (Pty) Ltd and Others* 2012 (6) SA 294 (SCA) at para 53[2].

[2] *per* Wallis JA:

> *'I accept that the City is entitled to review the claim of any person seeking temporary emergency accommodation as a result of an eviction. However, the relevant question, in cases of eviction creating an emergency, is whether the appropriate time to do that is before that person obtains such accommodation or afterwards. Where the facts point to the desirability of the eviction being effected as rapidly as possible, because the circumstances in which the occupiers are living pose a risk to life and health, the only answer must be that the review process should defer to the need for eviction and accordingly take place after the City has provided the evictees with temporary emergency accommodation. This gives rise to the possibility — not likely to be great — that some people not entitled thereto may obtain temporary access to temporary emergency accommodation, until their disqualification is discovered. However, that is preferable to a large number of people who undoubtedly are entitled to such accommodation being kept out of it and forced to live in unhealthy and potentially life-threatening surroundings for longer than necessary, while the City weeds out the few who are not entitled to this benefit. That is especially so as it seems probable that any adverse decision by the City on an individual's right to temporary emergency accommodation may be subject to legal challenge.'*

49. In its answering affidavit the City informed the court that it had already relocated the appellants from under the bridge to what it described as very temporary emergency accommodation at Ekhaya House in Hillbrow. It is;

> "*... a shelter-type accommodation and is not intended nor designed for the accommodation of any people beyond the shortest period. The City has used it for and only for, this very short period while other options are considered.*"

The City averred that Ekhaya House was set up to provide only extremely short term emergency accommodation of not more than some 72 hours duration.

50. The City claimed that there was no other temporary emergency accommodation available for the appellants save possibly for the Ekhuthuleni building in De Villiers Street which had approximately 100 beds. The building was already partially occupied by the evictees involved in the *Blue Moonlight*[3] case and the remainder of the facility had already been tendered by the City to evictees in the *Changing Tides*[4] matter. It was alleged that there were a substantial group of equally, if not more, desperate people requiring the same accommodation. The City however conceded that there was other temporary emergency accommodation which had been rejected by the appellants because the terms imposed were considered to be degrading and destructive of family life.

51. In its affidavit the City explained that it did not have an opportunity to assess the appellants for eligibility to temporary emergency accommodation. Because of the paucity of information provided by the appellants[5], it could not assess the circumstances of each individual or properly consider the type and size of accommodation required.

52. The City submitted that since May 2011 when the appellants received the notice to vacate (and certainly by May 2012 when the eviction order was served) they

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[3] *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* 2012 (2) SA 104 (CC)

[4] *City of Johannesburg v Changing Tides 74 (Pty) Ltd and Others* 2012 (6) SA 294 (SCA)

[5] The appellants identified the evictees as the 33 people listed in annexure B and then included "*any other applicants*" to those seeking relief

knew that continued occupation of the building was precarious and they should then have engaged the City to secure alternative accommodation.

53. Attention was also drawn, and I paraphrase, to the fact that aside from the question of available resources it was necessary to compare the individual circumstances of each evictee with the needs of all the other persons who were competing for scarce available temporary emergency accommodation.

    In this context the City explained that in order to identify those entitled to temporary emergency housing it had adopted a process of registration on both the Gauteng Demand Data Base and also on the City's own Expanded Social Package.

54. The City identified that there were some 1130 unlawful occupiers in seven buildings on its current waiting list for temporary emergency accommodation. The few who had been provided with emergency accommodation were still in occupation of the facilities after ten months and were opposed to vacating. In addition another 929 people were subject to eviction from six other buildings. It was claimed that there were many more eviction cases that had not been included on its list. However the City did not provide any details.

55. In dealing with its strategy to provide accommodation for evictees from both State owned land and private property (pursuant to *Blue Moonlight)* the City considered the best approach to be one that aided transformation through a dedicated programme "*so that evictees with the least available resources may be able to transition to the next available form of affordable rental accommodation. This required a managed care temporary accommodation provision, including a social component geared towards such transformation."*

56. The City indicated that it provided both its own rental accommodation and utilised rental accommodation provided on behalf of the City by Joshco[6] and other municipal owned entities. The entry level rental for accommodation provided by Joshco was R800 per month. There were seven buildings in this category which

[6] Johannesburg Social Housing Company

provided temporary or rental accommodation, of which four were fully occupied. The others were in various stages of renovation but were already earmarked for occupation. Effectively only one building, comprising 144 units, would be available to those already on Joshco's waiting list.

57. There were also public private partnerships which accounted for approximately 25 000 units with the lowest rentals being R1200 per month (charged for a bachelor type flat).

58. Low cost rental accommodation was provided to those entering the housing market and who needed a temporary housing option at a very cheap rate. This was generally in the form of communal accommodation. It was however for a limited period while the occupier made arrangements to relocate to housing he or she could afford, whether in the commercial market or in terms of housing opportunities provided by the State.

    Another six buildings were also being occupied or under construction. Three of them (totaling 787 beds) were occupied indefinitely by individuals who were not paying any rental while the other buildings were either being renovated or already earmarked for other groups of evictees.

59. According to the City there therefore remained only the Ekhuthuleni shelter providing 100 temporary emergency accommodation facilities of which 16 were utilised by Blue Moonlight evictees while the balance was offered to those evicted from Tikwelo House.

60. It was alleged that all the other beds and units provided by the City or accessible to it were allocated and nothing else was available for temporary emergency accommodation. The City claimed that without further financial resources and assistance from other spheres of government it was unable to upscale or accelerate the provision of such accommodation in the short term.

61. It was evident from the answering affidavit that the City had already engaged the appellants in trying to find temporary emergency accommodation. By 8 February

2012 the City had relocated the appellants from under the bridge to Ekhaya House.

62. This was the state of the papers when Molahlehi AJ, on 13 February 2015, heard the application for rescission of the eviction order which had been granted almost three years earlier in March 2012.

Since the City accepted its constitutional duty to provide emergency temporary shelter the learned judge directed the legal representatives of the appellant and the City to discuss the provision of accommodation beyond the extremely short time the City claimed the appellants could remain at Ekhaya House.

63. The matter was stood down for two days and argument resumed on15 February.

The court refused to rescind the eviction order holding that the appellants had failed to establish a *bona fide* defence.

It however directed the City to provide temporary accommodation to those appellants whose names appeared on a revised list of evictees identified as exhibit '*X*'.

64. In terms of the court order, should the prevailing arrangements for accommodating continue then those who earned an income, as reflected in exhibit *'X'*, *'may be required to pay R10 on a daily basis and this will apply only to adults and not to children'*.

65. Exhibit *'X'* featured prominently in the court directed discussions between the parties and was dealt with in the judgment. It had been prepared by the appellant's legal representatives. The document identified 25 of the appellants as earning an income and sets out their individual monthly earnings. Eight of the appellants appear to earn no income, ten earn less than R1200 per month, while the remaining seven earn between R1200 to R2900.

66. After Molahlehi AJ refused leave to appeal the appellants petitioned the President of the SCA. The petition confirmed that the appellants (numbering now 27 adults and eight children) were still housed at Ekhaya House. Their identities were however not revealed. This means that they were still there after seven months despite the facility only being intended for emergency accommodation limited to no longer than 72 hours.

67. The petition was deposed to by Mtshali without any supporting affidavits from the remaining adult evictees. However the deponent claimed that he was authorised to represent them and claimed that the whereabouts of the other 92 of the original evictees[7] was unknown.

68. In their petition to the SCA the appellants introduced further evidence without indicating that they had done so. The following paragraphs constituted new evidence;

    a. the appellants contended that the owners knew that VM Mashele represented Makhaya and not the occupiers but had failed to draw this to the court's attention;

    b. the owners had failed to disclose the personal circumstances of the occupiers and gave a misleading account of their circumstances by suggesting that the occupiers did not include elderly people, women and children who faced the prospect of homelessness if evicted;

    c. at the time when the application against Makhaya was launched, the applicant's attorneys were advised by Makhaya that he was the owner.

    d. Ekhaya House was a shelter run by the Metropolitan Evangelical Services and that of the 19 adult evictees, 10 had permanent employment but, unlike in the earlier affidavits, no mention was made of those who might be working in the informal sector;

[7] It will be recalled that the total number of original evictees was 127.

69. Moreover in the petition, the average income was alleged to be insufficient to support a monthly rental of R400 per household unit. In the petition it was claimed that the average income was now no more than some R585 per month. This is substantially lower than the previously claimed average income if regard is had to the affidavit of Huchzermeyer who established that it was R 1833 per month.

70. No attempt was made to explain the significant change of stance from averring an ability to pay rentals of R400 per month, which was the underlying contention in the original founding papers brought before the high court for rescission and re-occupation, to the position adopted in the petition to the SCA that the appellants were unable to pay any rental.

71. The appellants were also concerned that there was no certainty regarding the period they could continue being accommodated at Ekhaya House. They also did not know what house rules or conditions might be imposed.

It was claimed that after the City had agreed to provide accommodation at Ekhaya House it took no further steps to engage with or assist the appellants to find more suitable temporary accommodation. In their petition the appellants complained that they had been informed of a pending relocation to another building which was unlikely to cater for them since it was earmarked for evictees from two other buildings.

72. In its answering affidavit to the petition the City repeated that until Linatex became available it simply could not provide alternative temporary emergency accommodation.

73. The City averred that the court order did not compel those who could not afford it to pay for accommodation under pain of eviction. It also did not direct that those who could afford to pay, but did not, would cease to be accommodated by the City.

The City claimed that it was continuing to look for alternative accommodation despite those who claimed they could afford to pay refusing to do so. Other accommodation which was City owned and controlled had been offered at no rental. However it was declined by the appellants on the grounds that the house rules were oppressive.

74. In addition the City contended that the appellants were not left in a vulnerable position as a result of the order and that there was no need for the court *a quo* to grant any order in addition to those made, since there was ongoing engagement with the appellants to look for alternative accommodation.

The City also drew specific attention to the discussions between it and the appellants which resulted in temporary accommodation being provided at Ekhaya House without the necessity of a court directive other than regarding the payment of any rent.

75. In the answering affidavit it was explained that although Ekhaya House was owned by the City, MES managed it and that it was controlled, under a long term notarial lease, by Maduamoho Housing Association which was an independent social housing company.

The City stated that it was able to use its influence to allow the evictees to take up temporary accommodation. However it explained that there was a cost incurred by MES which would be partially defrayed by the payment of rental from those who could afford it. It was alleged that MES ordinarily charged homeless people R15 per day escalating to R20.

76. In their replying affidavit the appellants took issue with the City's averments but conceded that they were continuing to engage the City and confirmed that they were still being accommodated at Ekhaya House.

THE ISSUES

77. The appellants contend that they were entitled to a rescission of the eviction order due to the owners' failure to serve either the application or the section 4(2) notice on them.

They however accepted that they were in unlawful occupation and conceded that they could not return to the warehouse as it had since been demolished.

78. The City has accepted its responsibility to provide temporary emergency accommodation for the appellants in line with *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* 2012 (2) SA 104 (CC) but contend that they can charge a rental to those who are able to afford it.

The appellants responded that the City is not entitled to charge any amount for providing temporary emergency accommodation and that the conditions imposed, regarding gender segregation and a night time curfew, are unconstitutional.

79. It is evident that in order to rely on rights under PIE the appellants must demonstrate that their eviction was unlawful for want of either service of the eviction application or service of the section 4(2) notice[8].

80. If there are no valid grounds for rescinding the eviction order granted by Kathree-Setiloane J then it follows that the appellants' claim to temporary emergency accommodation cannot flow from PIE.

It would also create an intolerable situation if occupiers simply ignored court processes and valid eviction orders in the belief that a PIE investigation by the

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[8] Section 4(2):

> *At least 14 days before the hearing of the proceedings contemplated in subsection (1), the court must serve written and effective notice of the proceedings on the unlawful occupier and the municipality having jurisdiction.*

court as envisaged under sections 4(7) and (8) could be reopened once an eviction order was properly granted.

This would mean that the appellant's right to obtain temporary emergency shelter is to be determined under the socio-economic rights provided for in terms of s 26 of the Constitution in respect of access to housing[9], read with any applicable housing or emergency shelter legislation (including subordinate legislation), and the s 10 right to dignity.[10]

In the case of children it would also include the protection of their constitutionally guaranteed rights under s 28[11] of the Constitution and under the Children's Act 38 of 2005[12] which in turn would provide an umbrella protection to their parents and possibly a *de facto* custodian[13] .

81. Since the building has been demolished the issue of rescission is moot *vis a vis* the owners.

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[9] Section 26 of the Constitution 108 of 1996 provides

> *Housing*
> *(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.*

[10] See section 10 of the Constitution and *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others (Centre on Housing Rights and Evictions and Another, Amici Curiae)* 2010 (3) SA 454 (CC) at para 75

[11] See section 28(1) (c) and 28(2) of the Constitution.
Section 28(1)(c) provides that:
> *'Every child has the right ... to basic nutrition, shelter, basic health care services and social services.'*

Children's rights are prioritised under section 28(2):
> *A child's best interests are of paramount importance in every matter concerning the child.*

[12] See ss 8 and 9 of The Children's Act.
S 9 reads:
> *'Best interests of child paramount*
> *In all matters concerning the care, protection and well-being of a child the standard that the child's best interest is of paramount importance, must be applied.'*

[13] See *Chapelgate Properties 1022 CC v The Unlawful Occupiers Of Erf 644 Kew* (unrep) 1 April 2016 (GLD) at para 87

The issue however remains alive in respect of the City as it is necessary to determine whether the appellant's rights to suitable alternative accommodation derive from PIE or from the fact that they are destitute and rendered homeless, in which case their rights are derived from the protection afforded under section 26 of the Constitution and the other provisions mentioned in the preceding paragraph.

At face value it appears that an application of PIE as opposed to s 26 of the Constitution together with the other housing legislation referred earlier may yield a different result by reason of the weighting to be given to the competing rights and interests that are to be taken into account.

By way of illustration; PIE has regard to whether, and if so for how long, the owner is to continue bearing the cost of providing occupation as against the accommodation that the City is required to make available for persons who are already in need of emergency shelter. Where a private owner has satisfied the requirements of PIE and the occupiers have been lawfully evicted by court order, then the competing rights of other destitute persons who have no accommodation gain significance if there is simply not enough free shelter available; so too their respective rights to graduate to more permanent accommodation.

82. This is not to say that the type of enquiry will not encompass the same issues as envisaged by sections 4 (7) and (8)[14] of PIE: Those sections were introduced

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[14] Section 4(7) and (8):

(7) 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.

(8) 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).

precisely because they were intended to give statutory content to the protection provided by section 26 of the Constitution.

83. It becomes a matter of what is doable within the constraints of an already desperate housing situation. It also raises questions of when court oversight through a structural order is apposite bearing in mind that such an order may constitute an intervention in the formulation and administration of an evolving housing programme. A further concern is the difficulty of ensuring that those who have competing rights of access to housing in all its various permutations will have an opportunity to be heard on an issue that is likely to adversely affect their interests.

84. The other issue raised by the appellants concerns the house rules that may be applicable to their emergency accommodation.

However the constitutionality of the house rules had already been decided in this division by *Dladla and Others v City of Johannesburg and Another* 2014 (6) SA 516 (GJ) prior to us hearing the matter and has since been determined by the SCA in *City of Johannesburg v Dladla* [2016] ZASCA 66.

85. Finally the respondents abandoned the cost orders granted in their favour.

86. In the result the issues for determination on appeal are limited to;

a. whether the eviction order should have been rescinded;

b. whether the City is entitled to either outsource or charge for the provision of temporary emergency accommodation to any class of person;

c. whether the court should have granted a structural order with a report back.

WHETHER APPELLANTS ENTITLED TO RESCISSION OF JUDGMENT (Lawfulness of Eviction)

87. The appellant's contend that because the eviction order should be rescinded their right to temporary emergency shelter arises from an investigation of what is just and equitable in terms of ss 4(7) and (8) of PIE. It is also argued that they were deprived of these rights by the grant of the default judgment in their absence.

    It is therefore necessary to commence the enquiry by reference to whether the appellants are entitled to rescind the default judgment.

88. *Adv Brickhill* for the appellants submitted that the court *a quo* erred on two grounds when it refused to grant rescission of judgment.

    The first is its finding that the appellants failed to show that they had a right to remain on the property and the other is that the judge who granted the eviction order was not fully informed of the relevant circumstances as required under ss 4(7) and (8) of PIE; it being contended that the occupiers had no knowledge of the eviction proceedings and therefore could not make submissions to the court concerning their personal circumstances and their right of access to accommodation.

89. Molahlehi AJ found that the appellants had failed to demonstrate a right to remain on the property.

    While it is correct that the court looked at the issue of rescission from the perspective of a *bona fide* defence to the eviction order, the judge also took into account that Makhaya had hijacked the building, that the appellants did not dispute having "*rebuffed and chased away*" the owners when they had tried to discuss and that the appellants had tendered to rent the property from the owners.

90. I however agree that the court did not consider whether the eviction application or the section 4(2) notice was served on the appellants. This is a material factor in

determining whether the appellants were deprived of their rights to a court investigation under sections 4(7) and (8) of PIE.

91. In this regard appellants rely on the case of *Occupiers, Shulana Court, 11 Hendon Road, Yeoville, Johannesburg v Steele* 2010 (9) BCLR 911 (SCA) ([2010] 4 All SA 54). The case does not appear to have been brought to the attention of the court *a quo*.

92. In *Shulana Court* the SCA held that a failure on the part of the court *a quo* to take a more pro-active approach in the circumstances of the case resulted in it not being sufficiently informed of all relevant factors before granting an order which would deprive people of a home. The SCA held that the high court had failed to apply the peremptory provisions of section 4(6)[15] and (7) of PIE with the result that the appellants were entitled to rescind the eviction order granted against them[16].

93. It is evident from *Shulana Court* that the court which heard the eviction application had before it some information but that it was '*not sufficiently informed of all relevant circumstances*'[17] in order to make a proper determination under s 4(7) (and presumably s 4(8)), which in turn would require a consideration of the risk of homelessness and the availability of alternative accommodation. See *Shulana Court* at para 16 where the court said:

> *' It will, generally, not be just and equitable for a court to grant an eviction order where the effect of such an order would be to render the occupiers of the property homeless. In Port Elizabeth Municipality, the Constitutional Court cautioned that "a court should be reluctant to grant an eviction against relatively settled occupiers unless it is satisfied that a reasonable alternative is available". I am of the view, having regard to the personal circumstances of the occupiers, and in particular the real prospect that their eviction could lead to homelessness, that they have established a bona fide defence that carries some prospect of success.'*

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[15] Section 4(6) of PIE is concerned with unlawful occupation of less than six months in duration before the proceedings were initiated while section 4(7) deals with occupation of six months or more.
[16] *Shulana Court* at paras 12 and 14-16
[17] *Shulana Court* at para 14

94. Moreover in *Shulana Court* the occupiers were living in flats which the owner-landlord had leased to them. Accordingly the owner would have had information regarding their personal circumstances which should have been placed before the court. In the present case it is not disputed that the appellants refused to engage the owners and had chased them away prior to proceedings being instituted.

95. In my respectful view there was nothing before Kathree-Setiloane J to indicate that the appellants' eviction could lead to homelessness. On the contrary the application was based on the occupiers claiming that they were all paying rent under agreements of lease to a person who purported to be the agent for the landlord. Accordingly the factual circumstances of this case preclude the appellants from relying on *Shulana Court.*

    Moreover it was not suggested in the rescission application before Molahlehi AJ that any of the information contained in the eviction application was untrue

96. The appellants are therefore left with demonstrating a *bona fide* defence based on the non-service of either the eviction application or the section 4(2) notice.

    Both documents were served by the sheriff at the premises. They were served in circumstances where the appellants had already been approached by the true owners and were informed that any rent that was in fact being paid was paid to someone who was not the owner.

97. If the appellants were to demonstrate good cause for the purposes of rescinding the eviction order then they were obliged to provide a reasonable explanation for their default and set out a *bona fide* defence which had some *prima facie* prospects of success. See generally *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA) at para 11 where the court said:

    '... the Courts generally expect an applicant to show good cause (a) by giving a reasonable explanation of his default; (b) by showing that his application is made bona fide; and (c) by showing that he has a bona fide defence to the

plaintiff's claim which prima facie has some prospect of success (Grant v Plumbers (Pty) Ltd, HDS Construction (Pty) Ltd v Wait supra, Chetty v Law Society, Transvaal).'

For present purposes I will leave aside the appellants' failure to challenge the eviction order for a period of some seven months after it was served.

98. The test for what constitutes a *bona fide* defence is informed by the similar test applied for granting leave to defend in summary judgment proceedings.

The cases regularly cited in summary judgment proceedings are *Maharaj v Barclays National Bank Limited* 1976(1) SA 418 (A) and *Breytenbach v Fiat SA Edms Beperk* 1976(2) SA 226 (T).

99. The observation by Coleman J in *Breytenbach* at 228A-B is apposite, although made in the context of *bona fides* in summary judgment proceedings. The court said that the defence will fail to overcome summary judgment if:

"The court, with due regard to all the circumstances, receives the impression that the defendant has or may have dishonestly sought to avoid the dangers inherent in the presentation of their further or clearer version of the defence which he claims to have."

100. In *Standard Bank of SA Limited v EL-Naddaf and Another* 1999 (4) SA 779 (W) at 784D- 785I Marais J adopted a similar position regarding the requirements for demonstrating a *bona fide* defence in rescission applications.

Zulman J (at the time) in considering whether the affidavit in a summary judgment application disclosed a *bona fide* defence said in *Diesel Power Plant Hire CC v Master Diggers (Pty) Limited* 1992 (2) SA 295 (WLD) at 298 C-F that the context in which the plaintiff has set out its case must be addressed in a proper way by a defendant having regard to the substance of the contentions raised in the claim.

101. While a court will be slow to render indigent people homeless, the requirements of demonstrating good cause in order to obtain a rescission of judgment cannot be overlooked.

In the present case Molahlehi AJ was particularly concerned about the veracity of the appellants' allegations regarding their financial circumstances, the learned judge pointing out that there was very little time available for the City to examine them. The court's concern is understandable as the details contained in exhibit 'X', which reflect very low income levels for most of the appellants, are difficult to reconcile with the allegations made in the founding papers that they were paying rentals of between R400 to R650 per month per room and also with their tender in the amended notice of motion to pay the first and second respondents these amounts if occupation was restored.

102. Furthermore the appellants had numerous opportunities to approach the owners or their attorneys prior to their eviction.

Firstly, at a relatively early stage the owners attempted to speak to the appellants. This appears to be shortly prior to delivery of the letter to vacate of 22 May 2011. The appellants' response as a group was to chase the owners away and prevent access to the property.

In these circumstances it was for the appellants to explain why they did not engage Masawi when approached, why they chased him away, why they untruthfully alleged that they were paying money to an unknown woman who claimed to be the owner when at all relevant times, according to their version as presented to the court, the owner was Makhaya.

103. Secondly, the appellants admit receiving the letter to vacate on 22 May 2011. They therefore knew the owners' contact details. The appellants however failed to explain why they did not follow up with the owners once they had handed the letter, on their version, to Makhaya.

Then on 13 January 2012 the application for eviction was served followed by service on 8 March 2012 of the PIE notice. Both were served on Tenten. There is a bald denial of any knowledge of such a person. It is questionable that a person who was on the premises on two separate occasions some time apart when the documents were served was unknown to each one of the evictees who brought the rescission application.

104. It seems improbable that every one of the 76 original adult appellants was unaware of Tenten's existence when Makhaya could only have entered an appearance to defend if he had been notified of service by someone on the property.

It is also improbable that the appellants would lock the premises and act violently towards the sheriff when he served the eviction order on 5 May 2012, approximately two months after service of the PIE notice, unless they knew that eviction proceedings were underway.

105. The only reasonable inference to be drawn is that the appellants were aware that an eviction order was being served. They could only have been precognised of this fact if they knew the contents of the PIE notice, which would have informed them of the date of the application for their eviction and of their rights. In particular the PIE notice sanctioned by the court informed the appellants of their right to file an affidavit dealing with defences available to them under PIE and the opportunity they had to set out their personal circumstances[18].

106. Finally to suggest that the eviction order served on the principal door on 5 May 2012 either blew away or was taken at some stage by Makhaya overlooks

[18] An unexplained feature is that the lists attached to the amended notice of motion of 4 February 2013 of persons who paid rent and were living under the bridge (ie; annexures 'A' and 'B') include Nokuthula Makhaya and Lungisile Makhaya. They were identified as having paid rental at the property of R400 and R480 per month respectively. While Lungisile Makhaya was among the disclosed evictees in the founding papers Nokhuthula Makhaya was not. However a certain Ntombi Makhaya was disclosed in the founding papers. She together with Lungisile deposed to confirmatory affidavits. Whether Ntombi and Nokhuthula are the same person and whether there is any link to Phumangelakhe Makhaya were aspects one would have expected to be clarified. Phumangelakhe Makhaya was the person who allegedly held himself out as owner and was cited as the third respondent.

that in order to set out a *bona fide* defence, the appellants were obliged to explain why they barred the sheriff from performing his legal duty as an officer of the court in serving a court document and, once the order was affixed to the principal door of the building in May 2012 and the sheriff left, why they did not promptly take the order, read it and engage pro-bono attorneys to assist them in applying for rescission.

107. I am therefore satisfied that the appellants were unable to demonstrate an entitlement to rescission of judgment.

THE CITY'S OBLIGATIONS AND WHETHER IT CAN CHARGE RENTAL

General

108. The fact that the appellants are unable to rescind the judgment or rely on PIE does not mean that they have no recourse to temporary emergency accommodation. As stated earlier the City through its counsel *Mr Hollander* recognised its constitutional obligations in this regard. It is therefore only necessary to touch on some aspects.

109. The duty was identified in *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC). The Constitutional Court found that the State was obliged to take positive action to meet the needs of those living in extreme conditions of poverty, homelessness or intolerable conditions.

This was by reason of the s 26 right of access to housing, which was interrelated with and mutually supported by the other Chapter 2 rights[19]. Specific reference was made by the court to the right to human dignity, freedom and equality[20] as well as the rights of children under section 28[21].

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[19] *Grootboom* at para 24
[20] See sections 10, 12 and 9 respectively
[21] See *Grootboom*; especially Yacoob J at para 23

110. For present purposes the significant finding in *Grootboom* is that the immediate and short term provision of temporary relief for those who are in desperate need, by reason of natural disasters " *or because their homes are under threat of demolition"* [22], had to be incorporated into the State's national housing programme.

111. As a consequence of the declaratory orders contained in *Grootboom*[23] Chapter 12 of the National Housing Code was introduced[24] . It dealt with the obligation to provide temporary emergency shelter.

Chapter 12 of the NHC was incorporated into the City's housing policy. [25] It was headed *'Housing Assistance In Emergency Housing Circumstances'* and defined '*Emergencies'* in 12.3.1.

Blue Moonlight at para 27 considered emergency circumstances to relate to "*people who find themselves in a housing emergency for reasons beyond their control"*[26]

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[22] *Grootboom* at para 52. See generally paras 56, 64, 65 and 96.
[23] Ib at para 99. See para 112 below for the relevant text.
[24] The National Housing Code was enacted under s4 of the Housing Act 107 of 1997
[25] Chapter 12 is now to be found in Part 4 of the current National Housing Code
[26] For sake of completeness 12.3.1 defined "*Emergencies*" as:

> *'An Emergency exists when the MEC, on application by a municipality and or the provincial housing department, deems that persons affected,*
> *a. Owing to situations beyond their control:*
> - *have become homeless as a result of a declared state of disaster . . .*
> - *are evicted or threatened with imminent eviction from land or from unsafe buildings, or situations where pro-active steps ought to be taken to forestall such consequences;*
> - *whose homes are demolished or threatened with imminent demolition, or situations where pro-active steps ought to be taken to forestall such consequences; or*
> - *. . .*
> - *live in conditions that pose immediate threats to life, health and safety and require emergency assistance.*
>
> *b. Are in a situation of exceptional housing need, which constitutes an Emergency that can reasonably be addressed only by resettlement or other appropriate assistance, in terms of this Programme.'*

112. In determining whether the provision of emergency shelter for evictees is exclusively at State expense it is significant that the court in *Grootboom* considered it be a part of an integrated programme of housing development under the Housing Act 107 of 1997.

The court found that the housing programme in issue, although catering for medium and long term objectives, was not sufficiently flexible to provide for *"the immediate amelioration of the circumstances of those in crisis"*. In the result the programme failed to satisfy the test of reasonableness established under that Act. In reaching this conclusion the court had regard to the scale of the housing backlog in providing affordable housing[27]. The *ratio* of the court finds expression in the terms the declaratory it issued, of which the first two orders are relevant for present purposes[28]:

> *'(a) Section 26(2) of the Constitution requires the State to devise and implement within its available resources a comprehensive and co-ordinated programme progressively to realise the right of access to adequate housing.*
>
> *(b) The programme must include reasonable measures such as, but not necessarily limited to, those contemplated in the Accelerated Managed Land Settlement Programme, to provide relief for people who have no access to land, no roof over their heads, and who are living in intolerable conditions or crisis situations.'*

113. A housing code or its implementation in any given instance will pass constitutional scrutiny if it satisfies the requirements of legality and reasonableness[29]. In *Blue Moonlight (CC)* van der Westhuizen J considered the

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[27] *Grootboom* at paras 56. See generally paras 64 to 66

[28] Ib para 99

[29] *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* 2012 (2) SA 104 (CC) at paras 87 and 88. See *Grootboom* at paras 39-44, and 82 to 83 on reasonableness. See *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC) at para 58 on legality and *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC) at para 148 which expands on the requirement of legality.

possible distinction between reasonableness of measures required to comply with the progressive attainment of the right of access to adequate housing under section 26 of the Constitution and the issue of rationality[30].

114. Aside from recognising that a housing policy must be integrated, the Constitutional Court in *Grootboom* also required the policy to be sufficiently flexible to meet exigencies. In this context the court said at para 56:

> *'This Court must decide whether the nationwide housing program is sufficiently flexible to respond to those in desperate need in our society and to cater appropriately for immediate and short-term requirements. This must be done in the context of the scope of the housing problem that must be addressed.'*[31]

and added at para 95 that:

> *'Neither s 26 nor s 28 entitles the respondents to claim shelter or housing immediately upon demand.'*[32]

Requirement of legality

115. The issue of legality turns on whether it is competent for the City to impose any charge for providing temporary emergency accommodation and whether it can outsource.

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[30] *Blue Moonlight (CC)* at paras 87 and 88

[31] See also *Grootboom* at para 73

[32] Compare *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) at para 28 where in relation to section 6(3) of PIE Sachs J said at para 28:

> *'Section 6(3) states that the availability of a suitable alternative place to go to is something to which regard must be had, not an inflexible requirement. There is therefore no unqualified constitutional duty on local authorities to ensure that in no circumstances should a home be destroyed unless alternative accommodation or land is made available. In general terms, however, a court should be reluctant to grant an eviction against relatively settled occupiers unless it is satisfied that a reasonable alternative is available, even if only as an interim measure pending ultimate access to housing in the formal housing programme.'*

116. The appellants do not dispute that the City has the power to charge for services. They cannot point to any legal bar in charging for the provision of temporary emergency housing for evictees who can afford it. Mr Hollander referred to the various legislative provisions identified in *Blue Moonlight* which deal with the powers, duties and obligations of a municipality and which the court said *'empower municipalities with a degree of general, financial and institutional autonomy to carry out their functions".*[33]

117. In both *Grootboom* and *Blue Moonlight* the Constitutional Court recognised that the State could legitimately draw a distinction, in the provision of housing, between those eligible for housing assistance who "*can afford to pay ..., even if it is only basic through adequate housing, and those who cannot*"[34].

In *Blue Moonlight* the considerations which determined the level of housing to be provided for those evicted from land and who could not afford to rent elsewhere varied between those who could afford subsidised housing and those who were completely destitute[35].

118. The appellants could advance no argument to support the submission that evictees should not be required to pay an affordable amount to enjoy the constitutional protection against homelessness.

119. The submission itself is a non-sequitur. The expert testimony presented by the appellants demonstrated that evictees may have fixed employment in the formal sector and should be provided with accommodation near to where they work. In the present case all but one of the appellants originally claimed to be either working in the formal or informal sector. On the evidence originally presented all but one household was able to afford to pay at least R400 per month for accommodation. Only subsequently did the appellants present the court with Exhibit *X* which suggested that a number of them had no source of income.

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[33] *Blue Moonlight* at paras 21-28 and 53.
[34] *Grootboom* at para 36
[35] *Blue Moonlight* at para 92

120. The only pecuniary requirement discernable from our case law's interpretation of the Constitution and other relevant legislation is that of affordability[36]. See *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others (Centre on Housing Rights and Evictions and Another, Amici Curiae)* 2010 (3) SA 454 (CC) at para 251 where Ncgobo J (at the time) implicitly accepted that the State's obligation to provide access to accommodation is prefaced by *"affordable"* and that the State is permitted to differentiate between various income groups in the provision of housing.

The footnote to para 201 is instructive;

> *'The scheme provides a subsidy to all households earning up to R3500 per month so as to assist them to acquire secure tenure, basic services and a top structure'. The objectives of the scheme are, as the Code indicates, 'to help households access housing with secure tenure, at a cost they can afford, and of a standard that satisfies the norms and standards determined by the Minister of Housing'.* (emphasis added)

(See Sachs J at para 374. See also *Grootboom* at paras 36 and 95)

121. The appellants also contend that the City abdicated its constitutional obligations to provide temporary emergency housing to private enterprises. I comprehend this formulation of the issue to include an attack on legality.

122. In order to make out a case the appellants would have to show that it was not lawful for the City to have provided them with emergency accommodation at an establishment operated by a private organisation which would charge for its facilities.

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[36] Section 26of the Constitution provides:

'Housing

(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.'

123. It is accepted that there is a housing crisis with limited financial and physical resources available to cater for the number of destitute people in need of shelter.

124. Where is the City then to find emergency accommodation once its own resources have been exhausted? It cannot overnight conjure up accommodation that it does not have. It must therefore do the best it can, provided the requirements of legality, reasonableness and possibly rationality are satisfied.

125. The appellants could not point to any provision in the Constitution or enabling legislation which precludes the City from engaging private enterprises to provide services on its behalf. The extent to which municipalities ordinarily outsource the provision of services is self-evident and reference may again be made to the statement in *Blue Moonlight* that they are empowered "*with a degree of general, financial and institutional autonomy to carry out their functions*".[37]

126. Since the legality of outsourcing and charging for services cannot be challenged the issue comes down to the reasonableness of the City in fact outsourcing the provision of emergency accommodation with the possibility that rental may be charged and the reasonableness of charging the appellants who can afford an amount of R10per day.

Reasonableness of requiring rental

127. The reasonableness of the City in principle asking those who have been evicted to pay some amount for emergency accommodation is answered by the number of cases where the payment of rental for temporary emergency accommodation has been sanctioned. In *Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg v City of Johannesburg and Others* 2008 (3) SA 208 (CC) the Constitutional Court considered it appropriate to evaluate the terms of an agreement between the City and the evictees. The agreement "*defined with reasonable precision the nature and standard of the*

[37] *Blue Moonlight* at paras 21-28 and 53.

accommodation to be provided and determined the way in which the rent in respect of this accommodation will be calculated".[38]

The Constitutional Court endorsed the agreement.[39]

128. In considering*" all relevant circumstances*", at least for purposes of PIE, the courts have regard to whether the evictees are able to obtain adequate and affordable accommodation (eg; *Blue Moonlight (CC)* at para 6 and see Masipa J in *Blue Moonlight Properties 39 (Pty) Ltd v Occupiers of Saratoga Avenue and Another* 2009 (1) SA 470 (W) at para 19.

129. While those who are forced to leave their homes by reason of natural disaster and indigent persons who are evicted from property are equally entitled to immediate shelter, it does not mean that both groups can be expected to be treated on the same footing, either with the provision of food and clothing, not having to pay rental or an entitlement to be placed on a housing programme. Victims of natural disasters may be able to rebuild their homes at their own cost but in the interim may be obliged to carry on paying recurring expenses such as bond costs and rates. They may only require emergency accommodation for a relatively short period.

In the case of the appellants the provision of accommodation by the City will not be of short duration and they may have gained a preference, beyond the immediate short-term, over those who have no income whatsoever. Moreover, at the time of the petition to the SCA, which was some ten months after they were provided with accommodation, they were still at a shelter meant only as a 72 hour temporary emergency facility.

130. Furthermore the affidavits of the appellants' experts reveal that the plight of the homeless requiring temporary emergency shelter will continue to place financial strain on the City for an indefinite period with an ever increasing number of indigent people migrating to the metropolitan area.

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[38] *Olivia Road* at para 26 per Yaccob J
[39] Ib at para 27

The experts mentioned the additional strain on resources in providing even temporary accommodation because there is little or no emergency housing currently available aside from low cost rental accommodation.

They also confirmed that low cost rental accommodation was being provided to other evictees pursuant to court orders.

131. There is another consideration that was touched on earlier. The strain placed on both financial and infrastructural resources to meet the obligation of the City and the Province for that matter to provide shelter for the destitute and also provide a graduated housing programme requires innovative measures. In the present case the evidence reveals a mixture of initiatives, ranging from rehabilitating inner city buildings to subsidising existing available accommodation, from exclusively City run initiatives to engaging private sector service providers (*Dladla* being a case in point[40]).

132. South African metropolitan areas are not unique in struggling to find viable solutions to provide the destitute and the poor with housing in circumstances where available accommodation is scarce or non-existent and budgets are depleted.

Elsewhere authorities have sought to address the issue by devising innovative models on both the supply and the demand sides. Some models involve subsidies or rebates to the person providing low cost housing (eg. project based schemes) others provide a grant (in the United States known as a Section 8 Voucher Program) to the family requiring accommodation '*based on the annual income percentage of the family and a fair market rent*'.[41]

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[40] *Dladla* at paras 20 and 21. The social housing referred to in *Madullammoho Housing Association (Pty) Ltd v Mbambo and others* [2016] ZAGPJHC 276 at paras 3and 10 appear also to be part of such an initiative.

[41] See *"Blue Moonlight rising: Evictions, alternative accommodation and a comparative perspective on affordable housing solutions in Johannesburg"* Gerald S Dickinson 2011 SAJHR 466 at 483. See also the subsequent article by the same author *'The Blue Moonlight Remedy: Formulating the voucher scheme into a new emergency housing remedy in South Africa'* in 2103 SALJ 554 esp. at 573, 579-580, 582-4 and 591-7

The issue of housing to the poor inevitably comes down to the affordability of available accommodation for those who require it and the cost to the authorities of meeting their obligations of providing accommodation to all who qualify under an incremental housing policy which, in addition, must provide for emergency shelter.

133. It would stifle policy based solutions that have been or are still to be devised by municipalities and other authorities in addressing the acute accommodation crisis if the court was to adopt a blanket exclusion of rental contributions from evictees who were able to afford it. This would not preclude the court from intervening if the application of the policy in a given case was unreasonable.

134. Each of these considerations reinforces the conclusion that requiring the payment of a rental contribution from an evictee, provided the amount is affordable to the individual concerned, cannot be objectionable.

135. The next question is whether the amount itself is reasonable.

It was common cause that Ekhaya House charges a minimum daily rate to all those who use its facilities. The City therefore became obliged to pay this amount for each appellant.

136. The court order entitled the City to recoup in part the amount it was charged and Molahlehi AJ stressed in his order that payment of a rental of R10 per day was only required from those who could afford it.

137. In the present case the evictees claimed that they were lawful occupiers under monthly leases and in their papers had tendered to pay not less than R400 per room, an amount which is up to 33% more than Molahlehi AJ ordered those who could afford it to pay.

The court *a quo* was entitled to rely on the admissions made by the appellants regarding their ability to pay at least R400 per month per household head (ie. some R13 per day) when determining the amount payable.

138. On the facts of the case the amount of R10 per day provided it is affordable cannot be said to be unreasonable.

139. This also deals with whether the decision to charge the amount in question was an arbitrary one. In any event the City did not determine the amount. The court did and qualified it with the *proviso* of affordability. The court was entitled in the urgent circumstances of the case to do the best it could with the available information.

In my respectful view the court *a quo* cannot be faulted. It used the very figures provided by the appellants and weighed them against the actual cost to the City.

140. The appellants did not contend that the order itself is too vague to implement. That is a matter which is resolved on an affordability test to which the appellant's were amenable and it remains open for any one of them to challenge the outcome.

Reasonableness of outsourcing

141. In the present case the appellants had to demonstrate the availability of other emergency shelter which was owned and run by the City. Their own experts confirmed that at the time there was none which was acceptable to the appellants (as they objected to the house rules imposed). The experts accept that there is an acute shortage of available temporary emergency shelter and did not suggest where else the City might be able to accommodate the appellants.

142. It therefore appears that the City's solution of securing accommodation from the private sector was not only reasonable but was the only option open to it.

143. It should be borne in mind that this is not a case where unlawful occupiers have not yet been evicted. Accordingly the usual issues do not arise concerning the period a landowner must continue to allow occupation until the municipality provides temporary emergency shelter.

144. This in turn brings out another aspect concerning the City's entitlement to outsource.

The extract from *Grootboom* at para 56 was cited earlier. There the Constitutional Court mentioned that the immediate and short term requirements of a housing programme must be catered for in the context of the scope of the housing problem. Yacoob J added at para 82 that: '*Every step at every level of government must be consistent with the constitutional obligation to take reasonable measures to provide adequate housing.*'

145. After citing this passage from *Grootboom* the Constitutional Court, in *Olivia Road*, added at para 18 that:

> *'S 26(2) mandates that the response of any municipality to potentially homeless people with whom it engages must also be reasonable. It may in some circumstances be reasonable to make permanent housing available and, in others, to provide no housing at all. The possibilities between these extremes are almost endless. It must not be forgotten that the city cannot be expected to make provision for housing beyond the extent to which available resources allow. As long as the response of the municipality in the engagement process is reasonable, that response complies with s 26(2).'*

146. Outsourcing at Ekhaya House was part of a broader initiative to provide cheap shelter for 72 hours. This cannot be objectionable. The facilities were not intended for persons in the position of appellants who claimed to require immediate accommodation for a much longer period.

The appellants would be hard pressed to argue that an initiative catering for one category of affected people lacks legality if the circumstances are so urgent that the facility is converted to provide accommodation for others who are in desperate need; particularly where the appellants are the authors of their own

situation[42]. Only those who are ousted from a facility intended for their exclusive use may have a legitimate ground for complaint.

147. The Achilles heel in the appellants' argument remains their failure to suggest where else they could be accommodated. On the contrary; the appellants' experts confirm that the City had no other available option.

Accordingly the appellants failed to lay a foundation for this court to second guess the way the City exercised its legitimate powers. But even if they could, and bearing in mind that no other available accommodation was suggested, the facilities which the City provided for the appellants were well within the range of legitimate and reasonable responses contemplated in the *Olivia Road* passage cited earlier.

148. The appellants sought to make out their case on the basis of Chapter 12. However there was an overhaul of the National Housing Code in 2009 which more comprehensively addressed the emergency housing programme. This is to be found in Volume 4 Part 3 of the 2009 Code.

149. For sake of completeness, the key consideration is the provision of assistance to those in need of shelter in *"emergency circumstances"* and that the considerations involved in providing shelter are limited to that. There is however an integrated approach where a person entitled to shelter in an emergency situation is also eligible to participate in another programme. This appears from the following provisions of the Code;

Vol4 Part 3A. A.2.1 provides under the heading *'Policy Intent'*:

> *'The main objective of this Programme is to provide temporary assistance in the form of secure access to land and/or basic municipal engineering services and/or shelter in a wide range of emergency situations of exceptional housing need through the allocation of grants to municipalities in order to achieve the following policy objectives:*

[42] The situation of those who might have been intimidated into acquiescence is dealt with later

• To expedite action in order to relieve the plight of persons in emergency situations with exceptional housing needs;

• To provide for special arrangements in terms of which the Housing Programme will address the diversity of needs of households in emergency housing situations; and

• To maximise the effect of projects through this Programme to ensure that funds are effectively expended and the services provided could be converted for permanent residential development use.'

In turn Volume 4 Part 3B 2.1 provides under the heading *'Funding Resources'* that:

'Reasonable resources should be allocated to achieve the objectives of this programme whilst ensuring that the progressive and developmental objectives of Government's other Housing Programmes are also constantly given adequate attention. In this regard, it is then suggested that, if possible, the assistance provided by this Programme be structured in such a way that it contributes towards the achievement of the objectives of Government's other Housing Programmes. For example assistance under this Programme should wherever possible represent an initial phase towards a permanent housing solution.'

150. The case before this court is not about evictees who (save in one or two instances) cannot afford to pay anything for accommodation. Nor is it about persons who are threatened with eviction and who must be accommodated within a reasonable time in an emergency housing programme.

151. The evidence presented in this case indicates that the City has adopted various initiatives and also introduced steps to enable occupiers threatened with eviction to register their names for accommodation. This is to facilitate the orderly administration and procurement of accommodation. If the appellants had

constructively engaged the owners and the City at any stage prior to the eviction order being granted the City would not have ended up scrambling to find accommodation. Nor should the appellants' failure to engage allow them to leapfrog over others.

152. In summary, it appears from the authorities cited that the provision of temporary emergency shelter is an essential part of a comprehensive, coordinated and flexible housing development programme that is able to address the immediate, medium and long term objectives of the progressive realisation of the right of access to adequate housing[43]. Such a programme does not exclude the affected person from being obliged to make a rental contribution provided it is affordable.[44] In this matter, and for the reasons given, the appellants' cannot dispute that the rental those who can afford it were ordered to pay is unreasonable.

STRUCTURAL ORDER

153. The issue is whether the court should have provided procedural directions to the City in respect of its on-going responsibilities to accommodate the appellants. *Mr Brickhill's* argument on behalf of the appellants is that the failure to do so has resulted in the provision of accommodation being open-ended with uncertainty as to the respective rights and obligations of the parties. It is also contended that the court should have required the City to report back to it on the steps it was taking to relocate and provide alternative accommodation for the appellants bearing in mind that they were being accommodated in a shelter meant for no more than 72 hour emergency occupancy.

154. It appears from cases such as *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development* 2009 (4) SA 222 (CC) at

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[43] See especially *Grootboom* at paras 56, 64,65, 66, 69, 96 and the terms of the declaratory order at para 99
[44] See *Olivia Road* at pars 17, 26 and 27 and *Joe Slovo* at para 201, 251 and 374

paras 119-122, *Minister of Health and Others v Treatment Action Campaign and Others (No 2)* 2002 (5) SA 721 (CC) at para 129 and *Olivia Road* at para 30 that a court exercises a judicial discretion in determining whether a structural order (often referred to as a structural interdict) ought to be granted in a particular case.

It is for the appellant to therefore demonstrate that the court *a quo* misdirected itself or that some other competent ground, tantamount to one allowing for review, exists.[45]

155. The starting point is that the Constitutional Court has indicated that a structural order should only be granted when it is necessary[46]. An essential element in cases of evictions, but not necessarily the only one, is that a court should be satisfied that the authorities lack the commitment to engage in a reasonable or meaningful manner. [47]

156. Secondly a court would be conscious that in fashioning a structural order dealing with the duration of temporary accommodation it may usurp a municipality's ordinary administrative and policy functions.[48]

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[45] *Ex parte Neethling* 1951 (4) SA 331 (A) at 335F-H, *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC) at para 11.and *Naylor and another v Jansen* 2007 (1) SA 16 (SCA) at para 14

[46] *Treatment Action Campaign* at para 129:

> *'The order made by the High Court included a structural interdict requiring the appellants to revise their policy and to submit the revised policy to the Court to enable it to satisfy itself that the policy was consistent with the Constitution. In Pretoria City Council this Court recognised that Courts have such powers. In appropriate cases they should exercise such a power if it is necessary to secure compliance with a court order. That may be because of a failure to heed declaratory orders or other relief granted by a Court in a particular case. We do not consider, however, that orders should be made in those terms unless this is necessary.'*

[47] *per Olivia Court* at para 30:

> *'It is always for the municipality to ensure that its response to the process of engagement is reasonable. The deciding factor in this case in my view was that engagement was ordered by this court, and the parties had been asked to report back on the process while proceedings were pending before it'*

[48] In .*Thusi v Minister of Home Affairs and 71 Other Cases* 2011 (2) SA 561 (KZP) at para 56 Wallis J (at the time) cited the following extract from a paper presented by Justice Harms titled *'Fashioning Remedies'* delivered in September 2010:

> *'The ideal remedy for an infringement of a social right is the structural interdict (injunction) or mandamus. However, these orders have a tendency to blur the distinction between the executive and the judiciary and impact on the separation of powers. They tend to deal with policy matters and not with the enforcement of particular rights. Another aspect to take into account is the comity between*

A court would also appreciate that such an order runs the risk of preferring the evictees over those who might be in greater need or who had applied timeously when threatened by eviction and that a court might do so in circumstances where all those who might be affected will not have an opportunity to be heard.

157. It would appear that a process of on-going engagement is the preferred course unless one of the parties refuses to act reasonably or the negotiations have stalled. Even then mediation appears to be an appropriate form of alternate dispute resolution that should be encouraged. It is expressly sanctioned in a PIE situation by section 7 of the Act.

158. By the time Molahlehi AJ dealt with the matter in early February 2013 the occupiers were already accommodated at Ekhaya House albeit on an extremely temporary basis. The court directed the parties on the Monday to engage in discussions and the case was adjourned till later in the week. It is evident that when the case resumed the court was satisfied that the parties were attempting to resolve the accommodation aspect and did not consider that the City's responses were unreasonable or that continued court oversight was necessary. The only irresoluble issue concerned whether a contribution to the rental could be charged and the imposition of the house rules.

If negotiations subsequently broke down on accommodation then the appellants or the City were always at liberty to approach a court.

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the different arms of the State. Then there is the problem of sensible enforcement: the State must be able to comply with the order within the limits of its capabilities, financial or otherwise. Policies also change, as do requirements, and all this impacts on enforcement.
These problems justify the use of declaratory orders. Declaratory relief declares what the constitutional standards are and what conduct would meet them. The remedy aims to clarify and not alter. Although the declaration does not regulate the future conduct of parties or clarify their legal position, it is supposed to have the psychological and symbolic effect that a mere finding in the course of a judgment does not.
This means that declaratory orders tend to make a statement but make no real difference to the parties. It is convenient to declare that something done or not done by government was unconstitutional especially if it is impossible to find an answer or if the court order is likely to cross the boundary between the judicial field and the legislative or administrative. The fact that courts have to resort to such orders indicates the limits of judicial authority.'

159. The City provided evidence of the current demand and anticipated future demand for temporary emergency accommodation as well as the available supply. It also dealt with the provision of accommodation for those progressing from temporary shelter to more permanent accommodation. The appellants did not gainsay the critical situation in which the City found itself of trying to provide temporary shelter to indigent persons or to advance them into the City's more permanent housing programs or lay concrete evidence of how the City or Province had failed in its statutory obligations bearing in mind that the situation in which the appellants found themselves was only brought to its attention after they had been evicted.

160. The appellants however sought an order that the court oversee how the City structures and administers its housing programme by reference to the interests of the evictees. Even if it was competent to do so, in order to pursue such a remedy it would have been necessary for them to have dealt with the structure and policy considerations of the housing programme and the minutiae of how it is administered.

161. It is therefore difficult to appreciate how Molahlehi AJ could have issued a structural or declaratory order with regard to the period that the appellants were to remain in temporary emergency accommodation. All the judge had before him was evidence of the difficult task already facing the City in respect of the large number of evictees who were still occupying temporary emergency housing for well over a year after they had been evicted.

The detail of who is to be housed where and the order of preference for the first available next tier of more settled accommodation are pre-eminently matters for on-going engagement by all affected persons. The court should only become involved again if there is a failure of just administrative action. None was raised in the papers.

162. In *Olivia Road* at para 30 the Constitutional Court felt compelled to explain why it was prepared to endorse a court sanctioned report-back:[49]

> *'It will not always be appropriate for a court to approve all agreements entered into consequent upon engagement. It is always for the municipality to ensure that its response to the process of engagement is reasonable. The deciding factor in this case in my view was that engagement was ordered by this court, and the parties had been asked to report back on the process while proceedings were pending before it. Courts would ordinarily consider agreements entered into consequent upon engagement ordered by them in the course of litigation. It must be emphasised that the process of engagement should take place before litigation commences unless it is not possible or reasonable to do so because of urgency or some other compelling reason.'*

163. All considerations point to the parties being able to engage in the continued process of providing accommodation for the appellants within the City's housing programme and no ground has been placed before the court to suggest that the court *a quo* did not properly exercise its judicial discretion in refusing to grant the structural order sought.

CONDUCT OF THE APPELLANTS AND COSTS

164. I have refrained from considering whether the conduct of the appellants contributed to the position in which they found themselves. It would arise when considering whether the City could have been expected to find any accommodation other than at Ekhaya House due to the urgent need to provide immediate shelter for them and their children.

This in turns involves a consideration of whether the City, the owners or the appellants themselves were to blame for the situation which arose; and if the

latter how that might affect their rights vis a vis other evictees competing for the next category of available accommodation.

165. It will be recalled that section 26(3) of the Constitution provides that an eviction order can only be granted provided the court has considered "*all the relevant circumstances*".

166. In *Grootboom* Yacoob J considered whether "the *respondents are entitled to some relief in the form of temporary housing because of their special circumstances and because of the appellants' conduct towards them*[50] . The court then considered whether the appellants had invaded the land in question as a deliberate stratagem to gain preference in obtaining emergency housing over those equally indigent or possibly worse-off. The conduct of the municipality which led to the evictees' homelessness was also scrutinised.[51]

The Constitutional Court then cautioned at para 92:

> *"This judgment must not be understood as approving any practice of land invasion for the purpose of coercing a State structure into providing housing on a preferential basis to those who participate in any exercise of this kind. Land invasion is inimical to the systematic provision of adequate housing on a planned basis. It may well be that the decision of a State structure, faced with the difficulty of repeated land invasions, not to provide housing in response to those invasions, would be reasonable. Reasonableness must be determined on the facts of each case."*

167. This is a case where the appellants were evicted pursuant to a lawful court order with some having no place to go because the property was subsequently demolished. Although there were allegedly 230 original evictees, by the time the rescission application was deposed to on 22 January 2013 their number was reduced to an alleged 76 adults and 51 children, although only 40 adults were identified.

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[50] *Grootboom* at para 80.
[51] Ib. see generally at paras 80-81 and 86-91

168. By the time the appellants amended their notice of motion to claim temporary emergency accommodation the actual number who were allegedly in desperate need of accommodation because they were still living under the bridge with nowhere to go was reduced to a total of 33 adults and children.

These are the evictees whose plight required consideration when the matter came before Molahlehi AJ in February 2013. It is however noted that the powers of attorney reflect the names of only 19 adults who are pursuing the appeal before this court.

169. Unlike *Grootboom* the situation which resulted in the appellants being evicted onto the street was not of the municipality's making. The City reacted to a situation of which they were not precognised. Nor can blame be attributed to the owners since their attempts to engage the occupiers were rebuffed in an aggressive and offensive manner. The owners then followed due process.

170. The conduct of the appellants, or at least those who assumed control of the situation, are to blame for the plight in which they found themselves and which required the City to scramble around finding any available accommodation.

171. Since as far back as May 2011 the appellants refused to engage with the owners. At that stage they should have started engaging with the owner and the City to find alternate accommodation. This would have resulted in an agreed relocation or else an application to court to determine a date by when the owners could evict and the City was to assume the obligation of housing the appellants. It would also have allowed in the intervening period a process of identifying which evictees qualified for temporary accommodation. Their names could then have been registered on the provincial and municipality's data base mentioned earlier.

172. In *Grootboom*[52] and *Olivia Road*[53] the Constitutional Court placed high store on the process of engagement, finding in the latter case that the duty derived

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[52] *Grootboom* at paras 82 and 87

[53] *Olivia Road* at para 18

from s 26(2) of the Constitution. It found that a failure on the part of the responsible authorities to engage was in breach of its obligations and considered that this was one of the relevant circumstances to be considered under the provisions of s 26(3) of the Constitution when granting an eviction order. [54]

173. In the course of the judgment in *Olivia Road* Yacoob J pointed out at para 20 that the process of engagement is not a one way street:

> *'It must be understood that the process of engagement will work only if both sides act reasonably and in good faith. The people who might be rendered homeless as a result of an order of eviction must, in their turn, not content themselves with an intransigent attitude or nullify the engagement process by making non-negotiable, unreasonable demands. People in need of housing are not, and must not be regarded as a disempowered mass. They must be encouraged to be pro-active and not purely defensive. Civil society organisations that support the people's claims should preferably facilitate the engagement process in every possible way.'*

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[54] See also: *Head of Department of Education, Free State Province v Welkom High School and others* 2014 (2) SA 228 (CC) at para 139

> 'This understanding of the inherent value of participation and engagement also underlies many of the decisions of this court. Many provisions of the Constitution require the substantive involvement and engagement of people in decisions that may affect their lives. This court has recognised this in relation to ... socio-economic rights, adequate housing and protection from arbitrary eviction or demolition of homes, under the Constitution.'

The cases cited in the relevant footnotes (ftn 127-129)are numerous:

> *'Occupiers of Saratoga Avenue v City of Johannesburg Metropolitan Municipality and Another 2012 (9) BCLR 951 (CC) ([2012] ZACC 9); Pheko and Others v Ekurhuleni Metropolitan Municipality 2012 (2) SA 598 (CC) (2012 (4) BCLR 388; [2011] ZACC 34); City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another 2012 (2) SA 104 (CC) (2012 (2) BCLR 150; [2011] ZACC 33) ; Abahlali baseMjondolo Movement SA and Another v Premier of the Province of KwaZulu-Natal and Others 2010 (2) BCLR 99 (CC) ([2009] ZACC 31); Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others (Centre on Housing Rights and Evictions and Another, Amici Curiae) 2010 (3) SA 454 (CC) (2009 (9) BCLR 847; [2009] ZACC 16); Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg and Others 2008 (3) SA 208 (CC) (2008 (5) BCLR 475; [2008] ZACC 1); President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd (Agri SA and Others, Amici Curiae) 2005 (5) SA 3 (CC) (2005 (8) BCLR 786; [2005] ZACC 5); Port Elizabeth Municipality v Various Occupiers 2005 (1) SA 217 (CC) (2004 (12) BCLR 1268; [2004] ZACC 7) (PE Municipality); and Government of the Republic of South Africa and Others v Grootboom and Others 2001 (1) SA 46 (CC) (2000 (11) BCLR 1169; [2000] ZACC 19) .'*

174. In the present case the appellants were at fault by adopting a belligerent attitude when the owners sought to engage them. Their hostile approach also precluded the owners from being able to identify those who were in occupation or provide any other information regarding the gender and ages of the occupiers or their number:

175. Moreover the appellants ignored the s 4(2) PIE notice.

By reason of s 4(1) of PIE service of the notice is a precondition to the court assuming jurisdiction to grant an eviction order[55].

This provision was enacted for the benefit of occupiers to enable them to appear in court, with legal assistance if required, and defend the case or facilitate the transfer of the responsibility to provide them with accommodation from the landlord to the municipality.

The section entitles them to inform the court of all relevant circumstances pertaining to the eviction including whether they can be relocated by the authorities and also to inform the court of the rights and needs of the elderly, children, disabled persons and of women who head households. [56]

It was at this stage that the appellants could have engaged the owners and the City or, if they believed that they had a valid defence on the merits, to attend court on the set down date which appeared in the notice.

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[55] Sections 4(1) and (2) of PIE read:

(1) 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.

(2) At least 14 days before the hearing of the proceedings contemplated in subsection (1), the court must serve written and effective notice of the proceedings on the unlawful occupier and the municipality having jurisdiction.

[56] Section 4(7) of PIE provides:

'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'

176. The appellants unlawfully obstructed an officer of the court in the performance of his duties and acted in defiance of the law.

In May 2013 the occupiers threatened the sheriff with violence. The sheriff is an officer of the court appointed under statute. They also deliberately prevented the sheriff from executing a valid court order in any manner other than by affixing it to the principal door. There is a consequence for frustrating the sheriff in executing in any other way; they cannot be heard to say that somehow the court document disappeared. Since the appellants knew that the sheriff was serving a legal document and they were responsible for frustrating personal service it was their obligation to secure its retrieval and they were on risk if it was not done.

177. Despite the service of the eviction order in May 2013 the appellants took no steps to apply for rescission, engage the owners or inform the City that they were evictees who qualified for temporary accommodation.

Instead, their defiance of the court order to vacate required the owners, at the insistence of the sheriff, to engage a private security company known as the Red Ants to assist in effecting the eviction at a cost of some R68 000[57]. Court orders are valid unless lawfully set aside. It should not cost a successful applicant anything more than the ordinary charges of the sheriff to give effect to a duly pronounced court order. Nor should it be necessary to engage anyone other than the police to assist in the execution of a court order.

In this regard Budlender AJ pointed out in *City of Cape Town v Yawa and others* [2004] 2 All SA 281 (C) at 285c-d that the police are obliged to enforce the law in terms of s 205(3) of the Constitution and s 13 of the South African Police Service Act 68 of 1995. The court while recognising that the police have resource constraints continued at 285e:

'If the South African Police Services fail to carry out their constitutional and statutory duties, the applicant's remedy is to seek an order against them.'

[57] In more recent eviction cases this cost appears to have risen significantly.

178. In the case referred to earlier of *Madullammoho Housing Association* Kathree-Setiloane J set out the in detail the conduct of the occupiers in defiance of court orders and which necessitated the sheriff to utilise the Public Order Police unit to assist with the evictions.

Accordingly there appears to be no reason why the sheriff cannot call on the police to enforce a court order. The proper administration of justice requires court orders to be respected and if not, then to be enforced. This is a task which the police are obliged to perform and they are the ones the court should entrust with the power of arrest if the administration of justice is being obstructed or if violence or intimidation is threatened. Obviously an occupier may always approach a court urgently if the order should not have been granted.

179. In the present case the appellants attempted to play the system. And later instead of applying for rescission of judgment at the time the court order of May 2012 was served on them, which was the only lawful route open to them, they adopted a course of willful disobedience buttressed by acts of violence and intimidation.

180. This is not to say that there are vulnerable people among the appellants who might have had little say in the decisions that were taken in their name. Nonetheless it was for them, assisted by their legal representatives, to raise in the papers presented to court special considerations if they were unable to disassociate from the unlawful actions of the others.

In the case before us Molahlehi AJ did in fact alleviate the plight of those who genuinely were unable to afford the rental despite those who brought the rescission application claiming that all the occupiers were paying rental of at least R400 per month.

181. Insofar as costs are concerned the few remaining appellants are unlikely to include those who were involved in the hijacking of the building and who

instigated the attempt to forcibly regain control of the building despite lawful court orders. In future those who are responsible for instigating others to flout court orders in order to serve their own ends may find themselves personally being obliged to pay the costs.

In the present case the remaining appellants appear to be those who can ill afford any costs order against them.

MEDIATION

182. This case and many others demonstrate that there are no winners save for those who hijacked the building in question. Occupiers, some with infants and young children live in squalid and unhealthy conditions that continue to worsen. Once eviction is threatened the occupiers can have little sense of secure tenure and at some stage there may be acts of intimidation or violence which impact on the general wellbeing of each household.

On the other hand purchasers may buy the building at a heavily discounted price but the holding costs and costs of litigation eventually take their toll.

For the municipality there is a continual under-recovery on rates, and presumably, no recovery on lights and water. The value of surrounding properties declines which also impacts on a municipality's revenue stream. There are also costs incurred in litigation that could be put to more productive use.

183. Gerald S Dickenson in *The Blue Moonlight* articles referred to earlier mentions that in New York the debilitating effect of protracted litigation has led to a shift towards mediated solutions between owner, occupier and the municipal authorities.

184. The extracts cited earlier from both paras 18 and 20 of Yacoob J's judgment in *Olivia Road* consider engagement to be essential. See also *Welkom High*

School at para 139 (cited earlier). In both cases the foundation for a duty to engage was derived from the Constitution.

S 7 of PIE expressly provides a mediation framework.[58]

185. In most cases it will be evident to the legal representatives whether the occupiers can defeat the eviction application. In addition the living conditions in hijacked buildings, where the majority of evictees are located, are deplorable. The property in question being a case in point.

186. While it is recognised that occupiers may not have an independent voice and may be intimidated by those who have commandeered the building and are collecting rent, nonetheless by the time legal representation is obtained it should be readily discernable whether the evictees can claim rights of occupation as opposed to an entitlement to have determined when the municipality is to take over the obligation of providing accommodation.

187. Litigation has been necessary to settle the rights issues. When the case came before Molahlehi AJ the City admitted its obligations to provide shelter albeit at a cost to those who could afford it. The issues which the appellants seek to raise through a structural order relate essentially to the administration of accommodation allocations on a graduated basis within the City's programme. This involves problem solving solutions on a more inclusive basis since the administrative and policy considerations may involve thousands of potentially

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[58] S 7 of PIE provides:

Mediation

(1) If the municipality in whose area of jurisdiction the land in question is situated is not the owner of the land the municipality may, on the conditions that it may determine, appoint one or more persons with expertise in dispute resolution to facilitate meetings of interested parties and to attempt to mediate and settle any dispute in terms of this Act: Provided that the parties may at any time, by agreement, appoint another person to facilitate meetings or mediate a dispute, on the conditions that the municipality may determine.

(2) If the municipality in whose area of jurisdiction the land in question is situated is the owner of the land in question, the member of the Executive Council designated by the Premier of the province concerned, or his or her nominee, may, on the conditions that he or she may determine, appoint one or more persons with expertise in dispute resolution to facilitate meetings of interested parties and to attempt to mediate and settle any dispute in terms of this Act: Provided that the parties may at any time, by agreement, appoint another person to facilitate meetings or mediate a dispute, on the conditions that the said member of the Executive Council may determine.

homeless people or those who are entitled to access more permanent housing programmes. In such a case it appears more appropriate that the courts should not interfere with the administrative process and its minutiae unless mediation or the process of engagement has demonstrably broken down.

188. The present case suggests that a stage may have been reached where courts will direct that at the earliest available opportunity a s 7 mediation process (or an equivalent process) must be invoked and that it must be demonstrated that there is either a rights issue at stake or that one of the parties is not acting either reasonably or in good faith before it will be seized with the type of issues raised in this appeal.

The rationale adopted by Brassey AJ in *MB v NB* 2010 (3) SA 220 (GSJ) at paras 50-52 and 55 for insisting in a divorce case concerned with proprietary rights that parties first exhaust mediation as a dispute resolution mechanism commends itself in PIE type cases.

GENERAL- STATE OF PLEADINGS

189. Both parties failed to comply with basic procedural rules.

190. The citation of the occupiers as an unknown group occupying a particular property has become standard. The names of cases coming before the Constitutional Court and the SCA attest to this. In part this is understandable where the occupiers refuse to permit the owner access or where the occupiers of a building have to urgently launch an application to stave of eviction and the instructing attorney seeks to protect the collective rights of numerous occupiers.

191. Nonetheless the rules provide that each person or entity sued must be individually identified. See Uniform Rule17 (4) which applies to action

proceedings and Rule 6(2) in respect of applications. Although the former requires more detail[59] the latter nonetheless provides that:

> *"When relief is claimed against any person, or where it is necessary or proper to give any person notice of such application, the notice of motion must be addressed to both the registrar and such person, otherwise it must be addressed to the registrar only.'*

192. The requirement of identifying each individual person (save as expressly provided for in Rule 14 to deal with the difficulties experienced in citing non-legal entities such as associations and partnerships) or a legal entity is followed through in Rule 6(5) (d) which requires any person who wishes to oppose the grant of the order sought in application proceedings to give notice of his or her intention to oppose together with an address at which service will be accepted. Although Rule 7 does not require a power of attorney to be filed, any person disputing the representative's authority can require proof of authority.

193. In *Kayamandi Town Committee v Mkhwaso and Others* 1991 (2) SA 630 (C) Conradie J (at the time) held at 634E-I that it is not competent to cite a group of persons in general:

> *'But I know of no case in which, either under an inherent power or under the power granted by Rule 6(12), citation has been replaced by a notification to a group or to persons in general so as to bring a number of faceless respondents into the proceedings.*
>
> *A notification to persons in general or to a group of individuals by way of a rule nisi that the Court is about to pronounce upon a suit between parties is, of course, permissible. It is a procedure frequently adopted in order to give interested parties an opportunity of joining in the*

[59] The criticism of *Carson and Others NNO v Spencer* 1982 (2) SA 755 (T) at 758H that the court overlooked the definition of a civil summons (which included a notice of motion) in s1 of the Supreme Court Act 59 of 1959 no longer seems to hold good since the entire definition has been removed from the Superior Courts Act (although the Uniform Rules still refer to the Act for the definition of a civil summons). See Herbstein and van Winsen *The Civil Practice of the High Court of South Africa* (5th ed) at 145 and Nedcor Bank Ltd v *Hennop and Another* 2003 (3) SA 622 (T) at para 7

litigation. But it does not by itself make them parties to the litigation and they do not merely by virtue of having been notified of the litigation become liable to be punished for contempt of Court for failure to comply with any order which is eventually made. A failure to identify defendants or respondents would seem to me to be destructive of the notion that a Court's order operates only inter partes, not to mention questions of locus standi in iudicio. An order against respondents not identified by name (or perhaps by individualised description) in the process commencing action or (in very urgent cases, brought orally) on the record would have the generalised effect typical of legislation. It would be a decree and not a Court order at all.'

However as was pointed out by Rogers AJ (at the time) in the unreported judgment of *Communicare* (the full citation is in *Yawa at* 283c) the Prevention of Illegal Squatting Act 52 of 1951 which the court in *Kayamandi* relied on as providing a suitable alternative remedy was subsequently repealed.

194. Rule 27(3) may provide a solution as it expressly provides that:

'The court may, on good cause shown, condone any non-compliance with these Rules.'

With respect it also does not appear that citing a group of persons because they have successfully avoided being individually identified can elevate the form of citation adopted over the substance of the application. The proviso is that there is no prejudice to those who are affected if there can be no misunderstanding as to who falls within the group and provided the court is satisfied that the affected persons were aware that they could oppose the application if they so wished.

195. In the subsequent cases to *Kayamandi*, namely the *Illegal Occupiers of Various Erven, Philippi v Monwood Investment Trust Company (Pty) Ltd* [2002] 1 All SA 115 (C) at 121h-i and *Yawa* at 283g-h, the Cape Court has held that each case should be considered on its own merits.

196. In the present case the appellants prevented the owners from identifying who they were or their number. The omission to do so however has repercussions with regard to the effectiveness of service and who actually brought the application for rescission since, save for those who deposed to supporting affidavits, the appellants were not individually identified.

197. The citation of a group in a generalised manner has the potential for creating uncertainty and can be prejudicial.

In matters involving workers in labour disputes or communities the practice developed of citing the group as the party, presumably on the basis that it was an association of persons as contemplated under rule 14 or was sufficiently analogous to one. However the safeguard in applications brought by the group was to attach to the main affidavit a list of the individual members which set out their full names, whether they headed a household and if so how many in the household (if applicable), their identity numbers and the individual signatures of all adults.

198. Moreover service on groups or those who resist personal service is effected by either entering the building in question and affixing the documents served on each individual door to a unit or structure erected and if entry is prevented then by reading the notice or order over a loud hailer and pinning the process to the principal door, the main gate or on a notice board.[60]

Service therefore complies with the rules and condonation does not arise. However in such cases it may be preferable to make use of a loud-hailer as well.

199. Although no point was made of it, I am satisfied that there would have been no difficulty in the court condoning ex post facto the method of citation. Case law recognises that a formal application for condonation may not be necessary and that non-compliance may be condoned even if there is no formal application.[61]

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[60] Eg; *Shanike Investments No 85 (Pty) Ltd and Another v Ndima and Others* 2015 (2) SA 610 (GJ) at para 6, Fischer v Persons Unknown 2014 (3) SA 291 (WCC) at para 14 (case overturned on appeal but for different reasons) and *Beyers and Others v Mlanjeni and Others* 1991 (2) SA 392 (C) at 393F-G

[61] *Rabie v De Wit* [2013] JOL 30203 (WCC) at paras 15-16 and *De Lange and Another v Eskom Holdings Ltd and Others* 2012 (1) SA 280 (GSJ) at 27

200. Since it is now accepted that non-compliance with the rules does not result in a nullity save in the most limited of circumstances relating to legality[62] there can be no impediment to condoning a substituted form of service effected without first applying for it provided there is no prejudice on the basis explained by Lamont J in *Prism Payment Technologies (Pty) Ltd v Altech Information Technologies (Pty) Ltd (t/a Altech Card Solutions) and Others* 2012 (5) SA 267 (GSJ) at para 23:

> *'Had I formed the view that the service was irregular, I would have condoned the irregularity on the basis that the fourth defendant had knowledge of the summons and was able to enter an appearance to defend timeously. There should not be a rigorous and formalistic approach to the rules. The court should take into account the true intention of the fairness of the rules of court and the realities of the situation.'*[63]

201. In my view the appellants were obliged to identify themselves when bringing the application for rescission by means of compiling the list described earlier and each signing against his or her name. Moreover ideally an applicant should seek an order that the sheriff is required to obtain the identity all persons who are in occupation of the building so that there is certainty as to who in fact is affected, particularly as others may come in later to claim that they fall within the affected group.

202. Another criticism of the papers is that the appellants raised issues in the petition that were new without bringing this to the attention of the SCA. See section 19(b) of the Superior Courts Act 10 of 2013 and especially *Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others* 2005 (2) SA 359 (CC) at paras 41 – 43.

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[62] Harms *Civil Procedure in the superior Courts* at B27.7 citing *Northern Assurance Co Ltd v Somdaka* 1960 (1) SA 588 (A) at 595.

[63] *Booysen v Booysen* 1931 WLD 53 at 53-54 would therefore be explained on the basis that there may have been prejudice as the defendant would not have been aware of the summons requiring him to restore conjugal rights.

ORDER

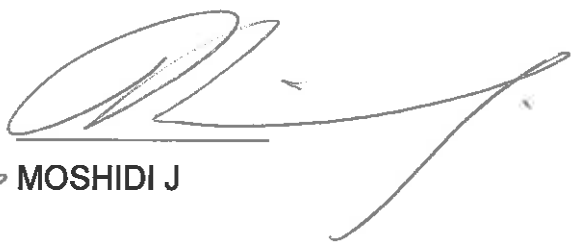
203. In the result and noting that the costs order granted by the court *a quo* against the appellants was abandoned the appeal is dismissed and each party is to bear its own costs of the proceedings including the costs of the appeal.

SPILG J

I agree.

pp COPPIN J

I agree and it is so ordered.



pp MOSHIDI J

DATE OF JUDGMENT:	9 November 2016
LEGAL REPRESENATION:	
FOR APPELLANTS:	Adv J R Brickhill
	Adv J G Bleazard
	Adv E Webber
	Centre for Applied Legal Studies
FOR 1st and 2nd RESPONDENT:	Adv R J Stevenson
FOR 4th RESPONDENT:	Adv L Hollander