



**IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG LOCAL DIVISION, JOHANNESBURG**

**CASE NO: 2010/3234**

(1) (2) (3)	REPORTABLE: <b>YES</b> OF INTEREST TO OTHER JUDGES: <b>YES</b> REVISED.
..... <b>SIGNATURE</b>	1 April 2016 <b>DATE</b>

In the matter between:

**CHAPELGATE PROPERTIES 1022 CC**

Applicant

and

**THE UNLAWFUL OCCUPIERS OF ERF 644 KEW**

First Respondent

**CITY COUNCIL OF JOHANNESBURG**

Second Respondent

**J U D G M E N T**

**SPILG, J:**

## INTRODUCTION

1. Chapelgate Properties 1022 CC is the registered owner of immovable property situated in Kew. The property is zoned for industrial use only. A factory was built on the property but as with a number of commercial and industrial buildings in Kew and the adjacent Marlborough area it was taken over by unlawful occupiers as living quarters.
2. In early 2010 an application was brought by Chapelgate to evict all those who occupied the property. Default judgment was granted in May 2010. This was followed by a rescission application in June of the same year. An application to join the City Council of Johannesburg (*'the City'*) was also brought. Rescission of judgment was granted a few months later in October. It was conceded that occupation was unlawful and the issue turned on the respective obligations of the applicant and the City to provide shelter for those who qualified for protection under the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (*'PIE'*).
3. At the end of August 2012 the court ordered the occupiers to vacate and called on the City to show cause why it should not provide temporary emergency housing under its housing program in accordance with the Constitutional Court decision in *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* 2012 (2) SA 104 (CC).
4. A housing report was produced and the matter subsequently came before me. The argument centred on the obligations of the City to provide temporary housing to indigent persons and who among the respondents qualify.

The parties then advised that they were in settlement negotiations and the rule that I had initially issued in March 2013 was extended from time to time. However during the course of argument I had raised a concern regarding whether foreigners who had not entered the country legally and who had not applied for

an asylum seekers permit in terms of the Refugees Act 130 of 1998 were eligible for temporary emergency housing.

5. Subsequently I was advised that the parties wished to argue whether '*illegal foreigners*' were eligible for temporary emergency housing.
6. *Adv Ngcukaitobi* on behalf of the occupiers ("*the respondents*") submitted that the issue came down to whether it is constitutionally permissible for the City's policy or practice to distinguish between South Africans and foreigners when providing temporary emergency accommodation.

I disagree. Such an enquiry presupposes that at least one of the issues for determination on the papers is whether the City's decision to discriminate between citizens and foreigners, or a particular category of foreigner, is rationally supportable in a democratic society. This however is not the case. If it had been then one would expect the City to explain why it discriminates against non-citizens and to provide the type of detail mentioned, albeit in another context, in *Eagle Valley Properties 250 CC v Unidentified Occupants of Erf 952*, Johannesburg [2011] ZAGPJHC 3 at para 40, namely:

- a. *sufficient information based on informed statistical projections of the anticipated number of indigent households in order to ascertain the number of shelters that must be provided on the requirement side of the equation; and*
- b. *on the capacity side of that equation, what budget and other essential resources are being and can be provided ( including possibly job-creation and community self-upliftment programs); and*
- c. *such other information as is necessary to establish what objectives in real terms can be attained in the short, medium and long terms relevant to the*

*City's contention that it is unable to obtain, or secure from the other spheres of government, the resources necessary to provide temporary emergency shelter to unlawful occupiers of privately owned properties.*

7. My concern arose for two reasons. Firstly, because of the possible conflict between the Immigration Act 13 of 2002 which declares certain categories of foreigners to be illegally in the country and obligations that may be imposed on an organ of State (in this case the City) to provide housing for those who are indigent.

Secondly the overwhelming number of occupiers in this case were non-citizens and the number of cases coming before the courts in the wake of *Blue Moonlight* created the risk of indigent citizens being unable to secure temporary emergency housing because the limited space and financial resources as claimed by the City in its housing report, if correct, would be taken by non-citizens who may have no lawful right to be in the country.

8. The Immigration Act identifies who is entitled to lawfully enter the country and the Refugees Act 130 of 1998 makes provision for obtaining a temporary asylum seekers permit to lawfully sojourn in the country pending the final determination, whether on review or appeal, of an application for refugee status.

In this judgment and adopting the definitions in section 1 of the Refugees Act, an asylum seeker is a person "*who is seeking recognition as a refugee in the Republic*" while a refugee is any one "*who has been granted asylum in terms of this Act*".

9. The issue of concern to the court was therefore limited to non-South African citizens who have no legal right to be in the country. They would include adults as well as children and the infirm. Moreover the issue on the papers before me is confined to a legal one based on an interpretation of the applicable legislation,

which appears to be PIE, the Immigration and Refugees Acts, the Children's Act and the Constitution.

The case did not, nor could it for reasons already stated, be concerned with whether a decision taken in any housing legislation, code or programme to draw a distinction between citizens and foreigners passes constitutional scrutiny. That would be a factual enquiry falling outside these papers.

## **NATIONALITY OF THE EVICTEES**

10. When Chapelgate instituted eviction proceedings in 2010 there were approximately 300 occupiers. They now number 161 of whom the large majority are not South African citizens. Of the total number 21 were still minors when the last census of the building's occupants was conducted in 2013. A number were 16 years of age or over at the time. Although the census is not the model of clarity it appears that over half the minors were born in South Africa to the non-citizen occupiers. In addition there is one non-citizen occupier who is disabled and who is being cared for by a relative who is a Zimbabwean national.
11. A list was prepared of the occupiers. Of the foreigners only one or two produced any papers indicating that they are lawfully entitled to reside in the country either by reason of holding a valid permit, visa, or have applied for asylum and are awaiting the outcome of an application, review or appeal under either the Immigration or Refugees Acts.
12. There are only 64 South African citizens out of the total of 161 occupiers; a percentage of just under 40%. In addition 22 Zimbabweans and 2 Mozambicans claim to have rights to remain in South Africa. In the result 73 foreign nationals cannot produce a document to demonstrate the basis upon which they remain in the country; they accounted for 45% of the total number of occupiers.

13. The list indicates that of all the current respondents;

a. 41 are South Africans or in the one case is married to a South African.  
There are five minor children among them;

b. 44 have produced Zimbabwean identification.

Of these nine hold South African identity documents. No additional information was provided and for present purposes it is assumed that they enjoy dual nationality.

Eight others either have a work visa or a certificate of exemption while the remaining 26 who possess Zimbabwean passports have no apparent entitlement to be in the country. In one case the asylum seekers permit<sup>1</sup> has expired.

c. Eight are Mozambican

d. One is a Malawian

e. 63 are unable to verify their country of origin. Of these;

i. 23 claim to be South Africans. Most are minors;

ii. Eight claim to be Mozambicans of whom 2 claim to have visitor visas;

iii. Ten claim to be Zimbabweans, one of whom claims to hold an asylum permit;

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<sup>1</sup> With effect from 26 May 2014 visas replaced permits, save in the case of a permanent residence permit. This was due to the amendments effected by the Immigration Amendment Act 13 of 2002

iv. 22 have produced no identity or other documents indicating their nationality;

f. Only three hold current asylum permits that were presumably renewed .  
The only one who identifies his country of origin claims to be Zimbabwean

The balance is made up of those who no longer require accommodation or have returned to Zimbabwe.

14. The high number of non- South African respondents makes it necessary to consider the rights they are accorded in respect of accessing basic shelter.

15. In order to appreciate what rights may be infringed, including those under the Bill of Rights, it is necessary to first consider the protection afforded to a person facing eviction under PIE before ascertaining whether these are restricted in the case of illegal foreigners.

## **THE EVICTION PROCESS UNDER PIE**

16. Unless the special provisions contained in section 5 of PIE apply, an eviction order can only be granted against an unlawful occupier if it is just and equitable to do so. Sections 4(6) and (7) of PIE set out the considerations which are to be taken into account, depending on whether occupation of private owned land has been for longer than six months or not. In the present case section 4(7) is relevant. It provides;

*(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.*

17. In *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) it was confirmed that a court must have regard to the interests and circumstances of the occupier and pay due regard to broader considerations of fairness and other constitutional values, so as to produce a just and equitable result.

18. The Supreme Court of Appeal ('SCA') in *Ekurhuleni Metro Municipality and another v Various Occupiers, Eden Park Extension 5* 2014 (3) SA 23 (SCA) comprehensively considered the meaning to be ascribed in PIE to the term '*just and equitable*'.

Firstly the court adopted the following statement by Horn AJ in *Port Elizabeth Municipality v Peoples Dialogue on Land and Shelter and Others* 2000 (2) SA 1074 (SE) at 1081E – G:

*'The use of the term just and equitable relates to both interests, that is what is just and equitable not only to the persons who had occupied the land illegally, but to the landowner as well. The term also implies that a court, when having to decide a matter of this nature, would be obliged to break away from a purely legalistic approach and have regard to extraneous factors such as morality, fairness, social values and*



*implications and any other circumstances which would necessitate bringing out an equitably principled judgment.'*

As noted in the judgment, this passage had been approved by Sachs J when the case went on appeal (*Port Elizabeth Municipality (CC)* at para 35)

19. Once a court is satisfied that an eviction order is just and equitable and there is no valid defence then in terms of section 4(8) of PIE, and provided a section 4(2) notice was authorised and served at least 14 days before the hearing, the court is compelled to grant an order of eviction. This is clear enough from the subsection which states that a court;

*... 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).*

However, it is equally evident from the provision, in determining a just and equitable date by when an occupier is to vacate under subsection (a), that the court must, in terms of section 4(9), have regard to all relevant factors, including the period the unlawful occupier and his or her family have resided on the land in question.

20. Finally on this point, in terms of section 4(12):

*Any order for the eviction of an unlawful occupier or for the demolition or removal of buildings or structures in terms of this section is subject to the*

*conditions deemed reasonable by the court, and the court may, on good cause shown, vary any condition for an eviction order.*

This is a significant feature as it demonstrates that the legislature contemplated situations where conditions could be imposed in an eviction order provided the court deemed them reasonable. The use of the word ‘*deemed*’ indicates the exercise of a discretionary power having regard to the circumstances of the case and subject to the court’s power to subsequently reconsider on good cause the conditions that had been imposed.

21. It is apparent from the steps that are required to be taken prior to an occupier being evicted, and practice bears this out in the case of large scale evictions, that the process itself is lengthy and requires the joining of at least one responsible authority which must then provide a housing report which is to be considered by the court.

If the court is satisfied that an eviction order should be granted then, in order to comply with the provisions of section 4(8), the date by when occupiers must vacate private property will coincide, in the case of those who are indigent, with when the court considers that the responsible authority must provide them with alternative temporary emergency shelter<sup>2</sup>. The period will generally be a number of months, but may turn out to be much longer if the authority or the occupiers appeal the decision.

22. The housing reports and other material produced by the City in numerous cases that have come before this Division demonstrate that the provision of temporary emergency housing for an indigent evictee is anything but temporary and that programmes are being introduced to provide work opportunities that will enable the affected person and his or her family to progress out of the shelters to some

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<sup>2</sup> See for instance the orders in *Blue Moonlight*

form of subsidised housing as part of a broader programme to achieve the progressive attainment of adequate housing under section 26 of the Constitution.

An illustration of the temporary emergency shelter provided by the City and the lengthy period that evictees have actually remained there is to be found in my brother Weppener J's decision of *Dladla and Others v City of Johannesburg and Another* 2014 (6) SA 516 (GJ) at paras 1,3, 4 and 10. Some of the occupiers were still living in the temporary accommodation provided by the City after a period of three years.

23. This potentially puts the authorities in a cleft stick. For as long as indigent occupiers cannot qualify for subsidised housing it will be argued that, unless other accommodation is provided, it is not competent under PIE to eject them from the temporary emergency facilities provided because they remain financially destitute.

It also creates a tension between the ability of the City to provide and maintain an adequate number of emergency housing facilities on the one hand and, on the other, the number of indigent people evicted from properties as urban renewal progresses. Ideally temporary emergency housing is precisely that; the provision of shelter in the short term while the affected person is enabled to secure adequate work and thereby improve his or her financial situation.

24. The difficulty is to avoid the provision of temporary housing turning into indefinite occupation because those affected are unable to attain a sustainable income. This is a concern in recessionary times such as the present, where the number of evictees entitled to emergency shelter may swell as the ranks of unemployed increase and where a further influx of people from the rural areas to the metropolitan cities might arise.

25. The question that arises is how the rights of a foreigner, or any category of foreigner, to be in the country may be affected by their status and, if they have

no such right, whether the Constitution or other laws requires them to be assisted with emergency temporary shelter if indigent or allows them to participate in housing projects

It seems that these factors together with the competing rights of indigent citizens facing eviction for, what are claimed by the authorities to be, limited temporary emergency accommodation facilities which are required to continue providing shelter for the same affected individuals for an extended period, are among the social value and the broader extraneous implications that should be taken into consideration in line with *Port Elizabeth Municipality*<sup>3</sup>.

26. The first question is determined by the provisions of the Immigration and the Refugees Acts. The other by any law that might be of specific or of overriding application.

## LEGAL STATUS OF FOREIGNERS

27. Only a non-citizen who holds a lawful visa or permanent residence permit may enter or sojourn in the country, failing which the individual must be deported unless authorised by the Director-General to remain pending an application for a status as defined<sup>4</sup>. The foreigner will also be an illegal immigrant if the visa has expired and has not been extended or an application for a change of status has not been made (although in the latter case it is only in the exceptional circumstances as prescribed that the applicant may be allowed to apply while still

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<sup>3</sup> *PE Municipality*(ECG) at 1081E-G and *PE Municipality* (CC) at para 35

<sup>4</sup> See section 32 reads;

*Illegal foreigners*

(1) Any illegal foreigner shall depart, unless authorised by the Director-General in the prescribed manner to remain in the Republic pending his or her application for a status.

(2) Any illegal foreigner shall be deported.

*Section 34 provides for the arrest by an immigration officer without a warrant, detention and deportation of an illegal foreigner*

in the country)<sup>5</sup>. There are certain other situations that arise, but they are not here relevant.

28. However if the individual claims asylum status for the first time only after having entered and remained in South Africa illegally then he or she may still remain lawfully in the country and not be subject to arrest or detention (on the ground only of being an illegal immigrant) until all internal reviews and appeals through the courts regarding his or her status have been exhausted.

This is by reason of the provisions of regulation 2(2) of the Regulations promulgated under the Refugees Act read with sections 21(2), (4) and 22(1) of that Act<sup>6</sup>. See in particular *Bula v Minister of Home Affairs* 2012 (4) SA 560 (SCA) at paras 70 and 78.

29. Since many of the respondents claim to hold visas or to have had their original permits extended, it is necessary to set out in more detail how a non-citizen may

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<sup>5</sup> See sections 10 (7) and (6)(b) of the Immigration Act respectively

<sup>6</sup> Regulation 2(2):

*Any person who entered the Republic and is encountered in violation of the Aliens Control Act, who has not submitted an application pursuant to subregulation 2(1), but indicates an intention to apply for asylum shall be issued with an appropriate permit valid for 14 days within which they must approach a Refugee Reception Office to complete an asylum application.'*

Section 21(1) provides:

*An application for asylum must be made in person in accordance with the prescribed procedures to a Refugee Reception Officer at any Refugee Reception Office.*

Section 21(4)(a):

*Notwithstanding any law to the contrary, no proceedings may be instituted or continued against any person in respect of his or her unlawful entry into or presence within the Republic if —*

- (a) such person has applied for asylum in terms of subsection (1), until a decision has been made on the application and, where applicable, such person has had an opportunity to exhaust his or her rights of review or appeal in terms of Chapter 4; . . .*

Section 22(1) of the Refugees Act provides:

*The Refugee Reception Officer must, pending the outcome of an application in terms of section 21(1), issue to the applicant an asylum seeker permit in the prescribed form allowing the applicant to sojourn in the Republic temporarily, subject to any conditions, determined by the Standing Committee, which are not in conflict with the Constitution or international law and are endorsed by the Refugee Receptions Officer on the permit.*

acquire a right to remain legally in the country under the Immigration Act or, if asylum is sought, under the Refugees Act.

30. Before doing so it should be added that Zimbabweans and possibly nationals from other neighbouring states enjoyed a special dispensation and were entitled to enter the country. This included dispensations accorded at the time of the 2010 soccer World Cup. It has been difficult to determine the nature of the exemption or dispensation. For this reason the order I have made includes provision for such category of persons in subparagraph 2(d).

## **STATUS OF FOREIGNERS UNDER THE IMMIGRATION ACT**

31. A foreigner may lawfully enter and reside in South Africa if possessed of a permanent residence permit under sections 25, 26 or 27 of the Immigration Act.

In terms of section 10 of the Act no other foreigner may '*enter or sojourn*' in the country unless he or she is in possession of a valid visa, and then only for the period prescribed in the visa.

32. Twelve different categories of visas are specified in section 10(2). They include a visitors, a study and a work visa as well as an asylum visa as contemplated in section 23.

33. It is only necessary for present purposes to deal with the purpose and function of the asylum transit visa. This is a temporary visa issued solely to enable a person who declares on entering the country that he or she seeks refugee status to travel to the nearest Refugee Reception Centre ('*RRC*') in order to apply for asylum. The visa is valid for a limited period of five days only (prior to the amendment that came into effect in May 2014 the period appears to have been 14 days).

For sake of completeness section 23 reads:

Asylum transit visa

*(1) The Director-General may, subject to the prescribed procedure under which an asylum transit visa may be granted, issue an asylum transit visa to a person who at a port of entry claims to be an asylum seeker, valid for a period of five days only, to travel to the nearest Refugee Reception Office in order to apply for asylum.*

*(2) Despite anything contained in any other law, when the visa contemplated in subsection (1) expires before the holder reports in person at a Refugee Reception Office in order to apply for asylum in terms of section 21 of the Refugees Act, 1998 (Act 130 of 1998), the holder of that visa shall become an illegal foreigner and be dealt with in accordance with this Act.*

34. Under the Immigration Act everyone is obliged to enter the country at a designated port of entry. Accordingly section 23 presupposes that a foreigner seeking asylum will also do so and obtain from the immigration official at the port of entry an asylum transit visa.

In terms of that section an asylum transit visa is only valid for a period of five days. This is to enable the asylum seeker to travel to the nearest RRC office in order to apply for asylum. However it will be recalled that the one in Port Elizabeth was closed down by the Department and required a decision of the SCA to secure its reopening<sup>7</sup>. There are five other RRC offices of which only one serves the entire extent of our inland border; it is near the border with Zimbabwe

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<sup>7</sup> *Minister of Home Affairs and Others v Somali Association of South Africa and Another* 2015 (3) SA 545 (SCA)

and Botswana at Musina. The others are within the metropolitan areas of Johannesburg, Pretoria, Cape Town and Durban.

35. In *Scalabrini Centre and others v Minister of Home Affairs and others* 2013 (3) SA 531 (WCC) Rogers J mentioned that the common cause evidence presented before him revealed that the vast majority of those who applied for refugee status at an RRC office had crossed the border illegally and not at a designated port of entry. The lack of documentation carried by the foreign respondents in the present case indicates the same.

36. However the status of a person seeking asylum is only resolved by a consideration of the Refugees Act to which I will progress shortly.

37. Leaving aside the position of a foreigner who has entered the country illegally but who has evinced an intention to apply for asylum although has not yet done so<sup>8</sup>, in terms of section 32 of the Immigration Act an illegal foreigner shall be deported and must await the outcome of any application for status outside the country's borders unless the Director-General authorises the individual to remain in the country<sup>9</sup>.

38. While in the country an illegal foreigner, to whom the Refugees Act does not apply, has a diminished status. He or she may not be lawfully employed<sup>10</sup> and no learning institution may knowingly provide him or her with training or instruction<sup>11</sup>.

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<sup>8</sup> See *Bula* at para 80.

<sup>9</sup> Section 32 reads:

*Illegal foreigners*

*(1) Any illegal foreigner shall depart, unless authorised by the Director-General in the prescribed manner to remain in the Republic pending his or her application for a status.*

*(2) Any illegal foreigner shall be deported.*

<sup>10</sup> Section 38

<sup>11</sup> Section 39



39. Sections 42(1) read with 49 of the Immigration Act makes it an offence to provide any assistance to an illegal foreigner and specifically prohibits providing accommodation (although this term may be limited to the act of harbouring), letting, or making any immovable property available to such person. A person who contravenes these provisions faces stiff penalties including imprisonment.

Nonetheless section 42 of the Immigration Act itself provides an exemption in cases where it is necessary to provide humanitarian assistance.

The relevant portions of section 42(1) provides:

*Subject to this Act, and save for necessary humanitarian assistance, no person, shall aid, abet, assist, enable or in any manner help-*

- (a) an illegal foreigner; or*
- (b) a foreigner in respect of any matter, conduct or transaction which violates such foreigner's status, when applicable, including but not limited to-*
  - (i) .....*
  - (viii) harbouring him or her, which includes providing accommodation; or*
  - (ix) letting or selling or in any manner making available any immoveable property in the Republic to him or her.*

## STATUS OF FOREIGNERS UNDER THE REFUGEES ACT

40. Irrespective of the provisions of section 23 of the Immigration Act the failure of a foreigner to enter the country legally at a designated port of entry or, having done so, did not seek asylum but gained entry using another category of visa which has since expired, does not render that person subject to the further consequences of the Immigration Act if there is still an intention to seek asylum.

41. In *Arse v Minister of Home Affairs and Others* 2012 (4) SA 544 (SCA) at para 19 the SCA confirmed that when an asylum seeker permit is applied for the provisions of the Immigration Act cease to apply to the illegal foreigner and by reason of the provisions of section 21(4) of the Refugees Act :

*'no proceedings may be instituted or continued against such person in respect of his or her unlawful entry into or presence in the country until a decision has been made on his or her application or he or she has exhausted his or her rights of review or appeal'.<sup>12</sup>*

For sake of completeness s 24(1) reads:

*'(1) Notwithstanding any law to the contrary, no proceedings may be instituted or continued against any person in respect of his or her unlawful entry into or presence within the Republic if —*

*(a) such person has applied for asylum in terms of subsection (1), until a decision has been made on the application and,*

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<sup>12</sup> In *Fikre v Minister of Home Affairs* 2012 (4) SA 348 (GSI) at paras 35 and 36 the interrelationship between the Refugee Act and the Immigration Act was considered and at para 37 the following was said:

*The structure of the Refugees Act is premised on respecting the right to liberty of a foreigner who claims refugee status until his application is finalised. This is understandable if regard is had to the experiences of those who were forced into exile and the more recent experiences of ethnic intimidation, including genocide that characterised Eastern Europe and our own continent and which placed the lives and general wellbeing of ordinary citizens in jeopardy. See further Arse and also its explanation of the structure of the Refugees Act.*

*where applicable, such person has had an opportunity to exhaust his or her rights of review or appeal in terms of Chapter 4; or*

*(b) such person has been granted asylum.'*

42. It has already been mentioned that subsequently the SCA in *Bula* at paras 70 and 78 confirmed that by reason of the provisions of regulation 2(2) of the Regulations promulgated under the Refugees Act read with sections 21(2), (4) and 22(1) of that Act an illegal foreigner is immunised against the provisions of the Immigration Act not only from the time when an application is made for asylum but from the time when he or she first evinces an intention to apply for refugee status irrespective of whether entry was illegal and irrespective of whether an asylum transit visa was not sought at a port of entry. The most important consequence is that he or she may remain lawfully in the country until his or her status has finally been determined.

43. The reason for according special status to asylum seekers is evident from the provisions of sections 2, 3 and the interpretation provisions contained in section 6 of the Refugees Act. They provide:

*Section 2     General prohibition of refusal of entry, expulsion, extradition or return to other country in certain circumstances*

*Notwithstanding any provision of this Act or any other law to the contrary, no person may be refused entry into the Republic, expelled, extradited or returned to any other country or be subject to any similar measure, if as a result of such refusal, expulsion, extradition, return or other measure, such person is compelled to return to or remain in a country where-*

- (a) *he or she may be subjected to persecution on account of his or her race, religion, nationality, political opinion or membership of a particular social group; or*
- (b) *his or her life, physical safety or freedom would be threatened on account of external aggression, occupation, foreign domination or other events seriously disturbing or disrupting public order in either part or the whole of that country.*

### Section 3     Refugee status

*Subject to Chapter 3, a person qualifies for refugee status for the purposes of this Act if that person-*

- (a) *owing to a well-founded fear of being persecuted by reason of his or her race, tribe, religion, nationality, political opinion or membership of a particular social group, is outside the country of his or her nationality and is unable or unwilling to avail himself or herself of the protection of that country, or, not having a nationality and being outside the country of his or her former habitual residence is unable or, owing to such fear, unwilling to return to it; or*
- (b) *owing to external aggression, occupation, foreign domination or events seriously disturbing or disrupting public order in either a part or the whole of his or her country of origin or nationality, is compelled to leave his or her place of habitual residence in order to seek refuge elsewhere; or*
- (c) *is a dependent of a person contemplated in paragraph (a) or (b).*

Section 6     Interpretation, application and administration of Act

(1)    *This Act must be interpreted and applied with due regard to-*

(a) *the Convention Relating to the Status of Refugees (UN, 1951);*

(b)    *the Protocol Relating to the Status of Refugees (UN, 1967);*

(c)    *the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU, 1969);*

(d)    *the Universal Declaration of Human Rights (UN, 1948); and*

(e)    *any other relevant convention or international agreement to which the Republic is or becomes a party.*

44. Refugees by definition are those who have been forced to flee from their own country, often with little more than the clothes on their back and in some cases having witnessed the brutal killing of family or neighbours, due to war, civil unrest, or state sponsored actions or the actions of others in *de facto* control over them which constitute threats to life, to limb or amount to other basic human rights violations.

In *Union of Refugee Women and others v Director: Private Security Industry Regulatory Authority and others* 2007 (4) SA 395 (CC) at para 28 Kondile AJ described the position of refugees as follows:

*'Refugees are unquestionably a vulnerable group in our society and their plight calls for compassion. As pointed out by the applicants, the fact that persons such as the applicants are refugees is normally due to events over which they have no control. They have been forced to flee their homes as a result of persecution, human rights violations and conflict. Very often they, or those close to them, have been victims of violence on the basis of very personal attributes such as ethnicity or religion. Added to these experiences is the further trauma associated with displacement to a foreign country.'*

45. The next issue concerns the rights accorded under our law to a refugee or person entitled to apply for asylum. It will be convenient to commence this leg of the enquiry with reference to section 27 of the Refugees Act: The section reads

*Protection and general rights of refugees*

A refugee-

- (a) *is entitled to a formal written recognition of refugee status in the prescribed form;*
- (b) *enjoys full legal protection, which includes the rights set out in Chapter 2 of the Constitution and the right to remain in the Republic in accordance with the provisions of this Act;*
- (c) *is entitled to apply for an immigration permit in terms of the Aliens Control Act, 1991, after five years' continuous*

*residence in the Republic from the date on which he or she was granted asylum, if the Standing Committee certifies that he or she will remain a refugee indefinitely;<sup>13</sup>*

- (d) is entitled to an identity document referred to in section 30;*
- (e) is entitled to a South African travel document on application as contemplated in section 31;*
- (f) is entitled to seek employment; and*
- (g) is entitled to the same basic health services and basic primary education which the inhabitants of the Republic receive from time to time.*

46. Since section 27 (b) of this Act entitles a person who is granted refugee status to the protection accorded under the Bill of Rights provisions it is self-evident that he or she is entitled to the same socio-economic rights a citizen enjoys in respect of housing and as set out in section 26 of the Constitution. This section 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.*

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<sup>13</sup> It should be added that in terms of section 27(d) of the Immigration Act a refugee referred to in section 27 (c) of the Refugees Act who satisfies the prescribed requirements may be issued with a permanent residence permit;

47. The position of someone who has applied for refugee status may be different. In some countries they are confined to refugee camps at State expense. The current tragedy of the refugee crisis created by the Syrian conflict demonstrates both the hardship suffered by those seeking asylum from the ravages of war and civil unrest and the pressure created on the receiving countries to cope with the influx of people. In some countries foreigners are confined to refugee camps until their status has been finally determined, but even in those cases the conditions may nonetheless have to pass constitutional scrutiny.
48. In South Africa the process of determining the status of an asylum seeker takes time until its final resolution and on occasion suffers from want of administrative regularity as attested to by case law. The sheer volume also appears to be responsible for the delays in repatriating persons who are detained at the Lindela Repatriation Centre. They are initially detained because they are illegal foreigners who have not applied for asylum or do not qualify for asylum. The urgent court regularly deals with applications for the release of those who have been detained beyond the maximum period provided for in terms of section 34(1)(d) of the Immigration Act. These cases are invariably resolved by a consent order which provides for the release of the applicant from detention and affording him or her an opportunity to apply for asylum.
49. It is therefore inevitable that those who evince an intention to apply for asylum and then apply within the time allowed may be required to wait an inordinate time before their applications are finally determined. In *Somali Association of South Africa and others v Limpopo Department of Economic Development, Environment and Tourism and others* 2015 (1) SA 151 (SCA) at para 44 Navsa ADP referred to an expected three year waiting period. In the meanwhile they require shelter, their children must receive some form of education and, in order to survive, they must be able to obtain work.



50. Since the asylum seeker is entitled to remain in the host country until his or her status is finally determined, and since the provisions of the Immigration Act do not deal with that person's status, it appears that his or her position should not be jeopardized in the event of a successful application unless there is a rational basis laid for deviating from the rights accorded under section 27 of the Refugees Act either generally or in the case of the specific person. These *caveats* appear necessary since in many urgent applications brought before this court for interdicts against deportation and release from detention the foreigner does not fit the profile of a genuine asylum seeker but is seeking better economic opportunities and appears to have belatedly considered this as means of remaining indefinitely in the country<sup>14</sup>. Moreover the City produced reports which, although not finally determined, indicated that it has very limited resources at its disposal to provide emergency shelter for evictees from unlawfully occupied property.

Nonetheless it remains an inevitable consequence of the consensus reached by nations as reflected in the international instruments mentioned in section 6 of the Refugees Act that a distinction is to be drawn between the so called political refugee and the economic refugee.

## **SOCIO ECONOMIC RIGHTS OF ASYLUM SEEKERS**

51. Our case law has also hesitated in according to an asylum seeker the same rights as are conferred on a refugee but nonetheless has confirmed that their

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<sup>14</sup> *Iqbal v Minister of Home Affairs and others* 2013 (5) SA 408 (GSI) is an example of where the foreigner paid to marry a South African to obtain residence and when the fraudulent marriage was exposed claimed that he was entitled to apply for refugee status.

right to dignity is determinative of the issue if it is conflicted by any other law, including another provision in the Constitutional .

52. The first of the cases is *Minister of Home Affairs and Others v Watchenuka and Another* 2004 (4) SA 326 (SCA) where the conditions of the asylum seeker permit placed a total prohibition on taking up employment or studying, pending the outcome of an application for asylum. Nugent JA on behalf of the court at para 30 recognised that sections 21 and 22 of the Constitution restricted the right to choose a trade or occupation or profession to citizens and referred to the issue being dealt with in the Second Certification case of *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Amended Text of the Constitution of the Republic of South Africa* 1996 1997 (2) SA 97 (CC) at para 20 where the court found that restricting to citizens the right to choice of occupation was in accordance with recognised international human rights instruments.

53. The SCA at para 31 then confirmed that this was a reasonable and justifiable ground for limiting the protection that section 10 of the Bill of Rights accords to dignity so as to exclude from its scope a right on the part of every applicant for asylum to undertake employment.

Nonetheless the court continued at para 32 :

*"But where employment is the only reasonable means for the person's support other considerations arise. What is then in issue is not merely a restriction upon the person's capacity for self-fulfilment, but a restriction upon his or her ability to live without positive humiliation and degradation. For it is not disputed that this country, unlike some other countries that receive refugees, offers no State support to applicants for asylum."*

54. In *Watchenuka* the court found at para 32 that

*“... the deprivation of the freedom to work assumes a different dimension when it threatens positively to degrade rather than merely to inhibit the realisation of the potential for self-fulfilment”.*

It concluded at para 36 that imposing in an asylum seekers permit a general prohibition on work and a general prohibition which would preclude even children from receiving available education infringed the rights to human dignity and were unlawful.

55. It is however also important for present purposes to note that the court stressed that it did not suggest that the State had an obligation to provide work for an asylum seeker who was financially destitute or that it was concerning itself with whether the State was obliged to provide educational opportunities.

56. The next case was *Union of Refugee Women* where the Constitutional Court distinguished *Watchenuka* on the ground that the offending provision of a statute<sup>15</sup> did not prevent asylum seekers from obtaining employment in other industries, it only restricted it to the limited “... extent that they may not work in the private security industry<sup>16</sup>”.

The Constitutional Court however confirmed at para 46 that:

*“Under the Constitution a foreigner who is inside this country is entitled to all the fundamental rights entrenched in the Bill of Rights except those expressly limited to South African citizens.”*

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<sup>15</sup> Section 23(1)(a) of the Private Security Industry Regulation Act 56 of 2001 which reserves the right to be employed in the private security industry to citizens

<sup>16</sup> *Union of Refugee Women* at para 47

57. The most recent reported case is the *Somali Association v Limpopo Department* where the SCA was concerned with an asylum seeker's right to self-employment it being contended that section 22 of the Constitution limited the right to trade to citizens. Navsa ADP on behalf of the court held at para 43

*'To sum up, there is no blanket prohibition against asylum seekers and refugees seeking employment. There appears to be no restrictive legislation or conditions in place that we could discern that prohibit foreign nationals from being granted spaza or tuck-shop licences. In any event, para 32 of Watchenuka, referred to above, makes it clear that in circumstances such as this, where persons have no other means to support themselves and will as a result be left destitute, the constitutional right to dignity is implicated. I can see no impediment to extending the principle there stated in relation to wage-earning employment to self-employment. Put differently, if, because of circumstances, a refugee or asylum seeker is unable to obtain wage-earning employment and is on the brink of starvation, which brings with it humiliation and degradation, and that person can only sustain him- or herself by engaging in trade, that such a person ought to be able to rely on the constitutional right to dignity in order to advance a case for the granting of a licence to trade as aforesaid. In fact in those circumstances it would be the very antithesis of the very enlightened rights culture proclaimed by our Constitution for us by resorting to s 22 of that very Constitution (as contended by the respondents and appears to have found favour with the high court) to condemn the appellants to a life of humiliation and degradation. That I do not believe our Constitution ought to countenance.'*

58. The concluding statement touched on an extract cited earlier by the learned judge of appeal. The extract was from the minority judgment of Mokgoro J and O'Regan J which also appears relevant to the present case:

*'A reading of these provisions gives some understanding of the predicament in which refugees generally find themselves. Refugees have had to flee their homes, and leave their livelihoods and often their families and possessions either because of a well-founded fear of persecution on the grounds of their religion, nationality, race or political opinion or because public order in their home countries has been so disrupted by war or other events that they can no longer remain there. Often refugees will have left their homes in haste and find themselves precariously in our country without family or friends, and without any resources to sustain themselves.'*

#### **AN ILLEGAL FOREIGNER'S RIGHT TO EMERGENCY HOUSING**

59. Adv Ngcukaitobi relied on *City of Johannesburg v Changing Tides 74 (Pty) Ltd and others* 2012 (6) SA 294 (SCA) where the SCA considered whether the City was obliged to provide temporary emergency accommodation for illegal foreigners. The court was only concerned with whether the determination of such status should precede the provision of emergency shelter. It identified the issue as one concerned with promptly alleviating the plight of individuals caught up in an emergency situation and determined that in such cases a court did not have the luxury of time to be concerned with the niceties of any qualifier other than the desperate need to accommodate the individuals concerned.

At paras 53 and 54 of the judgment Wallis JA said;

[53] 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.

[54] Infusing grace and compassion into the process of eviction does not mean that an eviction should be postponed for as long as possible, but may mean that it should take place expeditiously. If delayed the property owner bears the burden of not having access to its property whilst the authority responsible for attending to the housing needs of the persons in unlawful occupation of the premises postpones the discharge of its obligations. Where, as here, the occupiers are living in conditions of the utmost squalor, at the risk of their lives and health, the court should be concerned that the process is expedited so that they are moved away from that situation as soon as possible. It is noteworthy that local

*authorities are vested with statutory powers under other legislation to address situations such as these.'*

It is apparent from an earlier passage in the judgment that in these paragraphs the court was specifically responding to the City's contention that it was not obliged to provide illegal immigrants with temporary emergency accommodation<sup>17</sup>.

60. The first respondent also relied on para 2.4 of the Housing Code (2009) which accepts that illegal immigrants may qualify for temporary emergency housing on conditions prescribed by the Department of Home Affairs "*on a case by case basis*"<sup>18</sup>.

The Housing Code was promulgated under section 4 of the national Housing Act 107 of 1997. In Part 3 para 2.3 of the Code an emergency exists for purposes of qualifying for temporary emergency housing when *inter alia*;

*persons affected owing to situations beyond their control:*

....

(e) *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;*

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<sup>17</sup> *Changing Tides* at para 50

<sup>18</sup> Para 2.4 of the Code reads;

*The programme will benefit all affected persons who are not in a position to address their housing emergency from their own resources or from other sources such as the proceeds of superstructure insurance policies and the following households will qualify for assistance under this programme:*

- *Illegal immigrants on the conditions prescribed by the Department of Home Affairs on a case by case basis*

- (f) *whose homes are demolished or threatened with imminent demolition, or situations where pro-active steps ought to be taken to forestall such consequences;*

...

- (h) *live in conditions that pose immediate threats to life, health and safety and require emergency assistance;*
- (i) *are in such 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 the Programme'*

61. The authorities therefore appreciated that a situation where living conditions posed an immediate threat to life, health and safety such as floods, required them on humanitarian grounds to provide temporary emergency housing. Nonetheless where emergency assistance is to be provided to an illegal foreigner it remains subject to conditions prescribed by the Department of Home Affairs on a case by case basis.

62. The issue of providing temporary emergency housing is usually linked with the attainment of adequate housing on a progressive basis as provided for under section 26 of the Constitution<sup>19</sup>. Constitutional Court and SCA authority on the subject consider that those in desperate situations who face eviction are entitled to be afforded access to adequate housing on a progressive basis and that all

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<sup>19</sup> Section 26 of 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.*



tiers of Government must take reasonable legislative and other measures within available resources to achieve this end.

63. However these objectives do not necessarily converge in the case of asylum seekers; if only because there will be those among them who will not qualify for refugee status and will be lawfully arrested and deported. Accordingly, placing an asylum seeker in a section 26 housing programme to the exclusion of a citizen who would otherwise have been next in line raises questions of whether;

- a. any administration initiated programme which might discriminate in favour of citizens passes Constitutional scrutiny on the grounds of rationality and legality; or,
- b. any law which so discriminates is reasonable and justifiable in an open and democratic society under the limitation provisions of section 36 of the Constitution.

64. It therefore appears advisable to consider the underlying right sought to be protected.

65. Firstly, the progressive attainment of adequate housing under section 26(1) and (2) is a constitutionally protected second generation socio-economic right. It is also bolstered by one of the most fundamental rights, the right to dignity under section 10<sup>20</sup>.

66. There are also obligations to provide basic accommodation under sections 83(1), (2) and (3) of the Local Government: Municipal Structures Act 117 of 1998 read with sections 156 and 229 of the Constitution.

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<sup>20</sup> Section 10 of the Constitution reads:

*Human dignity*

*Everyone has inherent dignity and the right to have their dignity respected and protected.*

In *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) Moseneke ACJ at para 155 said;

*"The duty to provide basic services even to informal settlements stems from the Constitution and from legislation. Indeed, Yacoob J states at para [75] of his judgment:*

*'The Constitution requires the State, and therefore the City, to respect, protect, promote and fulfil all fundamental rights. Arguably one of the most significant rights, particularly in the context of the present case, is the right to have the inherent dignity of everyone respected and protected. More specifically the objects of local government in the Constitution are, among other things, to ensure the provision of services to communities in a sustainable manner and "to promote a safe and healthy environment". A municipality is obliged to try to achieve these objectives.'*

67. Socio-economic rights in addition to the right to dignity give expression to the constitutional rights to equality and freedom<sup>21</sup>. However restrictions on the exercise by illegal foreigners of these rights under the Immigration Act as read with the Refugees Act is more readily comprehended in terms of the limitation provisions of section 36 of the Constitution. Where questions of life, bodily integrity, dignity and children (who also receive special statutory protection) are involved, then the issue of rationality and the reasonableness or justification of the limitation becomes more problematic.

In *Khosa v Minister of Social Development* 2004(6) SA 505 (CC) at para 59

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<sup>21</sup> *Khosa v Minister of Social Development* 2004(6) SA 505 (CC) at para 40

Mokgoro J expressly recognised that it “ *may be reasonable to exclude from the legislative scheme workers who are citizens of other countries, who have only a tenuous link with this country.*”

68. The court in *Khosa* however distinguished the case of such a foreigner (ie one who is in this country either as a temporary or illegal resident) as “*quite different*” to one who obtains permanent residence<sup>22</sup>.

69. The respondents then drew the conclusion that the section 26 right to adequate housing on a progressively realisable basis applies equally to illegal foreigners unless that right is limited by a law of general application, and that there is no such law. Leaving aside whether the context of the socio-economic right is *per se* only comprehensible if exercised by someone who at the least is legally entitled to be in the country the provisions of the Immigration Act as qualified by the Refugees Act are limiting laws of general application and the respondents did not seek to challenge their constitutionality in these proceedings.

70. By a socio-economic right only being comprehensible if exercised by someone legally entitled to be in the country I do not suggest that the section 23, 24, 27 or 29 socio-economic rights cannot be claimed while the illegal foreigner is in the country. Far from it. The Constitutional Court and the SCA have already settled that only a few sections in the Bill of Rights expressly apply to citizens alone, while there may be laws of general application which can reasonably and justifiably restrict the enjoyment of other constitutionally protected rights to citizens only, despite such right being accorded to every person in the Republic. So too remedial administrative acts and decisions which exclude foreigners from their benefits may yet pass the tests of legality and rationality.

71. By contrast the provision of accessing adequate housing by definition contemplates a right in respect of immovable property exercisable indefinitely,

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<sup>22</sup>*Khosa* at para 31

which *a fortiori* appears to disqualify an illegal foreigner who is not an asylum seeker. It is unnecessary to decide the point.

72. But that does not end the enquiry since the right to dignity, aside from featuring prominently in the positive rights to access *adequate* housing on a progressive basis under sections 26(1) and (2) also underscores the protective (or negative) rights accorded to an evictee under section 26(3); a provision which is given substantive content through PIE.

In the latter case the right to dignity gains prominence because of the consequence to any person who has no roof over his or her head. Until that person's status is determined and until lawful detention or deportation he or she must be entitled while in the country to the benefits accorded to any citizen of temporary emergency shelter.

This is reinforced by the provisions of section 34(1)(e) of the Immigration Act which requires that an illegal foreigner who is arrested shall pending deportation:

*'be held in detention in compliance with minimum prescribed standards protecting his or her dignity and relevant human rights.'*

It would be incongruous if any lesser standards are to be provided by another organ of state obligated under any other law to provide shelter until such time as the illegal foreigner is so detained.

73. An evictee's rights were explained in *Joe Slovo* by Ngcobo J (at the time) at paras 231 and 232.

The learned justice said that the Constitution requires all evictions to be carried out in a manner which respects human dignity, equality and fundamental human

rights and freedoms and that section 26(3) *"... underscores the importance of a house, no matter how humble ... it acknowledges that a home is more than just a shelter from the elements. It is a zone of personal intimacy and family security."*

Reference was then made to international human rights law which recognises that while State projects for housing development and the like may require evictions, it should not result in people being rendered homeless and that where those affected by the eviction are unable to provide for themselves, the Government *"... must take appropriate measures, to the maximum of its available resources, to ensure that adequate alternative housing, resettlement or access to productive land, as the case may be, is available."* See also Moseneke ACJ in the same case at para 155 (which was quoted earlier).

74. The right to dignity therefore features prominently in the case of evictions and the immediate need to provide a temporary shelter for the poor who would otherwise be rendered homeless, irrespective of whether that would constitute the first step in a civic programme to provide adequate housing. A person will of course be entitled to emergency aid even though not eligible for the benefits of a longer term upliftment programme.

75. In my respectful view the distinction between providing necessary humanitarian assistance and a constitutional obligation to provide a programme for progressive habitation, despite both being underpinned by the right to dignity, was expressed by Sachs J in *Joe Slovo Community* at para 362:

*"The term 'humanitarian assistance' lends itself more to the granting of ad hoc support for occasional victims of war, persecution, or natural disasters, than to the fulfilment of constitutional and statutory obligations to furnish succour and redress to the long-standing casualties of history. What the council was doing was providing focused civic action to help people achieve their constitutional right to enjoy dignified habitation. At the*

*same time, however, the entitlement of the homeless to be in continuing occupation of the land was conditional on and subject to the exigencies of any reasonable programme for formal housing to be developed on that land."*

76. In considering the plight of illegal foreigners subject to eviction under PIE as read with section 26(3), and not subsections (1) and (2), the provision of temporary emergency housing does not become the gateway to securing for them access to an incrementally progressive housing programme, unless their status changes (as explained later). This would also address the concern of providing emergency shelter to illegal foreigners for an extended period in already stretched facilities.

77. Accordingly, while I disagree with the reasoning advanced, I agree with Adv Ngcukaitobi's submission that illegal foreigners cannot *per se* be precluded from being provided with temporary emergency housing in dire situations.

## **DETERMINING STATUS OF EVICTEES**

78. In *Changing Tides* the SCA was faced with a *fait accompli*. The illegal occupiers were required to be evicted speedily because the living conditions in the building posed "*a risk to life and health*"<sup>23</sup>. The appropriate time to determine whether any of the evictees were illegal foreigners, was therefore not prior to eviction which would delay the process but after they were provided with temporary emergency accommodation<sup>24</sup>.

79. It would therefore appear that in protracted litigation, where illegal occupation is admitted but one of the issues which impedes eviction from the landowner's property is the ability of the City to secure temporary emergency accommodation, and by when, there is no impediment to obtaining a court order, whether at the

<sup>23</sup> *Changing Tides* at para 53 (extract cited earlier)

<sup>24</sup> See *Changing Tides* at paras 53 to 54

time an application is brought for a section 4(2) notice or separately, to direct that any illegal foreigner regularise his or her entitlement to remain in the country, even if only applying for an asylum seekers permit, prior to the date when the eviction application is heard, provided a reasonable time is afforded for doing so.

## **CHILDREN, THE INFIRM AND DISABLED**

80. There are rights which receive special protection under our Constitution. They are the rights of children and the aged or infirm. In the former the rights are expressly conferred and recognised while it is implicit that the aged or infirm may be at risk of life or to their health, as well as degrading the right to dignity, if not in receipt of basic assistance. Cases concerned with PIE recognise the special status of the vulnerable within the framework of the Constitution.

81. Moreover in terms of section 29(2) of the Refugees Act;

*The detention of a child must be used only as a measure of last resort and for the shortest appropriate period of time.*

82. Again in section 32, the Refugees Act makes special provision for unaccompanied children and mentally disabled persons:

*(1) Any child who appears to qualify for refugee status in terms of section 3, and who is found under circumstances which clearly indicate that he or she is a child in need of care as contemplated in the Child Care Act, 1983 (Act 74 of 1983), must forthwith be brought before the Children's Court for the district in which he or she was found.*

*(2) The Children's Court may order that a child contemplated in subsection (1) be assisted in applying for asylum in terms of this Act.*

*(3) Any mentally disabled person who appears to qualify for refugee status in terms of section 3 must be assisted in applying for asylum in terms of this Act.*

83. The preamble to the Children's Act 38 of 2005 provides that;

*AND WHEREAS the United Nations has in the Universal Declaration of Human Rights proclaimed that children are entitled to special care and assistance;*

*AND WHEREAS the need to extend particular care to the child has been stated in the Geneva Declaration on the Rights of the Child, in the United Nations Declaration on the Rights of the Child, in the Convention on the Rights of the Child and in the African Charter on the Rights and Welfare of the Child and recognised in the Universal Declaration of Human Rights and in the statutes and relevant instruments of specialised agencies and international organisations concerned with the welfare of children;*

In the definition section of the Act;

*'care', in relation to a child, includes, where appropriate-*

*(a) within available means, providing the child with-*

*(i) a suitable place to live;*



- (ii) living conditions that are conducive to the child's health, well-being and development; and*
- (iii) the necessary financial support;*
- (b) safeguarding and promoting the well-being of the child;*
- (c) protecting the child from maltreatment, abuse, neglect, degradation, discrimination, exploitation and any other physical, emotional or moral harm or hazards;*
- (d) respecting, protecting, promoting and securing the fulfilment of, and guarding against any infringement of, the child's rights set out in the Bill of Rights and the principles set out in Chapter 2 of this Act;*
- (e) guiding, directing and securing the child's education and upbringing, including religious and cultural education and upbringing, in a manner appropriate to the child's age, maturity and stage of development;*
- (f) guiding, advising and assisting the child in decisions to be taken by the child in a manner appropriate to the child's age, maturity and stage of development;*
- (g) guiding the behaviour of the child in a humane manner;*
- (h) maintaining a sound relationship with the child;*
- (i) accommodating any special needs that the child may have; and*
- (j) generally, ensuring that the best interests of the child is the paramount concern in all matters affecting the child;*

84. The protections accorded to children are extended by the application provisions found in section 8 of that Act.

## *8 Application*

*(1) The rights which a child has in terms of this Act supplement the rights which a child has in terms of the Bill of Rights.*

*(2) All organs of state in any sphere of government and all officials, employees and representatives of an organ of state must respect, protect and promote the rights of children contained in this Act.*

*(3) A provision of this Act binds both natural or juristic persons, to the extent that it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.*

85. Finally, section 9 of the Children's Act statutorily recognises that the best interests of the child is paramount. It reads:

*9 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.*

86. The broad protection afforded to children and also the disabled, whose rights to dignity are by definition more acutely affected, should therefore be reflected in any order made in respect of the continued provision of temporary emergency housing to illegal foreigners.

87. Children, the disabled and the infirm are however dependent on the continued nurturing and protection of their parents or an able bodied adult. It certainly seems contrary to the children's rights to have them placed in foster care solely because their parents are illegal foreigners. For that reason it would appear that the parent or *de facto* care giver of a person who is infirm or suffering a disability be umbrellaed by the protection our law will accord the child or disabled person.

## **SPECIAL CONDITIONS UNDER SECTION 4 (12) OF PIE**

88. Early on in this judgment mentioned was made of section 4(12) of PIE which accords a court the power to impose reasonable conditions to any eviction order of an unlawful occupier, with the proviso that the court may subsequently vary these conditions on good cause.

89. In the present case it appears reasonable to impose a condition that those respondents who are illegal foreigners regularise their status with the proviso that if they do not produce proof to that effect within a specified period which the court considers reasonable then the City may apply on the same papers, duly supplemented, for a declarator that they are no longer entitled to receive temporary emergency accommodation.

90. I consider the order that I make in this regard to be reasonable in the circumstances and also to ensure that any affected person will have a further right to be heard on whether a declaratory order should be made against him or her with due regard to the circumstances then prevailing, including circumstances that may have an effect on any child or disabled person in his or her care.

## **ORDER**

91. It is for these reasons that on 9 February I granted the following order which amended the draft order in relation to those terms of the eviction and provision of temporary emergency accommodation that had been agreed.

1. *An order is granted in terms of the draft attached marked 'A' save that in addition the following paragraphs shall be added to the order.*

2. *Every adult who is an illegal immigrant and not lawfully entitled to remain or sojourn temporarily in the country in that he or she;*

a. *does not possess a valid permanent residence permit under sections 25 to 27 of the Immigration Act 13 of 2002; or*

b. *does not possess a valid visa (such as a work, student or asylum transit visa) as provided for in terms section 10 of the Immigration Act 13 of 2002; or*

c. *has not applied for asylum in terms of section 21 of the Refugees Act 130 of 1998 and does not possess a valid asylum seekers permit in terms of section 22 of that Act or whose application has not been finally determined, including by way of review and appeal where applicable; or*

d. *is not otherwise entitled to any lawful dispensation to remain or sojourn temporarily in the country*

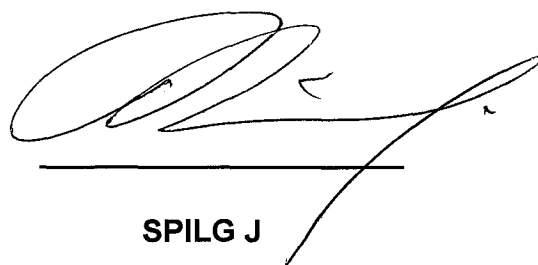
*shall by no later than 31 March 2016 produce to the Second Respondent by written submission to its attorneys of record at the contact address set out in paragraph 4 proof that he or she has applied for asylum under section 21 of the Refugees Act and has obtained a valid asylum seekers*

*permit under section 22 of that Act or produces a visa or permanent residence permit in terms of the Immigration Act or otherwise produces proof that he or she is otherwise entitled to any other lawful dispensation to remain or sojourn temporarily in the country.*

3. *In the event of any person who is an illegal immigrant failing to comply with the provisions of the previous paragraph or not producing the necessary proof then the Second Respondent shall be entitled to set down an application on long form notice to the affected person or persons on the same papers duly supplemented for an order declaring that such person is not entitled to continue receiving temporary emergency accommodation. Such application shall also indicate whether the affected person has any children or disabled persons in his or her care or if the affected person is himself or herself disabled or a minor.*

4. *The contact details of the Second Respondent are directed as:*

*(It is unnecessary to include them in this judgment)*

A handwritten signature in black ink, consisting of a large, stylized 'S' followed by a horizontal line and a long, sweeping flourish that extends to the right. Below the signature is a solid horizontal line.

**SPILG J**

**(delivered in open court on 1 April 2016)**

**POSTEA (17 May 2016):** The effect of incorporating the order made into the exiting draft resulted in further representations by the parties. As a consequence certain aspects of the original draft were amended. The parties were requested to complete a

final draft order incorporating both amendments to the original draft and the order I made in relation to the disputed issue (the latter now contained in paras 8 and 9). This has now been provided and for sake of completeness the consolidated order to be issued by the registrar is as follows:

1. *The first respondents and all persons occupying through or under them are to vacate the property described as Erf 644 Kew Township, Registration Division IR, Gauteng, known as numbers 93 and 95, Twelfth Road, Kew ("the Property"), by 28 February 2017.*
2. *The Sheriff of this Honourable Court is directed to remove from the property all persons still occupying the property by 1 March 2017 together with their belongings.*
3. *The attorneys for the occupiers, The Legal Resources Centre, are directed on or before the 13<sup>th</sup> of June 2016 to furnish the attorneys for the City with a list of those of its clients, on the date of this order who, as a result of the eviction from Erf 644 Kew Township, Registration Division IR, Gauteng, known as numbers 93 and 95, Twelfth Road, Kew may require temporary emergency accommodation assistance, together with their names, ages, family circumstances, sources of income, appropriate proof of identity and all documentation pertaining to their residency status in the Republic of South Africa.*
4. *The City is directed, by no later than 30 (thirty) days after being furnished with the list referred to in paragraph 3 above, to file with the Registrar and serve on the attorneys for the Applicant and the occupiers a report or reports setting out:-*

- 4.1 *Which of the occupiers is eligible for temporary emergency accommodation assistance;*
  - 4.2 *If it is contended that one or more of the occupiers does not qualify for the provision of temporary emergency accommodation assistance, the reasons for which is contended that the occupier or occupiers do not so qualify.*
5. *The contact details of the Second Respondent are directed as Kunene Ramapala Inc., ... (details omitted from this judgment).*
6. *Within 2 (two) weeks of the delivery of the City's report/s sent out hereinabove, the occupiers and/or the Applicant may file with the Registrar and serve on the attorneys for all other parties a commentary thereon, under oath.*
7. *Thereafter, this application may be re-enrolled for hearing on not less than 5 (five) days notice to all interested parties for the determination of such further relief as may be appropriate.*
8. *Every adult occupier listed pursuant to para 3 and found to be eligible for temporary emergency accommodation who is an illegal immigrant and not lawfully entitled to remain or sojourn temporarily in the country in that he/she :*
  - 8.1 *does not possess a valid permanent residence permit under sections 25 to 27 of the Immigration Act 13 of 2002; or*

8.2 *does not possess a valid visa (such as a work, student or asylum transit visa) as provided for in terms of section 10 of the Immigration Act 13 of 2002; or*

8.3 *has not applied for asylum in terms of section 21 of the Refugees Act 130 of 1998 and does not possess a valid asylum seekers permit in terms of section 22 of that Act or whose application has not been finally determined, including by way of review and appeal where applicable; or*

8.4 *is not otherwise entitled to any lawful dispensation to remain or sojourn temporarily in the country*

*shall within 2 weeks of the second respondents report produce to it*

*by written submission to its attorneys of record at the*

*contact address set out in paragraph 5 proof that he or she has applied for*

*asylum under section 21 of the Refugees*

*Act and has obtained a valid asylum seekers permit under section 22 of that Act*

*or produces a visa or permanent residence permit in terms of the Immigration Act*

*or otherwise produces proof that he or she is otherwise entitled to any other*

*lawful dispensation to remain or sojourn temporarily in the country.*

9. *In the event of any person who is an illegal immigrant failing to comply with the provisions of the previous paragraph or not producing the necessary proof then the Second Respondent shall be entitled to set down an application on long form*



*notice to the affected person or persons on the same papers duly supplemented for an order declaring that such person is not entitled to continue receiving temporary emergency accommodation. Such application shall also indicate whether the affected person has any children or disabled persons in his or her care or if the affected person is himself or herself disabled or a minor.*

10. *The following provisions shall apply to the provision of temporary emergency accommodation to the persons who are found to be eligible for temporary emergency accommodation:*

- 10.1 *The City of Johannesburg shall provide emergency temporary accommodation from 16 February 2017 to the persons found to be eligible.*

- 10.2. *The City of Johannesburg shall deliver a report to the parties and the Registrar of the above Honourable Court by 15 August 2016 dealing with at least the following:*

- 10.2.1 *The identification and details of buildings available for utilization by the City of Johannesburg in the provision of emergency temporary accommodation;*

- 10.2.2 *Details of any delay in the procurement of buildings for purposes of providing of emergency temporary accommodation or the refurbishment thereof; and*

*10.2.3 If any delays are experienced, the reasons therefore and the person or person responsible for the delay, as well as details of any remedial steps taken or planned.*

*10.3 The City of Johannesburg shall report to the parties and the Court on the progress of refurbishment of the buildings identified in the reports of 15 August 2016 by 15 October 2016 and further provide at least the details referred to in 10.2.1, 10.2.2 and 10.2.3 above.*

*10.4 The occupiers shall be entitled, through their attorneys and appointed representatives, to inspect the property/ies by 10 January 2017.*

*10.5 The City of Johannesburg shall commence relocation of the persons found to be eligible by no later than 16 February 2017.*

*11. No order as to costs is made in this application.*

A handwritten signature in black ink, consisting of a large, stylized 'A' followed by a long horizontal stroke and a diagonal line extending upwards and to the right.

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DATE OF JUDGMENT: 1 April 2016

LEGAL REPRESENTATIVES:

FOR APPLICANT: Adv A Bester

Vermaak & Partners

FOR FIRST RESPONDENT: Adv T Ngcukaitobi; Adv N Alli: Adv L Siyo

Legal Resources Centre

FOR SECOND RESPONDENT: GB McMaster

Kunene Ramapala Inc