CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 24/07
[2008] ZACC 1

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| OCCUPIERS OF 51 OLIVIA ROAD, BEREA TOWNSHIP, AND 197 MAIN STREET, JOHANNESBURG | Applicants |
| versus | |
| CITY OF JOHANNESBURG | First Respondent |
| RAND PROPERTIES (PTY) LTD | Second Respondent |
| MINISTER OF TRADE AND INDUSTRY | Third Respondent |
| PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA | Fourth Respondent |
| with | |
| CENTRE ON HOUSING RIGHTS AND EVICTIONS | Amicus Curiae |
| COMMUNITY LAW CENTRE, UNIVERSITY OF THE WESTERN CAPE | Amicus Curiae |

Heard on : 28 August 2007

Decided on : 19 February 2008

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JUDGMENT

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YACOOB J:

*Introduction*

[1] More than 400 occupiers of two buildings in the inner city of Johannesburg (the occupiers) applied for leave to appeal against a decision of the Supreme Court of Appeal.[1] They challenged the correctness of the judgment and order of that Court authorising their eviction at the instance of the City of Johannesburg (the City) based on the finding that the buildings they occupied were unsafe[2] and unhealthy.[3] The City was ordered to provide those of the occupiers who were "desperately in need of housing assistance with relocation to a temporary settlement area".[4]

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[1] *City of Johannesburg v Rand Properties (Pty) Ltd and Others* 2007 (6) SA 417 (SCA); 2007 (6) BCLR 643 (SCA); [2007] 2 All SA 459 (SCA).

[2] Pursuant to notices issued in terms of section 12(4)(b) of the National Building Regulations and Building Standards Act 103 of 1977 (the Act).

[3] The relevant portion of section 20 of the Health Act 63 of 1977 reads—

> "(1) Every local authority shall take all lawful, necessary and reasonably practicable measures—
>
> (a) to maintain its district at all times in a hygienic and clean condition;
>
> (b) to prevent the occurrence within its district of—
>
> (i) any nuisance;
>
> (ii) any unhygienic condition;
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> (iii) any offensive condition; or
>
> (iv) any other condition which will or could be harmful or dangerous to the health of any person within its district or the district of any other local authority,
>
> or, where a nuisance or condition referred to in subparagraphs (i) to (iv), inclusive, has so occurred, to abate, or cause to be abated, such nuisance, or remedy, or cause to be remedied, such condition, as the case may be".

[4] The order reads—

> "(a) The appeal is upheld and the cross-appeal dismissed.
>
> (b) The order of the court below is set aside save that the order dismissing the applications in cases WLD 04/10330, 04/10331, 04/10332 and 04/10332 (the Joel Street applications) with costs remains.
>
> (c) The following order issues in cases WLD 03/24101 (Zinns) and WLD 04/13835 (San Jose):
>
> 1.1 The respondents are interdicted from occupying the property concerned until such time as the applicant has granted permission in writing that the property may be occupied or used.
>
> 1.2 In the event that the respondents or any of them do not vacate the property within one month of this order, the sheriff is permitted to remove from the property all persons occupying the property and to take such steps as may be necessary to prevent the re-occupation of the building, including the sealing of all entrances.

[2] The appeal to the Supreme Court of Appeal was directed by the City against a judgment and order in the Johannesburg High Court (the High Court).[5] The High Court had before it applications by the City for the ejectment of the occupiers as well as counter-applications by the latter aimed at securing alternative accommodation or housing as a pre-condition to their eviction. The judge in the High Court declared that the City's housing programme fell short of what was required, ordered the City to produce a programme to cater for those people in desperate need, and interdicted the eviction of the occupiers on certain terms.[6]

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1.3 The sheriff is authorised to approach the South African Police Services for any assistance that may be required and the South African Police Services are directed to render such assistance or support as may be required to enforce this order.

2.1 The City of Johannesburg is ordered to offer and provide to those respondents who are evicted and are desperately in need of housing assistance with relocation to a temporary settlement area as described in chapter 12 of the National Housing Code (April 2004) within its municipal area. The temporary accommodation is to consist of at least the following elements: a place where they may live secure against eviction; a structure that is waterproof and secure against the elements; and with access to basic sanitation, water and refuse services.

2.3 In order to implement the foregoing, the City of Johannesburg must open within seven days a register of persons who qualify and the respondents' attorneys of record shall provide the City with a list of those respondents who wish to avail themselves of this order and the City shall after consultation (if requested by any respondent) determine the location of the alternative accommodation.

2.4 The City of Johannesburg is ordered to serve on the respondents' attorneys of record and the amici and file with the registrar a compliance affidavit within four months of this order.

2.5 The counter-application is, save to the extent set out, dismissed."

[5] *City of Johannesburg v Rand Properties (Pty) Ltd and Others* 2007 (1) SA 78 (W); 2006 (6) BCLR 728 (W); [2006] 2 All SA 240 (W).

[6] The order reads—

"1. It is declared that the housing programme of the Applicant fails to comply with the constitutional and statutory obligations of the Applicant. The Applicant has failed to provide suitable relief for people in the inner city of Johannesburg who are in a crisis situation or otherwise in desperate need of accommodation;

2. The Applicant has failed to give adequate priority and resources to people in the inner city of Johannesburg who are in a crisis situation or otherwise in desperate need of accommodation.

3. The Applicant is directed to devise and implement within its available resources a comprehensive and co-ordinated programme to progressively realise the right to

[3] The broad questions initially raised in the application for leave to appeal were whether the order for the eviction of the occupiers ought to have been granted and whether the City's housing programme complied with the obligations imposed upon it by section 26(3) of the Constitution.[7] I stress that the question in both courts was not limited to whether the City had complied with its housing obligations to the occupiers. They raised, in the public interest, the broader question whether the City had made reasonable provision for housing for those thousands of people who were said to be living in desperate conditions in the inner city.

[4] Since this case was argued, certain developments have occurred which have had a significant impact on whether any or all of the issues raised in it should be considered by this Court. These details are briefly set out now.

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adequate housing to people in the inner city of Johannesburg who are in a crisis situation or otherwise in desperate need of accommodation.

4. Pending the implementation of the programme referred to in paragraph 3 above, alternatively until such time as suitable adequate accommodation is provided to the Respondents, the Applicant is interdicted from evicting or seeking to evict the current Respondents from the properties in this application.

5. In the circumstances the application is dismissed with costs, including the costs occasioned by the employment of two counsel."

[7] Section 26(3) provides—

"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."

[5] Two days after the application for leave to appeal was heard, this Court issued an interim order[8] aimed at ensuring that the City and the occupiers engaged with each other meaningfully on certain issues. That order was in the following terms—

> "1. The City of Johannesburg and the applicants are required to engage with each other meaningfully and as soon as it is possible for them to do so, in an effort to resolve the differences and difficulties aired in this application in the light of the values of the Constitution, the constitutional and statutory duties of the municipality and the rights and duties of the citizens concerned.
>
> 2. The City of Johannesburg and the applicants must also engage with each other in an effort to alleviate the plight of the applicants who live in the two buildings concerned in this application by making the buildings as safe and as conducive to health as is reasonably practicable.
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> 3. The City of Johannesburg and the applicants must file affidavits before this Court on or before 3 October 2007 reporting on the results of the engagement between the parties as at 27 September 2007.
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> 4. Account will be taken of the contents of the affidavits in the preparation of the judgment in this matter for the issuing of further directions, should this become necessary."

We did not furnish reasons for the order and I do so later in this judgment.

[6] After extensions of time were twice sought,[9] the City and the occupiers filed affidavits in which we were informed that an agreement of settlement had been entered into between the City and the occupiers. As will appear from what is set out

[8] The order was issued on 30 August 2007.

[9] The first application for extension of time on 27 September 2007 required the time for engagement to be extended until 16 October 2007 and for affidavits to be filed on 19 October 2007. The second, made on 18 October 2007 sought to file affidavits by 24 October 2007.

later in this judgment, the parties differed in relation to the issues that remained for adjudication by this Court consequent upon the conclusion of the agreement. To determine the issues that remain for decision we must first define the issues raised by the application for leave to appeal. This judgment will next set out the reasons for issuing the engagement order as well as the terms of the agreement entered into consequent upon engagement. I will then investigate the effect of the agreement on those issues. The issues that remain to be decided are those not disposed of in that part of the judgment concerned with the reasons for engagement. Further the remaining issues will call for consideration only if they raise constitutional issues and if it is in the interests of justice for us to decide them.[10]

*Issues raised by this application*

[7] The first broad issue raised by the application is whether the Supreme Court of Appeal was right when it granted an order for the ejectment of all the occupiers. This broad issue encapsulates five questions. None of these was determined in the High Court. They arise out of the defences of the occupiers to the ejectment application.[11] The first of these was that section 12 of the Act is inconsistent with the Constitution because it provides for arbitrary evictions and evictions without a court order. Second, the occupiers attacked the constitutional validity of the decision by the City to evict them as being unfair because it had been taken without giving them a hearing. The next point taken was that the administrative decision to evict them was not

[10] I would suggest that the standard for deciding whether or not to consider applications for leave to appeal should also apply when we are to decide whether to consider particular issues in an application for leave to appeal.

[11] The High Court did not deem it necessary to decide these questions because it held that the occupiers could not be evicted until and unless alternative accommodation was found for them.

reasonable in all the circumstances because in particular the City did not take into account that the occupiers would be homeless after the eviction. Fourthly, it was contended that section 26(3) of the Constitution precluded their eviction.[12] The final argument made was that the standards set by the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (PIE)[13] were applicable to these evictions. The Supreme Court of Appeal dismissed all these objections and, as already mentioned, granted the eviction orders on the basis that temporary accommodation should be provided to those occupiers who fulfil certain requirements.

[8] The housing issues raised in the counter-applications are whether the City's housing programme then in operation catered reasonably for the occupiers and whether that programme also catered reasonably for the many thousands of people who lived in desperate conditions within the inner city. The essential question to be asked is whether the High Court was right in making the orders it did. The Supreme Court of Appeal disagreed with the High Court in this regard and made a limited order for temporary accommodation.

*Reasons for the engagement order*

[9] The need for meaningful engagement between the City and the occupiers was not directly raised by the parties before this Court. It was however in some sense foreshadowed by their contention that the City was obliged to give the occupiers a hearing before taking the decision to evict on the basis that the decision was an

[12] Above n 7.

[13] 19 of 1998.

administrative one.[14] The City contended that the occupiers had indeed been given a hearing because they had had an opportunity to file affidavits in the High Court in opposition to the ejectment application.

[10] In *Grootboom*[15] this Court said, on the relationship between reasonable state action and the need to treat human beings with the appropriate respect and care for their dignity to which they have a right as members of humanity—

> "All levels of government must ensure that the housing program is reasonably and appropriately implemented in the light of all the provisions in the Constitution. All implementation mechanisms and all State action in relation to housing falls to be assessed against the requirements of s 26 of the Constitution. Every step at every level of government must be consistent with the constitutional obligation to take reasonable measures to provide adequate housing.
>
> But s 26 is not the only provision relevant to a decision as to whether State action at any particular level of government is reasonable and consistent with the Constitution. The proposition that rights are interrelated and are all equally important is not merely a theoretical postulate. The concept has immense human and practical significance in a society founded on human dignity, equality and freedom. It is fundamental to an evaluation of the reasonableness of State action that account be taken of the inherent dignity of human beings. The Constitution will be worth infinitely less than its paper if the reasonableness of State action concerned with housing is determined without regard to the fundamental constitutional value of human dignity. Section 26, read in the context of the Bill of Rights as a whole, must mean that the respondents have a right to reasonable action by the State in all circumstances and with particular regard to human dignity. In short, I emphasise that human beings are required to be treated

[14] The decision would therefore be subject to section 3(2)(b)(ii) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) as well as jurisprudence on administrative decisions.

[15] *Government of the Republic of South Africa and Others v Grootboom and Others* 2001(1) SA 46 (CC); 2000 (11) BCLR 1169 (CC).

> as human beings. This is the backdrop against which the conduct of the [State] must be seen."[16]

[11] The Court went on to say more specifically about engagement and its importance—

> "The respondents began to move onto the New Rust land during September 1998 and the number of people on this land continued to grow relentlessly. I would have expected officials of the municipality responsible for housing to engage with these people as soon as they became aware of the occupation. I would have also thought that some effort would have been made by the municipality to resolve the difficulty on a case-by-case basis after an investigation of their circumstances before the matter got out of hand. The municipality did nothing and the settlement grew by leaps and bounds."[17]

[12] In *Port Elizabeth Municipality*[18] this Court said—

> " . . . the procedural and substantive aspects of justice and equity cannot always be separated. The managerial role of the courts may need to find expression in innovative ways. Thus, one potentially dignified and effective mode of achieving sustainable reconciliations of the different interests involved is to encourage and require the parties to engage with each other in a proactive and honest endeavour to find mutually acceptable solutions. Wherever possible, respectful face-to-face engagement or mediation through a third party should replace arm's-length combat by intransigent opponents."[19]

[13] It became evident during argument that the City had made no effort at all to engage with the occupiers at any time before proceedings for their eviction were

[16] Id at paras 82-83.

[17] Id at para 87.

[18] *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC); 2004 (12) BCLR 1268 (CC).

[19] Id at para 39.

brought. Yet the City must have been aware of the possibility, even the probability, that people would become homeless as a direct result of their eviction at its instance. In these circumstances those involved in the management of the municipality ought at the very least to have engaged meaningfully with the occupiers both individually and collectively.

[14] Engagement is a two-way process in which the City and those about to become homeless would talk to each other meaningfully in order to achieve certain objectives. There is no closed list of the objectives of engagement. Some of the objectives of engagement in the context of a city wishing to evict people who might be rendered homeless consequent upon the eviction would be to determine—

(a) what the consequences of the eviction might be;

(b) whether the city could help in alleviating those dire consequences;

(c) whether it was possible to render the buildings concerned relatively safe and conducive to health for an interim period;

(d) whether the city had any obligations to the occupiers in the prevailing circumstances; and

(e) when and how the city could or would fulfil these obligations.

[15] Engagement has the potential to contribute towards the resolution of disputes and to increased understanding and sympathetic care if both sides are willing to participate in the process. People about to be evicted may be so vulnerable that they may not be able to understand the importance of engagement and may refuse to take

part in the process. If this happens, a municipality cannot walk away without more. It must make reasonable efforts to engage and it is only if these reasonable efforts fail that a municipality may proceed without appropriate engagement. It is precisely to ensure that a city is able to engage meaningfully with poor, vulnerable or illiterate people that the engagement process should preferably be managed by careful and sensitive people on its side.

[16] The City has constitutional obligations towards the occupants of Johannesburg. It must provide services to communities in a sustainable manner,[20] promote social and economic development,[21] and encourage the involvement of communities and community organisations in matters of local government.[22] It also has the obligation to fulfil the objectives mentioned in the preamble to the Constitution to "[i]mprove the quality of life of all citizens and free the potential of each person". Most importantly it must respect, protect, promote and fulfil the rights in the Bill of Rights.[23] The most important of these rights for present purposes is the right to human dignity[24] and the right to life.[25] In the light of these constitutional provisions a municipality that ejects people from their homes without first meaningfully engaging with them acts in a manner that is broadly at odds with the spirit and purpose of the constitutional obligations set out in this paragraph taken together.

[20] Section 152(1)(b).

[21] Section 152(1)(c).

[22] Section 152(1)(e).

[23] Section 7(2).

[24] Section 10.

[25] Section 11.

[17] But the duty of the City to engage people who may be rendered homeless after an ejectment to be secured by it is also squarely grounded in section 26(2) of the Constitution.[26] It was said in *Grootboom* that "[e]very step at every level of government must be consistent with the constitutional obligation to take reasonable measures to provide adequate housing."[27] Reasonable conduct of a municipality pursuant to section 26(2) includes the reasonableness of every step taken in the provision of adequate housing. Every homeless person is in need of housing and this means that every step taken in relation to a potentially homeless person must also be reasonable if it is to comply with section 26(2).

[18] And, what is more, section 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 section 26(2). The Constitution therefore obliges every municipality to engage meaningfully with people who would become homeless because it evicts them. It also follows that, where a municipality is the applicant in

[26] Section 26(2) provides—

> "The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of [the right of access to adequate housing]."

[27] Above n 15 at para 82.

eviction proceedings that could result in homelessness, a circumstance that a court must take into account to comply with section 26(3) of the Constitution is whether there has been meaningful engagement.

[19] It has been suggested that there are around 67 000 people living in the inner city of Johannesburg in unsafe and unhealthy buildings in relation to whom ejectment orders will have to be issued and that it would be impractical to expect meaningful engagement in every case. I cannot agree. It is common cause that the implementation of the City's Regeneration Strategy[28] is an important reason that founded the decision to evict. That strategy was adopted in 2003. If structures had been put in place with competent sensitive council workers skilled in engagement, the process could have begun when the strategy was adopted. It must then have been apparent that the eviction of a large number of people was inevitable. Indeed the larger the number of people potentially to be affected by eviction, the greater the need for structured, consistent and careful engagement. Ad hoc engagement may be appropriate in a small municipality where an eviction or two might occur each year, but is entirely inappropriate in the circumstances prevalent in the City.

[20] 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,

[28] Johannesburg Inner City Regeneration Strategy.

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 peoples' claims should preferably facilitate the engagement process in every possible way.

[21] Finally it must be mentioned that secrecy is counter-productive to the process of engagement. The constitutional value of openness is inimical to secrecy. Moreover, as I have already pointed out, it is the duty of a court to take into account whether, before an order of eviction that would lead to homelessness is granted at the instance of a municipality, there has been meaningful engagement or, at least, that the municipality has made reasonable efforts towards meaningful engagement. In any eviction proceedings at the instance of a municipality therefore, the provision of a complete and accurate account of the process of engagement including at least the reasonable efforts of the municipality within that process would ordinarily be essential. The absence of any engagement or the unreasonable response of a municipality in the engagement process would ordinarily be a weighty consideration against the grant of an ejectment order.

[22] This Court made the interim order because it was not appropriate to grant any eviction order against the occupiers, in the circumstances of this case, unless there had at least been some effort at meaningful engagement. It was common cause during argument that there had been none. The ejectment of a resident by a municipality in circumstances where the resident would possibly become homeless should ordinarily

take place only after meaningful engagement. Whether there had been meaningful engagement between a city and the resident about to be rendered homeless is a circumstance to be considered by a court in terms of section 26(3).[29]

[23] It follows that the Supreme Court of Appeal should not have granted the order of ejectment in the circumstances of this case, in the absence of meaningful engagement.

*The engagement agreement*

[24] The post-engagement agreement concluded between the City and the occupiers records at its inception that it "contemplates" the resolution of two aspects of their dispute: the interim measures to be taken by the City to improve the condition of the properties as well as "[t]he City's application for the eviction of the occupiers". It is not necessary to go into these two aspects of the agreement in much detail.

[25] The agreement makes explicit and meticulous provision for measures aimed at rendering both properties "safer and more habitable" in the interim. It is not necessary to set out each measure. They include the installation of chemical toilets, the cleaning and sanitation of the buildings, the delivery of refuse bags, the closing of a certain lift shaft and the installation of fire extinguishers. The work aimed at rendering the building more habitable was to be completed within 21 working days of the signature of the agreement. The agreement was signed on 29 October 2007.

[29] Above n 7.

[26] The eviction application of the City was resolved on a somewhat different basis. The agreement obliged the City to provide all occupiers with alternative accommodation in certain identified buildings. It defined with reasonable precision the nature and standard of the accommodation to be provided and determined the way in which the rent in respect of this accommodation will be calculated. The agreement obliged all occupiers to move into alternative accommodation by yesterday[30] and stipulated that this alternative accommodation is provided "pending the provision of suitable permanent housing solutions" being developed by the City "in consultation" with the occupiers concerned.

*Approval of the agreement*

[27] I have already pointed out that work on the improvement of buildings now occupied was to begin 21 days after the signature of the agreement. However the rest of the agreement was to take effect only on the date on which it was approved or endorsed by this Court. On 5 November 2007 this Court made the following order—

> "1. The Agreement entered into between the City of Johannesburg and those Occupiers who have signed the Agreement dated 29 October 2007 is endorsed.
> 2. Residual issues arising from the parties' reports will be considered in the judgment to be delivered in this matter in due course."

[30] 18 February 2008.

[28] No reasons were given for the endorsement order. I state them briefly. This judgment holds that the City is required to respond reasonably to the process of engagement.[31] The agreement would call for endorsement by this Court if it does indeed represent a reasonable response to the engagement process. There was no doubt that the agreement represented a reasonable response to the engagement process. The City must be commended for the fact that its position became more humane as the case proceeded through the different courts, and for its ultimate reasonable response to the engagement order.

[29] This is the first time this Court has approved an agreement between the parties before it in circumstances where the parties required approval before important aspects of it came into operation. This Court deemed it appropriate to consider and evaluate the terms of the agreement for the purpose of deciding whether to approve it because—

(a) the City and the occupiers engaged with each other in the process of complying with the order of this Court;

(b) the parties reported to this Court also in compliance with our order;

(c) considerable expenditure on the part of the City was obviously required in the implementation of the agreement; and

(d) the City and the occupiers would have been in an invidious position if this Court had later held that the agreement was not a reasonable response to engagement.

[31] Above para [18].

[30] 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.

*Effect of development*

[31] There are issues in relation to which there is either a dispute or, at the very least, the absence of complete agreement whether they should be considered by this Court. Apart from costs, the contention of the occupiers in relation to the disputes that remain is set out as follows—

> "11.1. The relief claimed by the applicants in respect of the City's failure to formulate and implement a housing plan for the applicants and the class of persons on behalf of whom the current litigation was initiated;
>
> 11.2. The practice to be adopted by the City in dealing with persons occupying so-called "bad" buildings in future;
>
> 11.3. The constitutionality of Section 12(4)(b) of the National Building Regulations and Building Standards Act 103 of 1977 ("the NBRA");

> 11.4 The applicants' review of the City's decisions to issue the notices in terms of Section 12(4)(b) of the NBRA in respect of the 51 Olivia Road and 197 Main Street properties, assuming that the NBRA is valid;
>
> 11.5. The applicability of the Prevention of Illegal Eviction from, and Unlawful Occupation of, Land Act 19 of 1998;
>
> 11.6. The reach and applicability of Sections 26(1), 26(2) and 26(3) of the Constitution . . . ".

We must now determine whether any of these issues should be decided.

*Relief concerning the housing plan*

[32] The occupiers contend that this Court must adjudicate their contention that the City has failed to formulate and implement a housing plan for them and the class of person they say they represent. Since the agreement has disposed of the issue of temporary accommodation, the occupiers evidently require adjudication of the housing plan in relation to whether it facilitates permanent housing solutions for them and for the thousands of other people who might later be evicted from unsafe and unhealthy buildings. The agreement acknowledges that a permanent housing solution has not yet been found and records that—

> "The nature and location of any permanent housing options to be made available to the occupiers will be developed by the City in consultation with the occupiers concerned, having regard to applicable national, provincial and municipal housing policies and implementation plans."

[33] The occupiers contend in their reporting affidavit that negotiations concerning "permanent housing solutions have been marred by the absence of any concrete plan

to provide housing for the inner city poor" in general or for the occupiers in particular. The City attaches to its post-engagement settlement affidavit a housing plan and requires this Court to consider this plan in the context of the challenges and complexities inherent in the process of housing provision.[32] The occupiers in a supplementary affidavit contend that we should, if we are minded to consider the plan, give them a 30-day opportunity to deal with the plan and to provide the City with a similar opportunity to address their response before we do so.

[34] It is not necessary for this Court to consider the question of "permanent housing solutions" for the occupiers. The City has agreed that these solutions will be developed in consultation with them. The complaint by the occupiers that negotiations have been marred by unclear and inconcrete housing plans is not in my view a sufficient reason for this Court to consider this question at this stage. There is every reason to believe that negotiations will continue in good faith. The situation now is very different from that which confronted the occupiers in the High Court. The City has shown a willingness to engage. As a result, the desperate situation of the occupiers has been alleviated by the reasonable response of the City to the engagement process. There is no reason to think that future engagement will not be meaningful and will not lead to a reasonable result. In any event this Court should not be the court of first and last instance on whether the City has acted reasonably in the process.[33] Nor should it be the only determinant of whether the plan is reasonable in

[32] There is a debate about whether the plight of thousands of other poor residents of the inner city apart from the occupiers has been properly raised.

[33] See for example: *Van Vuren v Minister of Justice and Constitutional Development and Another* 2007 (8) BCLR 903 (CC) at paras 10-11; *De Kock v Minister of Water Affairs and Forestry and Others* 2005 (12) BCLR

the sense of being sufficiently concrete and clear. It is the duty of both parties to continue with the process of negotiation and for the occupiers or the City to approach the High Court if this course becomes necessary.

[35] Much the same reasoning applies to the plea of the occupiers that we consider the plight of thousands of other poor people in the inner city and evaluate the housing plan in relation to them. The housing plan before the High Court differs from the one that we are required to consider in this case. This Court should not be the court of first and last instance in deciding whether it complies with the Constitution and the law. We must bear in mind that the engagement between the occupiers and the City has resulted in an agreement that represents a reasonable response by the City. There is no reason to believe that the City will not in the future engage meaningfully with other occupants whose evictions become either necessary or desirable. The City has undertaken to negotiate permanent housing solutions for the occupiers in consultation with them. It is not unreasonable to expect that the City will, in the ordinary course, adopt a similar approach in respect of other people who are affected in the future. In the circumstances, it would be premature to examine the plan and evaluate it in a generalised way. A process of this kind comes close to an abstract evaluation which is undesirable at the best of times. A case can always be brought in the High Court in relation to particular occupiers with specific allegations as to the respects in which the

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1183 (CC) at paras 3-4; *Mnguni v Minister of Correctional Services and Others* 2005 (12) BCLR 1187 (CC) at para 6; *Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bissett and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign and Others v MEC, Local Government and Housing, Gauteng and Others (KwaZulu-Natal Law Society and Msunduzi Municipality as* Amici Curiae) 2005 (1) SA 530 (CC); 2005 (2) BCLR 150 (CC) at para 11 and *Bruce and Another v Fleecytex Johannesburg CC and Others* 1998 (2) SA 1143 (CC); 1998 (4) BCLR 415 (CC) at paras 7-9.

housing obligations imposed by the Constitution have not been complied with. This is preferable to dealing with a generalised claim in relation to anticipated future occurrences. At the same time the High Court order has been overtaken by events and cannot be allowed to stand.

[36] It must be apparent by now that this Court did not afford any opportunity for further response to the housing plan because, though the evaluation of these plans did raise a constitutional issue, it was not in the interests of justice to follow that course and to consider and evaluate the plan.

*Other issues that need not be decided*

[37] Enough has been said in this judgment about what the occupiers call the practice to be adopted by the City in dealing with people who occupy unsafe and unhealthy buildings in the future. I can also see no need for a further general discussion on "the reach and applicability of Sections 26(1), 26(2) and 26(3)". This judgment should say no more about these issues.

[38] There is equally no need for this judgment to be concerned with the question whether PIE applies in the present case or to expand on the relationship between section 26 and PIE. The question may never arise if the City engages meaningfully with those people who would become homeless if evicted by it.

*The section 12 issues*

[39] This leaves two matters mentioned by the occupiers. Both concern section 12 of the Act. The one is a claim for a review of the City's decision to issue the section 12(4)(b) notices. The other concerns the constitutionality of section 12(4)(b). I do not think the review remains relevant because the ejectment proceedings have been effectively settled. However it is in my view in the interests of justice to investigate the narrower question of the considerations relevant to the issuing of the section 12(4)(b) notice. The same applies to the question of the constitutionality of section 12(6). The section 12 procedure is likely to be applied by municipalities in the future and it is appropriate that some guidance be given to them. The importance of the issues to be considered will become apparent when they are discussed.

[40] Both these aspects have been fully argued before the Supreme Court of Appeal and this Court. Moreover the Supreme Court of Appeal has held that—

(a) relevant considerations were indeed taken into account by the City in making the section 12(4)(b) decision to evict.[34]

(b) section 12 is consistent with the Constitution.[35]

[41] Sections 12(4), 12(5) and 12(6) provide—

> "(4) If the local authority in question deems it necessary for the safety of any person, it may by notice in writing, served by post or delivered—
>
> (a) order the owner of any building to remove, within the period specified in such notice, all persons occupying or working or being for any other purpose in such building therefrom, and to take care

[34] Above n 1 at para 64.

[35] Id at paras 51-56.

that any person not authorised by such local authority does not enter such building;

(b) order any person occupying or working or being for any other purpose in any building, to vacate such building immediately or within a period specified in such notice.

(5) No person shall occupy or use or permit the occupation or use of any building in respect of which a notice was served or delivered in terms of this section or steps were taken by the local authority in question in terms of subsection (1), unless such local authority has granted permission in writing that such building may again be occupied or used.

(6) Any person who contravenes or fails to comply with any provision of this section or any notice issued thereunder, shall be guilty of an offence and, in the case of a contravention of the provisions of subsection (5), liable on conviction to a fine not exceeding R100 for each day on which he so contravened."

*Relevant considerations*

[42] One of the grounds upon which the lawfulness of the City's decision to issue the section 12(4)(b) notices was challenged was that the City had failed to take relevant considerations into account. The particular contention and the way in which it was disposed of appear in one paragraph of the judgment of the Supreme Court of Appeal[36] in the following terms—

> "The second ground, namely that the city failed to take relevant considerations into account, was based on the assertion that the city failed to consider the availability of suitable alternative accommodation or land for the respondents. The submission presupposes that the right to act under s 12(4)(b) and the right to access to adequate housing are reciprocal and that the former is dependent or conditional on the latter. There is in my view no merit in the submission."

[36] Id at para 64.

[43] The Supreme Court of Appeal is undoubtedly right in the conclusion that the right to act under section 12(4)(b) and the right to access adequate housing are not reciprocal and that the former is neither dependent nor conditional on the latter. However the difficulty is the inescapable inference from the passage just quoted that it is neither appropriate nor necessary for a decision-maker to consider at all the availability of suitable alternative accommodation or land when making a section 12(4)(b) decision. Any suggestion that the availability of alternative accommodation need not be considered carries the implication that whether a person or family is rendered homeless after an eviction consequent upon a section 12(4)(b) decision is irrelevant to the decision itself. The reasoning postulates the false premise that there is no relationship between section 12(4)(b) of the Act and section 26(2) even if the person is rendered homeless by the decision.

[44] It is common cause that the City in making the decision to evict the people concerned took no account whatsoever of the fact that the people concerned would be rendered homeless. This is regrettable. Municipal officials do not act appropriately if they take insulated decisions in respect of different duties that they are obliged to perform. In this case the City had a duty to ensure safe and healthy buildings on the one hand and to take reasonable measures within its available resources to make the right of access to adequate housing more accessible as time progresses on the other. It cannot be that the City is entitled to make decisions on each of these two aspects separately, one department making a decision on whether someone should be evicted

and some other department in the bureaucratic maze determining whether housing should be provided. The housing provision and the health and safety provision must be read together. There is a single City. That City must take a holistic decision in relation to eviction after appropriate engagement taking into account the possible homelessness of the people concerned and the capacity of the City to do something about it.

[45] The Supreme Court of Appeal did not wholly embrace the inter-relationship between section 12(4)(b) of the Act and section 26(2) of the Constitution. It said that the appeal before it concerned—

> " . . . in the main the right of a local authority to order occupiers by notice to vacate a building because it is necessary for their safety or the safety of others and its right, if they fail to comply, to apply for an order of court for their eviction."[37]

The Court saw the case as "only peripherally about the constitutional duty of organs of state towards those who are evicted from their homes and are in a desperate condition."[38] This characterisation is unfortunate.

[46] The Supreme Court of Appeal was incorrect in its conclusion that the failure of the City to consider the availability of suitable alternative accommodation or land for the occupiers in the process of making a section 12(4)(b) decision was

[37] Id at para 1.

[38] Id at para 4.

unobjectionable.[39] The relationship between the eviction of people by the City pursuant to section 12(4)(b) and the possibility of their being rendered homeless consequent upon that eviction cannot be gainsaid. It follows that the City must take into account the possibility of the homelessness of any resident consequent upon a section 12(4)(b) eviction in the process of making the decision as to whether or not to proceed with the eviction.

*The constitutional validity of section 12(6) of the Act*

[47] Sections 12(4), 12(5) and 12(6) were attacked before the Supreme Court of Appeal on numerous grounds.[40] None of these grounds of attack was expressly taken forward before this Court nor does it appear to be in the interests of justice for each of these grounds to be dealt with here.

[48] There is however one finding that does occasion sufficient constitutional concern to render it in the interests of justice for it to be considered. It is the conclusion of the Supreme Court of Appeal that there is nothing objectionable about a legislative provision that permits "the issuing of an administrative order to vacate and, in the event of non-compliance, for a criminal sanction."[41] It would have been noticed that the criminal sanction is imposed by section 12(6). Section 12(4)(b) authorises the municipality concerned by notice to "order any person occupying . . . any building" to "vacate" it "immediately" or within a specified period. In terms of section 12(5) no

[39] Above para [42].

[40] Above n 1 at paras 51, 52 and 54-56.

[41] Id at para 53.

person may occupy the building after the notice has been issued without the permission of the municipality. It is in this context that section 12(6) provides that any person who continues to occupy despite the "order" is liable on conviction to a maximum fine of R100 for each day of unlawful occupation.

[49] Section 26(3), like all provisions of the Bill of Rights, deserves a generous construction. The section prohibits eviction of people from their home absent a court order that must be made after taking into account all the relevant circumstances. It means in effect that no person may be compelled to leave their home unless there exists an appropriate court order. The provisions of section 26(3) would be virtually nugatory and would amount to little protection if people who were in occupation of their homes could be constitutionally compelled to leave by the exertion of the pressure of a criminal sanction without a court order. It follows that any provision that compels people to leave their homes on pain of criminal sanction in the absence of a court order is contrary to the provisions of section 26(3) of the Constitution. Section 12(6) provides for this criminal compulsion and is not consistent with the Constitution. Continued occupation of the property should not be a criminal offence absent a court order for eviction.

[50] It is neither just nor equitable to set the provisions of section 12(6) of the Act aside. It is appropriate to encourage people to leave unsafe or unhealthy buildings in compliance with the court order for their eviction. A criminal sanction does have this

effect.[42] It provides an additional incentive for occupiers to leave unhealthy and unsafe buildings and reduces the need for a forced eviction at the instance of the State. A reading-in order that provides for a criminal sanction only after a court order for eviction has already been made would in my view be appropriate to save the section.[43] As has already been pointed out in this judgment, a court must take into account all relevant circumstances before making an order for eviction. Any eviction order would also afford the occupier a reasonable time within which to vacate the property.

[51] This is not a case in which there are a myriad ways in which the Legislature could cure the section. The order should be to the effect that section 12(6) of the National Building Regulations and Building Standards Act 103 of 1977 must be read as if the following proviso has been added: "This subsection applies only to people who, after service upon them of an order of court for their eviction, continue to occupy the property concerned."

*Retrospectivity*

[52] It will not be just and equitable for this order to be retrospective. The read-in proviso should not apply to cases in which people have already been convicted of a contravention of section 12(6) of the Act, the period provided for the lodging of an application for leave to appeal has expired and no notice of appeal has been lodged.

[42] The constitutionality of the use of criminal law to compel evictions of the poor was not raised and I express no opinion on it, save to note that imprisonment is not involved in this matter.

[43] See *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) at paras 64-67, 70 and 73-75.

*Costs*

[53] This is an appropriate case in which the City should be ordered to pay the costs of the applicants. The proceedings would have been obviated if there had been meaningful engagement before the case had been started. In the circumstances the City should also pay the applicants' costs in the High Court and in the Supreme Court of Appeal. The appeal succeeds to this extent.

*Order*

[54] The following order is made—

1. The application for leave to appeal is granted.
2. The appeal succeeds to the extent set out in this order.
3. The order of the Supreme Court of Appeal is set aside.
4. The order of the High Court is set aside.
5. Section 12(6) of the National Building Regulations and Building Standards Act 103 of 1977 is declared to be inconsistent with the Constitution.
6. Section 12(6) of the National Building Regulations and Building Standards Act 103 of 1977 must be read as if the following proviso has been added at the end of it—

> "This subsection applies only to people who, after service upon them of an order of court for their eviction, continue to occupy the property concerned."

7. The read-in proviso contained in paragraph 6 of this order shall not apply to cases in which people have already been convicted of a contravention of section 12(6) of the National Building Regulations and Building Standards Act 103 of 1977, the period provided for the lodging of an application for leave to appeal has expired and no notice of appeal has been lodged.
8. The first respondent is ordered to pay the costs of the applicants in the High Court, in the Supreme Court of Appeal and in this Court, including the costs of two counsel.

Langa CJ, Moseneke DCJ, Madala J, Mpati AJ, Ngcobo J, Nkabinde J, Sachs J, Skweyiya J and Van der Westhuizen J concur in the judgment of Yacoob J.

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| For the Applicants: | Advocate P Kennedy SC and Advocate H Barnes instructed by Webber Wentzel Bowens and Wits Law Clinic. |
| For the First Respondent: | Advocate JJ Gauntlett SC and Advocate FA Snyckers instructed by Moodie and Robertson. |
| For the Amici Curiae: | Advocate G Budlender, Advocate O Mooki and Advocate R Moultrie instructed by the Legal Resources Centre. |