THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Reportable
Case No 253/06

In the matter between:

THE CITY OF JOHANNESBURG	**Appellant**
and	
RAND PROPERTIES (PTY) LTD	**1st Respondent**
OCCUPIERS OF ERF 381 BEREA TOWNSHIP	**2nd Respondent**
MINISTER OF TRADE AND INDUSTRY	**3rd Respondent**
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	**4th Respondent**

Coram: HARMS ADP, SCOTT, FARLAM, NUGENT AND CLOETE JJA
Heard: 20 FEBRUARY 2007
Delivered: 26 MARCH 2007
Summary: National Building Regulations and Building Standards Act 103 of 1977 s 12 – Dangerous building – Access to housing – s 26 of the Constitution – Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 – interaction.

Neutral citation: *City of Johannesburg v Rand Properties (Pty) Ltd* 2007 SCA 25 (RSA)

J U D G M E N T

HARMS ADP/

HARMS ADP:

Introduction

[1] This appeal, which is against a reported judgment of Jajbhay J,[1] concerns 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.

[2] By way of introduction I refer to the findings of the high court after an inspection in loco during February 2006. It found that the condition of the buildings concerned was appalling, abysmal and at times disgraceful; that the occupants were in an emergency situation; and that there existed fire and health hazards. As far as the respondents were concerned, the court held (based on the allegations in the papers) that many of them had been in occupation for a substantial period; that they were desperately poor; that most of them had no formal employment; and that many of them had no income.

[3] Like countless other South Africans, many living in and around Johannesburg, most of the occupiers live in poverty, which seriously compromises their human rights, including those relating to housing. Any reasonable person would wish that matters could have been otherwise; that all had appropriate housing close to where they wish to live and derive their income; that all had proper employment opportunities; and that all had more than the basic needs in life.

[4] This case is only peripherally about the constitutional duty of organs of state towards those who are evicted from their homes and are in a desperate condition. The central dispute (which is apparent from the high court's order and was confirmed during the course of argument in this appeal) is rather whether the City is precluded from exercising its powers to order persons to vacate unsafe buildings unless it first provides them (or at least tenders to

[1] *City of Johannesburg v Rand Properties (Pty) Ltd* 2007 (1) SA 78 (W), 2006 (6) BCLR 728 (W).

provide them) with adequate alternative housing. A subsidiary question that arises if the earlier question is answered against the City is whether such alternative housing must be within the inner city itself.

[5] We find that the powers of the City to order the vacation of unsafe buildings are not dependent upon its being able to offer alternative housing to the occupants. But we also find that the eviction of occupants triggers a constitutional obligation upon the City to provide at least minimum shelter to those occupants who have no access to alternative housing. We find further that the shelter that the City is obliged to provide need not necessarily be located within the inner city as demanded by the respondents.

The applications

[6] The City, the present appellant, launched separate applications against the owners and occupants of a number of buildings in the inner city. These were based on notices that had been issued under the provisions of the National Building Regulations and Building Standards Act 103 of 1977, more particularly s 12(4)(b) thereof. Section 12(4)(b) provides:

'If the local authority in question deems it necessary for the safety of any person, it may by notice in writing . . . 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.'

(All references to s 12 in this judgment will be this s 12.)

[7] San Jose is a sixteen-storey residential building comprising anything between 90 and 123 sectional title units (depending on which version one relies on). Of these 'only around three of the units were verifiably owner-occupied.' As far as the others were concerned, they were (as put euphemistically in the COHRE report)[2] 'informally alienated' from their owners. Because of an accumulation of arrears of property taxes and the like

[2] A report relied on by the respondents, which was prepared by the Centre of Housing Rights and Evictions, COHRE, entitled 'Any Room for the Poor? Forced Evictions in Johannesburg, South Africa' (8 March 2005).

the owners had abandoned their properties. The number of occupants of San Jose cannot be established. In the papers of the occupants one finds an allegation that it was occupied by 95 adults and 51 children but they also allege in an attached memorandum that there were 120 families comprising about 600 persons. The COHRE report, on the other hand, estimated that there were 322 occupiers.

[8] A task team comprising, inter alia, a town planner, a building control inspector and an official from the Fire and Emergency Services Department of the City first inspected the building on 20 August 2003. It found that all the floors were flooded with sewer water and that water ran through the building and spilled out of the parking level onto the pavement. The team also found that the building was a fire hazard because there were no fire extinguishers, the fire hydrants were unusable, there was no water supply, smoke and draught doors had been broken and unsafe electrical wiring abounded. In the event of a fire, the occupants would not be able to escape or be rescued. The team concluded, in short, that the building was a fire trap.

[9] Consequently, the City issued on 28 August 2003 a notice under s 12(1) of the Act addressed to the non existent body corporate of San Jose.[3] After a further inspection on 31 March 2004 the City decided to issue a s 12(4)(b) notice requiring the occupiers to vacate but deemed it prudent to obtain a court order for substituted service of the notice. The Johannesburg High Court granted the order and also one for substituted service of a notice of motion applying for the eviction of those who would not comply with the s

[3] Section 12(1) reads:
'If the local authority in question is of the opinion that—
(a) any building is dilapidated or in a state of disrepair or shows signs thereof;
(b) any building or the land on which a building was or is being or is to be erected or any earthwork is dangerous or is showing signs of becoming dangerous to life or property, it may by notice in writing, served by post or delivered, order the owner of such building, land or earthwork, within the period specified in such notice to demolish such building or to alter or secure it in such manner that it will no longer be dilapidated or in a state of disrepair or show signs thereof or be dangerous or show signs of becoming dangerous to life or property or to alter or secure such land or earthwork in such manner that it will no longer be dangerous or show signs of becoming dangerous to life or property: Provided that if such local authority is of the opinion that the condition of any building, land or earthwork is such that steps should forthwith be taken to protect life or property, it may take such steps without serving or delivering such notice on or to the owner of such building, land or earthwork and may recover the costs of such steps from such owner.'

12(4)(b) notice. In the event no one complied, and the eviction application was likewise served.

[10] Although the occupiers did some cleaning-up, an inspection on 21 October 2004 revealed that the parking garage was filled with waste and sewer water as well as refuse and faeces; the fire escapes were totally filled with refuse and were unusable; there was no fire fighting equipment in the entire building; all the courtyards and other open spaces were filled with faeces and refuse; one passage on the first floor was flooded with sewer water; and the lift shafts on the ground floor were open and filled with water. An inspection on 2 February 2005 did not show any improvement.

[11] The second application related to a commercial property located in Main Street, Johannesburg, which belongs to Zinns Investments CC. The owner abandoned the building and some 23 homeless persons of both sexes are in occupation. It is a two-storey building but the upper floor was destroyed in a fire. One of the respondents described the residential area as follows: it is a single rectangular area (an abandoned workshop) with two small rooms in which several of the respondents sleep; the greater part is an open area in which the others sleep; at the back are windows but the street side has an opening without any door or gate; and there is no kitchen, bathroom, toilet or water and electricity. In fact, every basic provision of the City Accommodation Establishment By-Laws was being contravened and the building was a serious fire hazard. Having served the owner with the necessary notices under s 12(1) as well as the said by-laws and not having received any response, the City followed more or less the same procedure as in the San Jose case by having s 12(4)(b) notices and later an application for eviction served on the occupiers.

[12] Lastly, the City launched applications on similar grounds in respect of a number of residential houses in Joel Street. In these cases, however, at the time of the court's inspection the occupiers had rectified matters and the City did not proceed with its eviction applications. Instead it sought postponements sine die to enable it to re-enrol these matters should the position deteriorate.

The court refused and dismissed these applications. The City did not appeal this order.

The defences and counter-applications

[13] The occupiers (the only respondents represented in the high court and on appeal and to whom I shall henceforth refer as the respondents), ably assisted by the Wits Law Clinic and a public-spirited firm of attorneys, opposed the eviction orders and sought (save in the Zinns application) wide-ranging relief in counter-applications. The City's applications were opposed on three grounds: (a) the unconstitutionality of s 12(4) of the Act; (b) the City's failure to have followed the procedure prescribed by the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (also known as PIE); and (c) that an eviction order would not be just and equitable. The counter-applications were for the setting aside of the City's s 12(4)(b) notices as having been made in conflict with the provisions of the Promotion of Administrative Justice Act 3 of 2000 (called PAJA) and furthermore for a number of orders relating to the constitutional duty of the City to provide suitable alternative accommodation to the respondents (and others in a like position) who are in desperate need of accommodation in the inner city of Johannesburg.

The proceedings in the high court

[14] The applications were consolidated and the applications and counter-applications will be referred to in the singular. The Minister of Trade and Industry, under whom the administration of the Act falls, and the President of the Republic indicated that they would abide the decision of the court in relation to the constitutionality of s 12(4). However, the MEC for Housing (Gauteng) and the National Minister of Housing were not joined.

[15] As indicated, the City's application was dismissed with costs. The counter-application, on the other hand, was partly successful and the following order was made in consequence:

'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 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.'

The appeal

[16] Both sides were dissatisfied with the order and their respective applications for leave to appeal and cross-appeal were granted by the high court. The main complaint of the respondents is that the court failed to decide many of the issues raised by them with the result that all the relief they sought was not granted and that matters of importance for them and others in a like position remain unresolved.

[17] The principal objection of the City is that the high court court's order and the reasons for granting it were marred by normative confusion. In particular, the court confused the City's obligation to prevent unsafe conditions from prevailing with its constitutional duty to provide access to adequate housing, with the result that it incorrectly made the former dependent upon the fulfilment of the latter. In other respects too, it was submitted, the high court failed to properly isolate and consider the matters in issue. To illustrate: despite a finding that many of the occupants were illegal occupiers as contemplated by PIE, the court failed to hold whether or not PIE applied. In fact, the interdict (para 4 of the order quoted above) preventing the City from evicting the respondents was not made dependent on compliance with PIE. On the other hand, the court used the case law dealing with PIE in dismissing the eviction application. Another example is that while holding that an eviction

under s 12(4)(b) amounts to arbitrary eviction, the court did not hold that the provision is unconstitutional in spite of the provision in s 26(3) of the Bill of Rights that no legislation may permit arbitrary evictions. Lastly, without setting aside the City's notice to vacate, the court nevertheless failed to give effect thereto.

The circumstances of the respondents

[18] Although the circumstances of the respondents are obviously not identical (some have reasonable employment and income levels and, as mentioned, about three of them own their flats in San Jose), many if not most are in dire straits. Two random examples will suffice for present purposes. Mr M G Ndlovu, who resides on the Zinns property, lost his parents when he was still young. Although he was about 40 years of age and has a standard 8 education he was never been able to find employment. He had to leave the family home and came to Johannesburg and makes a living by begging in the CBD. He initially found a place to sleep in a public park in the inner city. He then moved to the Zinns property where he had been living for some time before the order. In San Jose one finds, for instance, Ms T E Plaatjie who at the time was 36 years of age. She has two children, aged 3 and 8, and they live on a child support grant which, at the time, amounted to R340. She stated that she had moved to San Jose during 1987 and said that she lived there because she believed that there were work opportunities in the inner city.

[19] Housing is a global problem that is not peculiar to this country. Many international human rights conventions and covenants[4] acknowledge and seek to address the problem but in spite of this 'the right to adequate housing remains unrealized for the vast majority of poor and vulnerable people and communities across the world.' It has been estimated that almost 100 million people are forced to live with no shelter; that women constitute 70 per cent of those living in absolute poverty; that between 30 million and 70 million

[4] Article 25 (1), Universal Declaration of Human Rights; Article 11 (1), International Covenant on Economic, Social and Cultural Rights; Article 27 (3), Convention on the Rights of the Child; Article 14 (h), Convention on the Elimination of All Forms of Discrimination against Women; Article 5 (c), International Convention on the Elimination of All Forms of Racial Discrimination; Paragraph 61, Habitat Agenda (Second United Nations Conference on Human Settlements, Habitat II).

children are living on the streets; and that 1.7 billion persons lack access to clean water and 3.3 billion are without adequate sanitation.[5]

'Statistics, however, do not fully capture the global dimension of the state of housing. To gain an understanding of the sheer inadequacy and insecurity with which people and communities are forced to live, consider just some of the following contemporary forms of distressed housing: slums and squatter settlements, old buses, shipping containers, pavements, railway platforms and alongside railway tracks, streets and roadside embankments, cellars, staircases, rooftops, elevator enclosures, cages, cardboard boxes, plastic sheets and aluminium and tin shelters.'

[20] The international ideal has been described by UNESCO in these terms:[6]

'The right to adequate housing should not be understood narrowly as the right to have a roof over one's head. Rather, it should be seen as the right to live somewhere in security, peace and dignity. This right has a number of components, including the following:
(i) Legal security of tenure: everyone should enjoy legal protection from forced eviction, harassment and other threats;
(ii) Habitability: housing must provide inhabitants with adequate space and protection from the elements and other threats to health;
(iii) Location: housing must be in a safe and healthy location which allows access to opportunities to earn an adequate livelihood, as well as access to schools, health care, transport and other services;
(iv) Economic accessibility: personal or household costs associated with housing should be at such a level that the attainment and satisfaction of other basic needs are not compromised;
(v) Physical accessibility: housing must be accessible to everyone, especially vulnerable groups such as the elderly, persons with physical disabilities and the mentally ill;
(vi) Cultural acceptability: housing must be culturally acceptable to the inhabitants, for example reflective of their cultural preferences in relation to design, site organization and other features;

[5] The quotations and information come from Miloon Kothari 'The Right to Adequate Housing is a Human Right' 2001 (XXXVIII) no 1 UN Chronicle.
[6] 'Poverty and Human Rights: UNESCO's Anti-Poverty Projects.'

(vii) Availability of services, materials, facilities and infrastructure that are essential for health, security, comfort and nutrition, such as safe drinking water, sanitation and washing facilities.'

The Johannesburg Inner City Regeneration Strategy Business Plan

[21] The City adopted a business plan for inner city regeneration for the financial years 2004 to 2007. It was based on a vision for the inner city, which was decaying rapidly, launched by the then Deputy President of the Republic in July 1997, and followed on an intensive process involving provincial and local government, the private sector, and community and organized labour structures. The object was to regenerate the inner city by capitalizing on its position in South Africa, Africa and the world and by creating a 'truly global city that could serve as the golden heartbeat of Africa'. This requires a 'livable, safe, well-managed and welcoming city' for 'residents, workers, tourists, entrepreneurs and learners'.

[22] The goal of the regeneration effort was to raise and sustain private investment in the inner city leading to a steady rise in property values. The first step in the process was to address so-called sinkholes, i.e., properties that have become slums or are abandoned, overcrowded or poorly maintained and also properties used for illegal or unsuitable purposes. This required, amongst other things, the continuation of the City's 'Better Buildings Programme'; fast track implementation of its social housing programme; a survey of buildings; identifying and acting in respect of dangerous buildings; reviewing the transitional shelter programme; addressing homelessness and street children; and upgrading identified areas and buildings using different financial models. The anticipated costs are staggering.

[23] This vision and plan effectively deny the poor access to housing in the inner city. The cost of inner city accommodation, including emergency housing, is prohibitive (a matter dealt with in more detail in the affidavit by Mr Stuart Wilson filed after the appeal hearing). Cooperative and social housing in the inner city, according to COHRE, is targeted at people earning between R 1 250 and R 3 500 and the cheapest unsubsidized rental accommodation for a single room without services amounts to around R 850 per month.

[24] The City has a housing plan for households without adequate shelter. This includes the 209 000 households (comprising about 800 000 people) that were at the time living in approved informal settlements and the countless households living in backyard shacks, persons displaced by the conversion of single sex hostels, those in the position of the respondents, and the homeless living in the streets of the city. The projected cost of the provision of housing for 370 000 households amounts some R3 700m. This plan provides for the settlement of those who qualify in townships around but not within the inner city. Because of this, some respondents refuse to register for assistance and, one can surmise from the absence of any allegation to the contrary, all the others have failed to register.

Emergency Housing

[25] Shortly before the launch of the application the central government issued its National Housing Programme in an apparent response to the judgment of the Constitutional Court in *Grootboom*.[7] Chapter 12 dealt with housing assistance in emergency housing situations. The central government undertook to provide a grant to local authorities of some R24 000 per household to assist people who, for reasons beyond their control, find themselves in an emergency situation, for instance, because of the destruction of existing shelter, or because their prevailing situation posed an immediate threat to their life, health and safety, or if they are evicted or face the threat of imminent eviction. According to the scheme the funds have to be used by municipalities to provide land, the infrastructure for services, and shelter.

[26] Before a municipality is entitled to any funds for emergency purposes it is obliged to assess its requirements and to prepare a plan for submission to the relevant provincial authorities. It must then submit the necessary application to the province. The province has to assess the programme and once funds become available the municipality must implement the programme.

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[7] *Government of the RSA v Grootboom* 2001 (1) SA 46 (CC), 2000(11) BCLR 1169 (CC).

[27] At the hearing in the high court the City filed an additional affidavit concerning the availability of emergency housing in the inner city. This evidence was germane in view of the insistence of the respondents that they had a right to shelter in the inner city. The court was dismissive of the options presented, presumably because they had been designed for short term occupation, demanded a rental of R 150 per month per bed, and because applicants had to produce an identity document, a pay slip and pay two months' rental in advance. The court also rejected a proposal that the respondents be relocated to an informal settlement, probably because of its finding (to which I shall revert) that the respondents were entitled to adequate housing in the inner city which had to be provided by the City and because they had all along resisted any suggestion that they could be relocated except within the inner city.

[28] The affidavit also dealt with the Better Building Project mentioned earlier. If the amount owed to the City by the owner justifies it, the City attaches a building, buys it back and makes it available for commercial upgrading. These renovated buildings provide accommodation for those who can afford the relatively low rentals of R200 per month (whether that is per person or per unit is unclear). Once again, this project does not satisfy either the requirements or the demands of the respondents.

[29] At the hearing of the appeal the City sought leave to file an affidavit updating the information relating to emergency shelter. The affidavit was subsequently filed. It transpires that the City had indeed filed a chapter 12 application on 22 December 2005 shortly before the hearing in the court below. Despite follow-up requests the provincial authorities have not responded in any manner to the application.

[30] Further, according to the affidavit, the City has 100 beds available in the inner city for emergency situations. These beds are only available for three nights per person. However, it has 1600 beds available in Protea, Soweto for the same purpose. In addition, it is in the process of upgrading and

converting seven buildings in the inner city into emergency shelters. The expected date of completion is 5 April 2007 and the costs are to be funded by the City. This is not intended to provide permanent or semi-permanent housing – indeed it is for a maximum of two weeks' free accommodation. This alternative emergency accommodation, in whatever form, is not acceptable to the respondents. Protea is too far from the inner city and the temporary nature of the other accommodation (assuming it to become available) does not satisfy their demands.

The judgment of the High Court

[31] It is convenient to deal first with the orders made by the high court against the City before dealing with the City's application and the responses thereto, including the review application. This will enable me to have regard to the constitutional provision that impacts on the application and counter-application, namely s 26 of the Bill of Rights.

[32] It is not always easy to follow the reasoning of the high court because, as mentioned, the different issues were often conflated. However, the following findings appear to be germane for present purposes:

(a) The 'right to housing' is a basic human right. According to international human rights law all states have a minimum core obligation to ensure the satisfaction of, at the very least, the minimum essential levels of this right. This minimum core requirement with respect to the right to 'adequate housing' entails a state's duty to immediately address the housing needs of its population, if any significant number of individuals are deprived of basic shelter and housing. The failure to do so constitutes a prima facie violation of the right to 'adequate housing'.[8]

(b) The right to (adequate) housing means that the State[9]

'undertakes to endeavour, by appropriate means, to ensure that everyone has access to affordable and acceptable housing; the State will undertake a series of

[8] Judgment para 1.
[9] Judgment para 50.

measures which indicate policy and legislative recognition of each of the constituent aspects of the right to housing; the State will protect and improve houses and neighbourhoods rather than damage or destroy them.'

(c) The right of access to adequate housing includes a duty on organs of State to respect the access to 'inadequate' housing of those who enjoy it.[10]

(d) The City is not entitled to exercise its powers and perform its functions and duties in relation to health and safety in a manner that violates the right of access to housing, protection against arbitrary eviction and the right to dignity. This is especially so where the City has failed to provide any alternative adequate accommodation.[11]

(e) The City is obliged to foster conditions to enable the respondents to have access to adequate housing in the inner city. The sole criteria for living in the inner city should not depend on affordability.[12]

(f) A local authority's constitutional duty towards the general public to promote a safe and healthy environment has to be reconciled with the State's constitutional duty towards the poor and the destitute.[13]

(g) The presence of the s 12(4)(b) jurisdictional facts merely triggers the court's discretion whether to evict. Factors such as the length of occupation and the motive of occupation have to be taken into account in deciding whether to grant an order of eviction.[14]

[33] These extracts, I hope, fairly reflect the main features of the judgment. It is apparent that the high court's basic hypothesis was that the State has a minimum core obligation in respect of housing (without distinguishing between the right to housing, the right to adequate housing and the right of access to adequate housing). From that premise it reasoned that the right of access to

[10] Judgment para 54.
[11] Judgment para 59.
[12] Judgment para 66.
[13] Judgment para 26.
[14] Judgment para 29.

adequate housing includes the negative right to remain in occupation of unsafe ('inadequate') housing. The court also held that the Constitution provides an overriding discretion to courts whether or not to evict irrespective of other statutory provisions. And lastly, it held that the respondents are entitled to be adequately housed by organs of state in the inner city because that is where they wish to try and earn a living. The footprints of the last mentioned finding are evident from the court order, more particularly para 3.

Section 26 of the Constitution

[34] It is now necessary to determine whether the high court's approach was consistent with the provisions of especially s 26 of the Constitution. We were not referred to comparative jurisprudence that is of assistance in understanding the provision but fortunately the Constitutional Court on more than one occasion has had the opportunity to throw light on its meaning and scope and I shall attempt, without lengthy quotations, to summarize the jurisprudence relevant to the present case.

[35] Section 26 reads as follows:

'(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.'

[36] Section 26 must be read in context and with s 27, which deals with health care, food, water and social security. Section 26 must also be seen in another context. It reinforces other human rights such as the right to dignity, equality and freedom.[15] It is based on, but is not co-terminous with, the right

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[15] *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC), 2004 (12) BCLR 1268 (CC) para 17-18; *Khoza v Minister of Social Development* 2004 (6) SA 505 (CC), 2006 (6) BCLR 569 (CC) para 40. Cf Office of the High Commissioner for Human Rights 'Fact Sheet No 21, The Human Right to Adequate Housing':

to housing contained in the international instruments mentioned earlier that speak of a right to 'adequate housing' whereas s 26(1) is limited to a right of 'access to adequate housing'.[16] They also speak of a minimum core to which everyone in need is entitled whereas the underlying assumption of the Constitution is that it does not guarantee a minimum core.[17]

[37] Section 26(1) has a positive and negative aspect. The positive duty on the State is circumscribed by ss (2), which acts as an internal limitation on the content and ambit of ss (1). The effect is that the obligation imposed on the State is not absolute or unqualified[18] but that the extent of its obligation is defined by three key elements that have to be considered separately: (a) the obligation to 'take reasonable legislative and other measures'; (b) 'to achieve the progressive realisation' of the right; and (c) 'within available resources.'[19]

[38] The negative aspect of s 26(1) is the

'The indivisibility and interdependence of all human rights find clear expression through the right to housing. As recognized by several human rights bodies of the United Nations, the full enjoyment of such rights as the right to human dignity, the principle of non-discrimination, the right to an adequate standard of living, the right to freedom to choose one's residence, the right to freedom of association and expression (such as for tenants and other community-based groups), the right to security of person (in the case of forced or arbitrary evictions or other forms of harassment) and the right not to be subjected to arbitrary interference with one's privacy, family, home or correspondence is indispensable for the right to adequate housing to be realized, possessed and maintained by all groups in society.

At the same time, having access to adequate, safe and secure housing substantially strengthens the likelihood of people being able to enjoy certain additional rights. Housing is a foundation from which other legal entitlements can be achieved. For example: the adequacy of one's housing and living conditions is closely linked to the degree to which the right to environmental hygiene and the right to the highest attainable level of mental and physical health can be enjoyed. The World Health Organization has asserted that housing is the single most important environmental factor associated with disease conditions and higher mortality and morbidity rates.

This relationship or "permeability" between certain human rights and the right to adequate housing show clearly how central are the notions of indivisibility and interdependence to the full enjoyment of *all* rights.'

[16] *Government of the RSA v Grootboom* 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC) para 35. There are statements in *Jaftha v Schoeman* 2005 (2) SA 140 (CC), 2005 (1) BCLR 78 (CC) para 25-30 that appear to overlook this difference but there does not appear to be any intention to overrule *Grootboom* in this regard

[17] *Grootboom* para 33; *Minister of Health v Treatment Action Campaign (No 2)* 2002 (5) SA 721 (CC), 2002 (10) BCLR 1033 (CC) para 26 et seq especially para 35.

[18] Cf *Khoza* para 43.

[19] *Grootboom* para 38.

'obligation placed upon the State and all other entities and persons to desist from preventing or impairing the right of access to adequate housing.'[20]

Although everyone has the right of access, the State may 'interfere' with that right if it would be justifiable to do so.[21] Even though the Constitutional Court has as yet not delineated the negative content of ss (1), any measure that permits a person to be deprived of 'existing access to adequate housing' limits the rights protected in ss (1) although the limitation may be justified under s 36.[22]

[39] Turning then to ss (3), it prohibits (a) any eviction without an order of court; (b) any court order granted without a consideration of all the relevant circumstances; and (c) any legislation that permits 'arbitrary' evictions. Its effect is threefold. First, it does not sanction arbitrary seizure of land and it therefore creates a defensive rather than an affirmative right. Secondly, it expressly acknowledges that eviction from homes in informal settlements may take place, 'even if it results in loss of a home' because there is

'no unqualified constitutional duty on local authorities to ensure that in no circumstances should a home be destroyed unless alternative accommodation or land is made available.'[23]

And thirdly, the requirement that a court has to take into account all relevant circumstances underlines how non-prescriptive the provision was intended to be.[24]

[40] The questions not yet addressed by the Constitutional Court are the meaning of 'relevant circumstances' and whether a court has a general discretion after having considered the 'relevant circumstances'. A statute such

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[20] *Grootboom* para 34. This obligation is there referred to as a negative obligation but, with respect, it appears to me to be a positive obligation. I have the same problem with the statement that the prohibition against eviction in ss (3) creates a 'negative' right. However, nothing turns on this semantic debate.
[21] *Jaftha v Schoeman* 2005 (2) SA 140 (CC) para 28.
[22] *Jaftha* para 34.
[23] *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC), 2004 (12) BCLR 1268 (CC) para 28.
[24] *Port Elizabeth Municipality* para 20-22.

as PIE, which follows the wording of ss (3) by requiring a consideration of all the relevant circumstances, but adds that the court must in addition consider whether it would be 'just and equitable' to grant the order, no doubt gives the court a discretion based on what is just and equitable. But, as has been pointed out by this Court in *Brisley v Drotsky*,[25] when an eviction application is not covered by PIE a court does not without more have a discretion based on what is just and equitable. What is required is a consideration of all *legally* relevant factors. This Court recognized that where a state organ wishes to evict, the state's obligations under ss (1) and (2) may possibly and in particular circumstances place a limitation on the right of eviction.

[41] The following example illustrates the issue. Suppose a law of general application prohibits the use of a national heritage site for residential purposes and criminalizes a breach. Does a court have a general discretion under s 26(3) to decide whether or not to evict when the State, in enforcing that law, applies for the eviction of an occupier? Do equitable considerations, such as the length of or motive behind the occupation, enter the picture? May the court by refusing to grant the order allow the continuation of a criminal breach? I think not. The relevant circumstances that have to be considered, it appears to me, are the fact that the law is constitutional and that there is a breach of the statute.

[42] The final aspect of s 26(3) that requires consideration is the prohibition of any law that permits arbitrary evictions. The term 'arbitrary' as used in s 25(1) of the Constitution, namely that 'no law may permit arbitrary deprivation of property', has been interpreted to refer to a 'law' that does not provide sufficient reason for the deprivation of ownership or is procedurally unfair.[26] Applied to s 26(3), sufficient reason in essence requires an evaluation of the relationship between the means employed, namely the eviction, and the end sought to be achieved, namely the purpose of the law in question.

Assessment of the high court's judgment

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[25] 2002 (4) SA 1 (SCA), 2002 (12) BCLR 1229 (SCA) para 38 and 42.
[26] *First National Bank of SA Ltd t/a Wesbank v Commissioner for the SA Revenue Service* 2002 (7) BCLR 702 (CC), 2002 (4) SA 768 (CC) para 100.

[43] I fear that the high court has failed to have regard to material parts of this jurisprudence. The court erred by assuming the existence of a duty in respect of a minimum core and failing to limit the right involved to that which is contained in the Constitution, namely a right of access to housing.

[44] More particularly, the Constitution does not give a person a right to housing at state expense at a locality of that person's choice (in this case the inner city). Obviously, the State would be failing in its duty if it were to ignore or fail to give due regard to the relationship between location of residence and the place where persons earn or try to earn their living but a right of the nature envisaged by the court and the respondents is not to be found in the Constitution.

[45] A related problem is that the high court had insufficient regard to the division of power. It is for the democratically elected government of the City to determine what its vision of the inner city is. Courts are not equipped or entitled to second-guess this type of policy decision. The court also failed to have regard to the constitutional limitation on the right of access to housing. In particular it took no account of the uncontradicted evidence of the City that it did not have the means to provide the respondents with inner city accommodation. I have already referred to the City's housing obligations and plans. There is no suggestion that the City has failed in its general obligations in this regard considering that its duty is to provide housing progressively within its means. One can easily disagree with the allocation of resources by organs of state and one may justifiably debate priorities but thus far the Constitutional Court has not sanctioned the reallocation of public funds by courts. Significant in this regard is the manner in which the Constitutional Court dealt with the right to health care services and emergency medical treatment in *Soobramoney*.[27] The issue was whether terminally ill patients who require treatment such as renal dialysis may require the State to provide funding and resources for their treatment. The patient's right to life, which is at least morally of a higher value than the right to housing, is compromised. In the context of negative rights the Constitutional Court was at pains to point out

[27] *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC), 1997 (12) BCLR 1696 (CC).

that the position of the patient was not one of emergency but it was an ongoing state of affairs (not unlike the position of the respondents).[28] It expressed sympathy for the patient but denied him the relief sought and explained as follows:

'The provincial administration . . . has to make decisions about the funding that should be made available for health care and how such funds should be spent. These choices involve difficult decisions to be taken at the political level in fixing the health budget, and at the functional level in deciding upon the priorities to be met. A court will be slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibility it is to deal with such matters.'[29]

'The hard and unpalatable fact is that if the appellant were a wealthy man he would be able to procure such treatment from private sources; he is not and has to look to the State to provide him with the treatment. But the State's resources are limited and the appellant does not meet the criteria for admission to the renal dialysis programme. Unfortunately, this is true not only of the appellant but of many others who need access to renal dialysis units or to other health services. There are also those who need access to housing, food and water, employment opportunities, and social security. These too are aspects of the right to

". . . human life: the right to live as a human being, to be part of a broader community, to share in the experience of humanity."

The State has to manage its limited resources in order to address all these claims. There will be times when this requires it to adopt a holistic approach to the larger needs of society rather than to focus on the specific needs of particular individuals within society.'[30]

[46] The finding that persons in desperate situations may not be evicted unless alternative or adequate housing is provided does not fit comfortably with the dicta in the *Port Elizabeth Municipality* case[31] referred to earlier. This finding is closely related to the finding that the City was not entitled to infringe

[28] *Soobramoney* para 20-21.
[29] *Soobramoney* para 29.
[30] *Soobramoney* para 31.
[31] *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC), 2004 (12) BCLR 1268 (CC).

the respondents' right to unsafe ('inadequate') housing. In my view, the contention that to deprive a person of unsafe housing denies him or her access to adequate housing is not correct. The corollary would be that to deny someone poisonous food is to deny that person food. Significantly, the court of first instance in *Grootboom* had ordered state organs to provide the evicted applicants with shelter within a given time frame.[32] The Constitutional Court, in response, held that the court had erred in this regard because s 26 did not entitle the applicants 'to claim shelter or housing immediately upon demand.'[33]

[47] There is, however, another side to the coin. *Grootboom* has held that organs of state have a special duty towards persons in crisis who have 'no access to land, no roof over their heads, and who were living in intolerable conditions or crisis situations'. This duty has been recognized by the central government and the City as appears from my exposition under the heading 'Emergency Housing' earlier. And both (presumably also the provincial government) have plans to cope with such situations. It is therefore not necessary to delve further and to search for a justification for this recognition. Eviction, at the very least, triggers an obligation resting on the City to provide emergency and basic shelter to any affected respondent.[34]

[48] The respondents relied on *Baartman*[35] for the proposition that unless evicted persons are given some security of tenure they ought not to be relocated from a place where they reside. That is obviously an ideal but it is not a rule. *Baartman* was decided under PIE and dealt with the statutory requirement that if an organ of State seeks to evict persons under s 6 of PIE, a court is obliged to consider the availability of 'suitable' alternative land. On the facts of the case, it was held, that the municipality had not established that the alternative land was indeed suitable because it did not provide some security of tenure.

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[32] *Government of the RSA v Grootboom* 2001 (1) SA 46 (CC), 2000(11) BCLR 1169 (CC) para 16.
[33] *Grootboom* para 95. Cf *Minister of Health v Treatment Action Campaign (No 2)* 2002 (5) SA 721 (CC), 2002 (10) BCLR 1033 (CC) para 30-35.
[34] Cf *City of Cape Town v Rudolph* 2004 (5) SA 39 (C), 2003 (11) BCLR 1236 (C).
[35] *Baartman v Port Elizabeth Municipality* 2004 (1) SA 560 (SCA).

[49] The underlying hypothesis for the assumption that a court has an overriding discretion to refuse to enforce legislation appears to have been that the PIE discretion is to be read into s 12(4)(b) via the Constitution. That is not correct and is contrary to authority binding on that court. (We have not, I may add, been invited to revisit *Brisley v Drotsky*[36] and I have not found anything in the Constitutional Court jurisprudence to suggest that it was wrongly decided.)

[50] Before dealing with the question whether in the light of this analysis the respondents were entitled to any relief and, if so, in what form, it will be convenient first to consider the merit of the respondents' answers to the City's application for eviction.

The National Building Regulations and Building Standards Act 103 of 1977

[51] The respondents (supported by the amici) allege that s 12(4), read with ss (5) and (6), is unconstitutional. They accepted that a prohibition on the occupation of unsafe buildings contained in an Act of general application is in principle not unconstitutional. This has to be correct. If one has regard to s 12 in its totality, it firstly enables a local authority to require of an owner to make a building safe (ss (1)). But if a local authority deems it 'necessary for the safety of any person' to have a building vacated it may issue the necessary s 12(4)(b) notice. That does not make any subsequent eviction by virtue of a court order arbitrary.

[52] The decision to issue a s 12(4)(b) notice must be based on necessity on the ground of the safety of persons. That is the jurisdictional fact for the notice. But the decision to issue a notice must nevertheless be rational. Thus, if reasonable alternatives are available, for instance if a fire hazard can be abated through other measures, they have to be explored and, if reasonable, be adopted. (In the present instances the evidence is that the buildings cannot be made safe while occupied.)

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[36] 2002 (4) SA 1 (SCA).

[53] The case on unconstitutionality was based primarily on the ground that the section allows for eviction without a court order. I disagree. All the Act permits is the issuing of an administrative order to vacate and, in the event of non-compliance, for a criminal sanction. Nothing in the Act permits self-help.

[54] Another argument was that the Act allows for eviction without a consideration of all the relevant circumstances as required by s 26(3). The argument is flawed because it was based on the supposition that the s 12(4)(b) notice is the equivalent of a court order. There is nevertheless a duty on the local authority to consider all circumstances relevant to the safety of the building but this duty is an administrative justice requirement and does not flow from the provisions of s 26(3).

[55] The amici argued that the Act is constitutionally defective because it does not require a court order empowering a local authority to issue a s 12(4)(b) notice. Administrative notices and orders do not require prior court orders for their validity. The law assumes that law-abiding citizens will comply with valid administrative notices without court orders compelling them to do so. Voluntary compliance with an administrative notice does not amount to a proscribed eviction. It is only in the event of a failure to comply that the need for a court order arises.

[56] The amici argued that the Act authorises administrative action that is procedurally unfair. I disagree. PAJA by definition applies to all decisions taken by an organ of state exercising a public power in terms of ‘any legislation’ and which affects the rights of anyone and which has a direct external legal effect. This definition describes a decision by a local authority to issue a notice to vacate under the Act. The extent to which PAJA is applicable or has been breached is a question that arises in the context of the application to review the City’s decision, something I shall deal with in due course. My conclusion is therefore that the constitutional attack on the Act has to fail.

The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE)

[57] The next question to consider is whether an eviction order under present circumstances is subject to the provisions PIE (more especially s 6, which deals with evictions at the instance of organs of state).[37] The respondents allege that many of them are unlawful occupiers as defined in s 1 of PIE and that therefore the provisions of PIE apply to those of them that do not have the owners' permission to occupy. The argument leads to an incongruous result because it means that evacuations in emergency situations require that a distinction be drawn between lawful and unlawful occupiers: lawful occupiers can be evacuated without more whereas unlawful occupiers are protected by PIE. To draw such a distinction when the concern is safety of persons makes no sense. Parliament is not presumed to make laws that give rise to anomalous results and impinge on the basic requirement of equal protection.

[58] It must be borne in mind that the obligation to vacate unsafe premises follows from the issue of a notice in terms of s 12(4)(b). Clearly PIE has no application to the issuing of such a notice. And I have already pointed out that

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[37] Section 6:
(1) An organ of State may institute proceedings for the eviction of an unlawful occupier from land which falls within its area of jurisdiction, except where the unlawful occupier is a mortgagor and the land in question is sold in a sale of execution pursuant to a mortgage, and the court may grant such an order if it is just and equitable to do so, after considering all the relevant circumstances, and if—
(a) the consent of that organ of State is required for the erection of a building or structure on that land or for the occupation of the land, and the unlawful occupier is occupying a building or structure on that land without such consent having been obtained; or
(b) it is in the public interest to grant such an order.
(2) For the purposes of this section, "public interest" includes the interest of the health and safety of those occupying the land and the public in general.
(3) In deciding whether it is just and equitable to grant an order for eviction, the court must have regard to—
(a) the circumstances under which the unlawful occupier occupied the land and erected the building or structure;
(b) the period the unlawful occupier and his or her family have resided on the land in question; and
(c) the availability to the unlawful occupier of suitable alternative accommodation or land.
(4) An organ of State contemplated in subsection (1) may, before instituting such proceedings, give not less than 14 days' written notice to the owner or person in charge of the land to institute proceedings for the eviction of the unlawful occupier.
(5) If an organ of State gives the owner or person in charge of land notice in terms of subsection (4) to institute proceedings for eviction, and the owner or person in charge fails to do so within the period stipulated in the notice, the court may, at the request of the organ of State, order the owner or person in charge of the land to pay the costs of the proceedings contemplated in subsection (1).
(6) The procedures set out in section 4 apply, with the necessary changes, to any proceedings in terms of subsection (1).

the provisions of PAJA function to ensure that the issuing of such a notice accords with administrative justice. Once such a notice has been validly issued the continued occupation of the premises is unlawful and constitutes a criminal offence. The role of a court order is to prohibit that unlawful state of affairs from continuing. I see nothing in PIE that permits a court to sanction the continuation of an unlawful state of affairs by declining to grant an order in a proper case. PIE must be seen in the light of it history and purpose, which is to resolve a clash between proprietary rights and the plight of the poor.[38] I do not think it applies to orders that are directed at preventing illegal conduct. There are, however, in my view two further reasons why PIE cannot apply and they are dealt with in the subsequent paragraphs.

[59] An 'unlawful occupier' is someone who occupies without the 'express or tacit consent of the owner or without any other right in law to occupy such land' (PIE s 1). On the facts of this case we know that the respondents did not have express consent but we also know that the owners had abandoned their properties. (I am excluding the case of owner-occupiers.) By abandoning their properties the owners by necessary implication gave tacit consent to whomsoever to occupy. (It is not without interest to note that not one respondent admits to having dispossessed any owner against his or her will.)

[60] Section 6 differs in scope from s 4 of PIE because it permits the organ of state to apply for eviction 'where it is in the public interest', which includes the 'interests of the health and safety' of occupiers. There is thus a potential overlap between this provision and s 12(4)(b). Section 6, in contrast to s 4, does not contain the qualification 'notwithstanding anything to the contrary contained in any law or the common law'. This means that s 6 recognises that PIE is not the exclusive statutory mechanism in terms of which persons may be evicted at the behest of organs of state. It will also be noted that PIE does not permit an organ of state to apply for urgent relief and that it would be

[38] The statement (relied on by the amici) by AJ van der Walt *Constitutional Property Law* (2005) p 413 n 45 that in the apartheid era 'normal' eviction proceedings in laws relating to health and public safety 'were applied on a racial basis and so served the agenda of apartheid rather than public health and safety' may be factually correct but the problem is that the author makes the bald statement without providing any factual basis for it. His only reference is a previous article by him which does not mention the issue.

strange to have such a prohibition in the case of necessity as postulated by s 12(4)(b).

[61] I therefore conclude that the provisions of PIE do not apply. This disposes of the defence that an eviction order would have been unjust and inequitable because the requirement that an eviction order may only be granted if it is just and equitable is, as we have seen, not mandated by the Constitution but is to be found only in PIE.

The review application

[62] The respondents sought to review the decision of the City to issue s 12(4)(b) notices on three grounds namely (a) the lack of an opportunity to be heard; (b) the City's failure to take into account relevant considerations; and (c) ulterior purpose and irrationality. The high court, whilst not deciding the review application, made some findings that give the impression that its view was that the decision was reviewable. But despite the fact that the City's notice was allowed to stand, the court issued an interdict that effectively emasculated the City's decision and consequent notice. The interdict also prohibits further evictions (although none was ever threatened) and eviction proceedings.

[63] The right to be heard has now been constitutionalised and has effectively been codified in s 3 of PAJA. It is not an absolute or immutable right. What is required is a fair administrative procedure and fairness depends on the circumstances of each case. As a general rule, the 'administrator' must give the affected person the opportunity to make representations but if it is reasonable and justifiable in the circumstances the administrator may depart from this requirement (s 3(4) of PAJA). In this case the only issue on which the administrator might have been obliged to hear and consider representations was in relation to the question whether it was necessary for the safety of any person that the buildings be vacated. It is clearly desirable that there should be consultation in matters of this nature but this is not such a

case. In cases of crisis the audi principle can hardly apply.[39] There is no suggestion that the jurisdictional facts for the decision did not exist or that the respondents wished to make any representations in that regard. I have already mentioned the problem in establishing the number, apart from the identity, of occupiers of San Jose. I therefore conclude that, taking into account all relevant factors, the City was entitled to dispense with a prior hearing (see s 3(4)(b) of PAJA).

[64] 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.

[65] The final attack, based on ulterior purpose and irrationality, was premised on the argument that the City was not genuinely concerned about health and fire risks. Many factors were mentioned such as the delay of the City in acting; the fact that there are also other 'bad buildings'; and that the City could instead have acted against informal settlements around the city where there are also health and fire hazards. Once again, whether or not the City was concerned about the respondents' safety or was dilatory in exercising its duties or could or should have taken similar steps in relation to others are all beside the point. The question is simply whether it was 'necessary' to vacate these buildings for the sake of the safety of respondents and others and in my view the evidence establishes that it was.

[66] The amici submitted that we should regard the City's use of s 12(4)(b) with a measure of scepticism because the notice was issued in the context of a policy to rejuvenate the inner city by removing what the City considered to be sinkholes and because of the leisurely pace with which the City moved without consulting the respondents.

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[39] Cf De Smith, Woolf and Jowell *Judicial Review of Administrative* Action 5 ed (1995) p 482 – 485. For older instances: *White v Redfern* (1879) 5 QBD 15; *R v Davey* [1899] 2 QB 301.

[67] It is true that the vision that the City has for the inner city does not accommodate the poor but I do not think it follows that its present actions are directed by an ulterior motive. The evidence shows that many buildings in the inner city have reached such a state of decay that they pose a danger both to their occupants and to the public at large. The City cannot be faulted for undertaking its duty not to permit that state of affairs to persist. Once having acted to prevent that occurring the question necessarily arises what is to be done with the buildings concerned. The City has decided as a matter of policy that the buildings are to be rejuvenated in the interest of the economic health of the inner city, but I do not think that implies that the eradication of unsafe conditions is no more than a ploy. It seems to me that the two questions – what is to be done to avoid unsafe conditions and what is to be done with the buildings thereafter – are two unrelated questions, and the choice that has been made in relation to the latter does not imply that the decision in relation to the former was taken with an ulterior motive.

The City's application: conclusion

[68] I have found that the City's s 12(4)(b) notice is neither unconstitutional nor otherwise unlawful and in those circumstances a court has no discretion to disregard it and condone the continuance of unlawful acts either by refusing to give effect to it or by suspending it. Moreover, the obligation of the occupiers to comply with that order is not dependent upon their being provided with alternative accommodation even if the effect of complying with the order will be that they are left without access to adequate housing. It follows that the order dismissing the application by the City cannot stand.

[69] But it does not follow that the City is absolved from any constitutional obligations. It is apparent that immediately upon eviction at least some of the occupiers will not have access to any housing as a consequence of their eviction. To some degree, at least, that will place obligations upon the City to provide a measure of relief. I consider that relief in dealing with the counter-application below.

The counter-application: conclusion

[70] I have already found that the respondent's counter-application for the review and setting aside of the s 12(4)(b) notices cannot be upheld. The same applies to the attempt to have s 12(4)(b) and the practice of the City in employing it declared unconstitutional. I have also disposed of the attempt to suspend the operation of the eviction order until such time as suitable alternative accommodation is available.

[71] What remains is the question of a declaratory order that the City has failed in its constitutional duties to provide access to housing within the inner city to those in desperate need of accommodation and, consequent thereon, a structural interdict to compel the City to comply with its duties.

[72] I need no persuading that government, at every level in varying degrees, is constitutionally obliged to realize the right of every person to have access to adequate housing, albeit that it can only be realized progressively, if it can ever by fully realized at all. I also need no persuading that the enormity of meeting that commitment cannot excuse inaction on the part of government.

[73] There is some merit in the submission on behalf of the respondents and the amici that government at all levels and the City in particular have yet to firmly grasp the nettle of the obligations that they have towards the poor. For while it is true that the City has developed, with broad strokes, visions and plans that it has for the city, and that those plans do not altogether leave out the poor, there is little evidence to demonstrate what the City has actually done.

[74] But I do not think this is the case in which to attempt to make an assessment of the extent to which the City has or has not made acceptable progress towards fulfilling its obligations, nor, if it has not, in which to devise structural relief to spur it along that path. I have already indicated that the present respondents are not concerned with such an enquiry being conducted

in general terms nor in structural relief that might be appropriate to that enquiry. They ask for nothing less than that the City should provide adequate housing for the poor in the inner city and they seek structural relief only if it is directed towards that end. Even at the end of argument in the present appeal the respondents remained steadfast in that stance.

[75] I have already held that the City is not obliged to provide housing for the poor in the inner city specifically (though it might be obliged to do so elsewhere). Where housing is to be provided for any particular economic group is a matter that lies within the province of the policy-making functions of the City and I do not think a court can usurp that function. In those circumstances an enquiry to determine whether structural relief is appropriate is not material to the relief that is sought in the present proceedings.

[76] But notwithstanding the approach taken by the respondents this Court, in my view, would be remiss if it were to ignore the consequences that might follow upon eviction. It seems probable that, once evicted, at least some respondents will be left without any shelter at all, and will have no resources with which to secure any. In my view the duties the City accepts that it has extend to ensuring that persons who are left in that position are provided at least with temporary shelter to alleviate the desperate plight in which they will find themselves.

[77] The respondents' insistence on nothing short of permanent accommodation in the inner city has meant that we have had little assistance in devising what the extent of those obligations might be and we have been compelled to rely in this regard largely upon the tender that has been made by the City. That is unfortunate because we have little doubt that a more constructive approach by the respondents might have been capable of producing a more constructive solution. However, eviction at the hand of the City creates an emergency for some that triggers, as mentioned, special duties. The City has offered, as mentioned, emergency shelter for two weeks at no cost. But that is not enough and something more is required. I am not satisfied that the City has pursued with any vigour the application under

chapter 12. Writing a letter or two is not enough. Plans are one thing, execution is another. This failure means that the City has failed to make any provision for those that are evicted beyond the first two weeks. To order the City to comply with its accepted duty appears to me to be eminently fair and since it only caters for those who are to be evicted cannot tax its budget unduly. The order that issues follows in this regard the lines of the agreement that was sanctioned in *Grootboom*.

The order

[78] It follows from this that the appeal must be upheld and the cross-appeal dismissed. Bearing in mind that the Joel Street costs order in the court below stands (which will to a large extent cover the costs incurred by the respondents), and bearing in mind the nature of the relief, a costs order in the court below is not justified. The following order issues:

(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.

1.3. The sheriff is authorized 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.

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L T C HARMS
ACTING DEPUTY PRESIDENT

AGREE:

SCOTT JA
FARLAM JA
NUGENT JA
CLOETE JA