IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO: CCT 24/07

In the matter between:

OCCUPIERS OF 51 OLIVIA ROAD, BEREA TOWNSHIP AND 197 MAIN STREET, JOHANNESBURG	Applicants
and	
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

APPLICANTS' HEADS OF ARGUMENT

A INTRODUCTION

1. This matter concerns approximately 67 000 people who live in so-called "bad buildings" in the inner city of Johannesburg and who stand to be displaced by the first respondent's Inner City Regeneration Strategy.

2. The applicants are 118 adults who together with their children live in two such buildings – San Jose, a block of flats situated at 51 Olivia Road, Berea and the Zinns building, an erstwhile retail building situated at 157 Main Road in central Johannesburg. The applicants act on their own behalf as well as on behalf of the broader class referred to above. The applicants also act in the public interest.

3. This matter concerns the constitutional rights of the applicants, and the broader class on whose behalf they act, in the context of the first respondent's plans to evict them in order to give effect to the Inner City Regeneration Strategy. It also concerns the constitutionality of sections 12(4)(b), 12(5) and 12(6) of the National Building Standards and Building Regulations Act 103 of 1977 on which the first respondent relies to clear buildings purportedly on health and safety grounds in terms of the Inner City Regeneration Strategy.

4. The applicants seek leave to appeal against the judgment and order of his Lordship Mr Justice Harms, handed down on behalf of the Supreme Court of Appeal on 26 March 2007. Leave to appeal is sought against the whole of the judgment and order, barring paragraph 2.1 thereof.

5. The applicants submit, with respect, that the Supreme Court of Appeal erred in respect of its findings on both the facts and the law.

6. In respect of the former, the applicants submit, with respect, that two fundamental factual errors were made which permeated the judgment and affected the conclusions finally arrived at.

7. The first was the finding that the first respondent's Housing Plan caters for the applicants, albeit outside the inner city of Johannesburg.[1] As shall be shown below this is incorrect. The first respondent's Housing Plan makes no provision whatsoever for the applicants or the broader class on whose behalf they act, whether in the inner city or elsewhere.

8. The second was the characterisation of the case for the applicants as one which "demanded" permanent housing in the inner city of Johannesburg and nowhere else.[2] This too is incorrect. While there is undisputed evidence on the papers that the applicants, and the broader class on whose behalf they act, live in the inner city in order to access livelihood opportunities not available to them elsewhere, the applicants have never demanded accommodation in the inner city of Johannesburg as of right. The applicants' case is that they are entitled to a plan which makes short, medium and long term provision for their housing needs and which takes account of the location of the livelihood opportunities on which the applicants rely for their survival.[3]

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[1] R17, p1259, para 24.
[2] R17, p1278, para 77.
[3] The applicants' case as pleaded was the following -

9. While paragraph 2.1 of the order of the Supreme Court of Appeal orders the first respondent to provide temporary housing assistance for the 118 applicants and their children in this matter, we respectfully submit that this does not go far enough. We submit that section 26(1) and (2) of the Constitution require the first respondent to make provision for where the applicants are to live after this temporary stay; to take account of the applicants' livelihoods in the location of both the temporary accommodation and the accommodation or land made available to the applicants thereafter, and to make similar provision for the broader class on whose behalf the applicants act. We do not say that all of this must

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"185 We are advised and respectfully submit that in devising such a [housing] programme the [first respondent] would have to have adequate regard to the following –

185.1 Our income precludes the affordability of rental accommodation at market related prices.

185.2 We depend, in the main, on the following in order to make a living –

- Informal trading such as the sale of clothes, fruit and vegetables, sweets, cigarettes and newspapers in the Johannesburg central business district and its adjacent suburbs;
- Piece construction and factory work in the Johannesburg central business district;
- Cleaning and doing other odd jobs in the Johannesburg central business district and its adjacent suburbs.

185.3 Our income places limits on our ability to incur transport costs to the Johannesburg inner city area in order to work.

186 We respectfully submit that [the first respondent] does not have such a programme." R2, p101 –102, paras 185-186.

happen immediately on demand. We say that the first respondent must devise and implement a constitutionally compliant plan.

10. In these heads of argument we shall refer to the properties in which the present applicants live as “San Jose” and “the Zinns building” respectively; we shall refer to the 118 applicants and their children as “the applicants” or “the occupiers” and we shall refer to the first respondent as “the City.”

11. We shall begin these heads of argument by setting out the facts which are relevant to the matter. Our factual chapter will be divided into the following sections –

11.1. The Historical Context;

11.2. The Occupiers of San Jose and the Zinns building;

11.3. The Condition of San Jose and the Zinns building;

11.4. The City’s Housing Plan;

11.5. The Absence of Alternative Accommodation for the Present Applicants and the Broader Class;

11.6. The City's Inner City Regeneration Strategy;

11.7. The City's Practice of Evictions in the Inner City; and

11.8. The City's Eviction Applications in respect of San Jose and the Zinns building.

12. Thereafter we shall submit that the Supreme Court of Appeal erred –

12.1. in its interpretation of the content and reach of section 26(1), (2) and (3) of the Constitution respectively;

12.2. in ruling that sections 12(4)(b), 12(5) and 12(6) of the National Building Standards and Building Regulations Act 103 of 1997 ("the NBRA") do not violate the Constitution;

12.3. in ruling that the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 ("PIE") is of no application to the present matter or to eviction applications under the NBRA generally;

12.4. in ruling that the City's decisions to issue the notices in terms of section 12(4)(b) of the NBRA in respect of the properties at hand do not fall to be reviewed and set aside; and

12.5. in declining to grant a structural interdict requiring the City to devise a housing plan for the applicants and the broader class on whose behalf they act.

13. We shall deal with each of these aspects in turn below.

B THE FACTS

The Historical Context.[4]

14. Johannesburg's spatial settlement patterns, land tenure arrangements and housing conditions have been fundamentally determined by racial segregation progressively implemented both prior to and during Apartheid.

Progressive Segregation 1886 - 1948

[4] This historical excursus is taken directly from the COHRE Report, which provides full references. R8, pp496 – 501.

15. Spatial segregation by race took hold almost immediately after it became apparent that Johannesburg would provide a stable source of gold. Early efforts to expel Africans and Indians to the urban periphery in 1904 resulted in the first African settlements at Klipspruit, some 35 km from the city centre, in the heart of present day Soweto.

16. After 1918, the diversification of Johannesburg's economy and the urbanisation of migrant workers' families resulted in a sharp increase in the numbers of African people in Johannesburg. This increase was however not matched by any significant increase in housing provision. Wealthier Africans could purchase a plot in the freehold townships of Alexandra and Sophiatown. These areas provided a permanent base nearer to the inner city than Klipspruit. Many poorer Africans, though, lived in backyard dwellings in these freehold areas or in Klipspruit and other emerging townships.

17. In 1923 the Natives (Urban Areas) Act was passed. This sought to further reduce the number of lawful tenure options for African people outside the townships, by making urban tenure conditional on urban employment. The Natives Act was however largely ineffective in segregating the inner city

18. In addition to the ineffectiveness of the Natives Act, of concern to the local council at the time was the extent of racial mixing between “poor whites,” Africans, coloureds and Indians living in slum areas in the inner city. In an effort to pull poor whites out of the racial melting pot of the inner city slums; to circumvent the difficulty of applying the Natives Act (which did not apply to coloureds and Indians) and to make way for the construction of an increasing number of skyscrapers, the council used the Slum Act of 1934 to effect a series of clearances on health and safety grounds. These evictions affected all races but alternative housing was only provided to white slum dwellers. Orlando, some 30 km from the city centre, became the dumping ground for African evictees.

19. By 1946 the housing backlog for Africans had grown to some 42 000 units. Yet only 2% of building material available for public housing construction was assigned to Africans. The Johannesburg municipality would eventually build what became the modern day Soweto suburb of Dube and extend Orlando and Jabavu. But the strategy of restricting new housing developments for Africans to the out-of-town settlements to the south west of the city, meant that the basic spatial outline of racial segregation in Johannesburg was already in place before the National Party came to power in 1948.

Grand Apartheid 1948 -1983

20. This brutal period in our country's history is well known and need not be set out in detail here. The Apartheid government replaced the Natives Act with the notorious Group Areas Act 41 of 1950.

21. Tens of thousands of urban African Johannesburgers were removed to economically barren Bantustans. In Johannesburg, with the exception of Alexandra, freehold townships were cleared and rezoned as white group areas. Townships were planned with no commercial or industrial base and were controlled by separate administrative units within local authorities. Townships were laid out with winding roads, dead ends and few entrances or through routes, in order to restrict movement and facilitate police control. This constituted a further brake on economic development in these areas.

22. Throughout this time housing supply in the townships failed to keep pace with demand. During the 1960s and 1970s the bulk of the state resources made available for African housing was directed towards new developments in the Bantustans. The result was an escalation of overcrowding in African townships and the further proliferation of illegal backyard shacks. If caught, 'illegal' residents were prosecuted, fined and expelled to a Bantustan.

23. The inner city of Johannesburg was segregated and zoned exclusively for white residential and commercial activity. Even domestic workers were evicted from their quarters in the high rise residential blocks of Hillbrow, Berea and Joubert Park, and moved into single sex hostels in the townships.

The Collapse of Influx Controls

24. The so-called “Botha reforms” introduced in the early 1980s led to the progressive erosion of influx controls. This paved the way for the growth of informal settlements and the “greying” of the inner city of Johannesburg. The influx of black residents increased steadily from 1986, resulting in the establishment and growth of many informal settlements, and a rapid increase of the inner city population. By the early 1990s, Johannesburg’s inner city had become one of the most racially integrated areas in South Africa.

25. Landlords in inner city residential blocks responded to the high demand for accommodation by new black tenants, and the flight of many white occupants, by hiking rents and cutting expenditure on maintenance and repairs. This was partly due to uncertainty about the long term prospects of the inner city as a viable property investment zone. But just as important was the fact that the new inner city tenants, whose presence

was not yet formally recognised in law, could not complain about the level of rents and the standard of maintenance in their new homes, for fear of eviction and removal to townships, or further afield.

26. At this time there was much investment in commercial property in decentralised locations by financial institutions starved of international opportunities by anti-apartheid sanctions. This assisted white commercial and residential flight from the inner city. Taking their cue from this deterioration in investor confidence in the inner city and seeing their property values fall, many residential and commercial property owners simply abandoned their buildings. These buildings became occupied by an increasing number of poor people in desperate need of the economic opportunities offered by the inner city but unable to afford to rent inner city accommodation on the private rental market.

27. Wracked by a series of institutional reforms and financial and political crises throughout the 1980s and 1990s, the municipality did not accord priority to the enforcement of building standards and regulations or municipal health and safety by-laws. Hence the advent and multiplication of Johannesburg's so-called "bad buildings."

28. There are currently 235 “bad buildings” in the inner city of Johannesburg occupied by approximately 67 000 poor people. 118 of these people and their children live in San Jose and the Zinns building.

The Occupiers of San Jose and the Zinns Building

29. San Jose is occupied by 95 adults and 51 children.[5] The Zinns Building is occupied by 23 adults and a number of children.[6]

30. The applicants are desperately poor people. The occupiers of San Jose earn an average household income of approximately R600.00 a month.[7] Most of the occupiers of the Zinns building earn only enough money to feed and clothe themselves.[8] Many of the applicants have no income at all.[9]

31. A large proportion of the households on the properties are headed by women. Juliet Zondi lives in flat 305, San Jose. She supports her three children on the R500.00 a month she earns as an informal trader in the inner city. She moved into flat 305 in January 2005 because it was vacant and she had nowhere else to live.[10]

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[5] R2, p58, para 10.
[6] R12, p892.
[7] R2, p59, para 12.
[8] R12, p895, para 9, lines 4 -7; p898, para 9, lines 27-31.
[9] R2, p59, para 12; R12, p907, para 7.
[10] R2, p77, para 72.

32. Priscilla Sotomela lives in flat 409, San Jose. She supports her two schoolgoing children on the R500.00 a month she earns doing part time domestic work in Orange Grove. Her children's school is in the inner city and her place of work is in close proximity to where she lives. Living in San Jose means that she saves on transport costs. This enables her to pay her children's school fees and buy food and clothes with the income she earns each month. Priscilla first moved into San Jose in August 1982, 25 years ago. She was evicted from the building in the late 1980s. After a few months she moved back in. She and her children have been there ever since.[11]

33. A number of the applicants are disabled. Elizabeth Dzhivhuvho who lives in flat 301 in San Jose is one of these. Elizabeth lives with her daughters Susan and Tiny, aged 14 and 26; her son Christopher, aged 18, and her granddaughter. Susan attends school. Tiny and Christopher are unemployed and have no income.[12]

34. Elizabeth was born in Venda. Her father died when she was 7. Her mother died when she was 11. After completing Standard 2 Elizabeth could no longer afford to go to school. As soon as she was able to she moved to Johannesburg to look for work. She found work as a domestic worker, married and bore three children by her husband, Gilbert. Gilbert

[11] R2, p79, paras 80-81.
[12] R2, p75, para 62.

died in 1995. In 1996 Elizabeth fell chronically ill and was no longer able to work.[13] For some time Elizabeth received a state disability grant of R740.00 a month. Recently, it was revoked without notice. Elizabeth is currently attempting to renew her grant.[14]

35. Elizabeth and her children survive on food parcels. Living in San Jose allows Elizabeth to be near to the social workers' offices where she and her children go daily to collect food parcels. The family have no money for taxi fares and must accordingly be within walking distance of the social workers' offices. Elizabeth and her children have lived in San Jose since 1998.[15]

36. Many of the applicants have experienced homelessness in the past. Most of the occupiers of the Zinns building were homeless before taking occupation of the Zinns building.[16] For many it has been a long hard struggle to escape homelessness and find a place, secure from the elements, that affords a measure of privacy and dignity. Prince Mbatha, who lives in the Zinns Building, is an example.

37. Prince was born in Pietermaritzburg. He moved to Johannesburg in 1982 to look for work. From 1989 to 1996 Prince lived in a petrol station in

[13] R2, p76, para 63.
[14] R2, p75, para 61.
[15] R2, p76, paras 64 -65.
[16] R13, p990, para 4.11.1.

Kerk Street in central Johannesburg. He was allowed to live there in return for doing odd jobs such as cleaning the premises.[17] This arrangement came to an end in 1996.

38. For 7 years, from 1996 to 2003 Prince lived on the streets and under highways in central Johannesburg. He survived by producing and selling paintings and drawings on the streets.[18]

39. In 2003 Prince moved into the Zinns building. He still survives by selling his art. He is now able to produce his art and store his materials in a space that is secure from the elements and the dangers of the streets. He has also started making and selling flower pots. He earns enough to feed and clothe himself.[19] As Prince himself puts it –

"If I was to be evicted from the premises at 197 Main Street I would suffer. I would have to go back to living on the streets of the Central Business District. I cannot move back to Pietermaritzburg. The prospects for earning a living there are very much less than in Johannesburg. It is better for me to live in Johannesburg than in Pietermaritzburg."[20]

[17] R12, p901, para 8.
[18] R12, p901, paras 9 and 11.
[19] R12, p901, para 10.
[20] R12, p 901, para 12.

40. Many of the applicants have been in occupation of the properties for a substantial period of time, many for 10 years, some for over 15 years. Priscilla Sotomela has lived in San Jose since 1982.[21] Nigi Khumalo and her partner Nkosinathi Mbatha have lived in San Jose for 16 years.[22] Thlanthla Mothlabane has lived in the Zinns building for 9 years. Before this Thlanthla had been homeless for 6 years.[23]

41. The applicants are poorly educated and unskilled. They have come to central Johannesburg from rural areas and townships on the periphery of the city in a quest to survive. They are generally able to do so by virtue of the livelihood opportunities in the Johannesburg inner city. These are –

41.1. Informal trading;

41.2. Collecting scrap metal, paper and cardboard for sale to recycling companies located in central Johannesburg; and

41.3. Cleaning and doing other odd jobs in houses in Houghton, Yeoville and other inner city suburbs.[24]

[21] R2, p79, para 81.
[22] R2, p76, paras 66-67.
[23] R12, p894, para 8.
[24] R2, p58, para 11.

42. Many of the occupiers of San Jose live there in order to support their families who live in rural areas or in state-subsidised houses in peripheral locations.[25] Joseph Msomi is one example. He supports his partner, his three children and his brother who all live in Mandini, Kwa-Zulu Natal. By living in San Jose and working in the inner city he is able to send them R800.00 a month.[26]

43. Relocating to an informal settlement or township outside the inner city would destroy the applicants' livelihood strategies.[27] This is because of the limited livelihood opportunities in these outlying areas coupled with the prohibitive cost of commuting to the inner city each day.

44. A return taxi fare from Diepsloot to the inner city is R14.00. The monthly cost of commuting from Diepsloot to the inner city 20 days a month would therefore be R280.00. In respect of Ivory Park these figures are R19.00 and R380.00 respectively. In respect of Orange Farm: R27.00 and R540.00. In respect of Soweto R12.00 and R240.00. In respect of Bramfischerville: R19.00 and R380.00.[28]

45. These transport costs are way beyond the means of the occupiers of the Zinns building who live from hand to mouth. As stated above the average

[25] R2, p 95, para 155, lines 20-24.
[26] R2, p70-71, para 41.
[27] R3, p175, para 21.
[28] R7, p461, para 30.12, lines 11-16.

household income at San Jose is R600.00 per month. Living in one of the above far-flung locations would accordingly require the average San Jose household to spend upwards of a third of its monthly income on transport. This would not be feasible.[29]

46. It is this economic reality that traps the desperately poor in squalid conditions in the inner city of Johannesburg. As stated by Wandile Zungu, a resident of a dilapidated house in Joel Street, Berea –

"If they evict us, we'll sleep on the streets for a while, until we find somewhere else to go. I can't leave the city. If I do my family will starve."[30]

47. The COHRE Report notes that Wandile Zungu is one of about 7.5 million people who lack access to adequate housing and secure tenure in South Africa. –

"*They* are *South Africa's poorest. Most live in cities. In Johannesburg they live either in one of its 190 urban shack settlements, in one of around 235 so-called 'bad buildings' in the inner city, or in backyards, on pavements, under highway bridges. Tenure is precarious and conditions are squalid. <u>But poor people chose to live in these places because they</u>*

[29] R7, p461 para 30.12, lines 18-20.
[30] Quoted in the COHRE Report, R8, p489, lines 11-12.

are located close to formal job opportunities or points of entry into the informal economy."[31] (emphasis added)

The Condition of San Jose and the Zinns Building

48. Conditions in San Jose and the Zinns building are squalid. There is no electricity or running water, the buildings are in serious need of maintenance and repair and there is uncollected domestic waste in certain areas. However the Supreme Court of Appeal's findings that *"all the courtyards and other open spaces [in San Jose] were filled with faeces and refuse"* and that certain parts of San Jose *"were flooded with sewer water"*[32] are not correct. These allegations, which were made by the City, were disputed by the applicants on the papers.[33] Having regard to the rule in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*[34] *("the Plascon-Evans rule")* it is submitted that the Supreme Court of Appeal ought not to have accepted them.

49. It is submitted further that the City's exaggerated claims in respect of the state of the buildings were exposed at an inspection *in loco* of the properties conducted in the course of the high court application. His Lordship Mr Justice Jajbhay found that the condition of the buildings was

[31] R8, p489, lines 25-30.
[32] R17, p1253, para 10.
[33] R7, p 435, para 6.2; p 436, paras 7.1 and 8; p437, para 12.1
[34] 1984 (3) SA 623 (A).

"far from the extreme conditions complained of by the [City]."[35] In contrast to the City's claims on the papers Jajbhay J stated that he *"did not observe any of the properties 'covered in human waste.'"*[36] It is submitted that the Supreme Court of Appeal ought to have accepted the findings of Jajbhay J in this regard.

50. The Supreme Court of Appeal found that *"in the present instance the evidence is that the buildings cannot be made safe while occupied"* [37] and *"the evidence establishes that it is necessary to vacate the buildings for the sake of the safety of the [applicants]."*[38] It is important to emphasise that these claims were made by the City and were disputed in detail by the applicants. Having regard to the evidence on the papers and to the *Plascon-Evans rule*, it is respectfully submitted that the Supreme Court of Appeal erred in making these findings. Some of the relevant evidence in this regard was the following –

50.1. The City conceded that San Jose is structurally sound.[39] The City did not allege the Zinns building to be structurally unsound.

50.2. The occupiers of San Jose have taken steps to mitigate the risk of fire. They have placed a bucket of water on every floor of the

[35] R17, p1220, para 18.
[36] R17, p1220, para 18.
[37] R17, p1270, para 52.
[38] R17, p1275, para 65.
[39] R3, p213, para 68.

building for fire-fighting purposes and designated persons among their number to act as fire marshals.[40] The occupiers of San Jose pointed out that fire hydrants in the building would be capable of use had the City not terminated the fire water supply to the building.[41]

50.3. The occupiers of San Jose pointed out that the hygiene risks which existed in the building had been created, in the main, by the City's total termination of the water supply to the property.[42] This was also the view of Nellie Agingu, one of the applicants' experts, who stated that *"the absence of a water supply constitutes the most serious health hazard in the building."*[43] The occupiers of San Jose pointed out that providing them with a free basic water supply (to which they are entitled) would significantly abate the risks of which the City complained.[44]

50.4. The occupiers of San Jose have always been prepared to work with the City to take the necessary steps to eliminate any health and safety risks on the property. They stated as follows in their answering affidavit-

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[40] R2, p94, para 149.
[41] R7, p444, para 23.2
[42] R2, p106, para 205.4.
[43] R3, p169, para 9.4.
[44] R2, p106, para 205.5.

"We submit that we have always been prepared to co-operate with [the City] by doing whatever we can to mitigate the risk of fire, by, inter alia, unblocking access routes, clearing away refuse and other combustible material and installing fire extinguishers. Prior to instituting these proceedings [the City] did not approach any of the occupiers to discuss how any of these steps might be taken.

We submit that the granting of an eviction order is the most extreme means of removing unhygienic conditions or any risk of fire which might arguably exist on the property and should only be resorted to if no other effective remedy exits. We respectfully submit that it is unreasonable for [the City] to approach this honourable Court for an order for our eviction in circumstances in which it has not approached us to discuss how any of these remedial steps might be taken."[45]

50.5. Similarly the occupiers of the Zinns building stated that –

"We submit that the granting of an eviction order is the most extreme means of removing unhygienic conditions or any risk of fire which might arguably exist on the property and should only be resorted to if no other effective remedy exists. We submit

[45] R2, p107, paras 205.7 – 205.8.

that prior to launching its application for our eviction [the City] did not approach us to discuss how any remedial steps in this regard might be taken. We submit that it is unreasonable for [the City] to approach this honourable Court for an order for our eviction in these circumstances."[46]

50.6. After receiving the applicants' answering affidavits the City still did not approach the applicants to discuss how health and safety risks on the properties might be mitigated. The City did not provide water to the properties. The City did not even reconnect the fire water supply to San Jose.

50.7. The applicants have accordingly taken such remedial steps as they have been able to on their own without any assistance from the City. In particular the applicants have cleared away large quantities of domestic waste.[47] At one stage the occupiers of San Jose asked the City if it could provide them with skips and gloves in order for them to remove a quantity of waste in an interstice between San Jose and a neighbouring building. The City refused.[48]

[46] R13, p985, para 4.2.4.
[47] R7, p 435, paras 6.2.4 and 6.2.5.
[48] R7, p435-436, para 6.2.6.

51. Having regard to the above it is submitted that the Supreme Court of Appeal ought to have found that the City failed to establish that the buildings could not be made safe while occupied. It follows that the City did not establish that it was necessary to vacate the buildings for the sake of the safety of the applicants.

52. The Supreme Court of Appeal found that *"there was no suggestion that [the applicants] wished to make any representations"*[49] in respect of the condition of the buildings or their safety in relation thereto. Having regard to what has been set out above it is respectfully submitted that this finding too was incorrect.

53. The conditions in which the applicants live are far from ideal but are unfortunately not materially different from the conditions in which millions of poor South Africans live, including those living in the 190 informal settlements in the City's area of jurisdiction. Nellie Agingu, one of the applicants' experts, deposed to an affidavit on the living conditions in Kliptown, one such informal settlement.[50] Some of Agingu's findings in this regard were the following –

"…there are frequent fires in Kliptown. They are invariably caused by residents knocking over a candle or a paraffin lamp or leaving a coal fire

[49] R17, p1275, para 63.
[50] R9, pp587–606.

burning. The fires spread quickly by virtue of the combustible material of which the shacks are constructed and their close proximity to one another.[51]

The shacks in one area of Kliptown stand on marsh land. The residents call this area 'Robben Island.' These shacks are flooded every time it rains…Large pools of stagnant water stand between the shacks in this area. ….A young child recently fell into one of these pools and drowned. In addition to the danger of drowning, the residents of Kliptown who live on this stagnant marsh-land are exposed to a high risk of disease.[52]

The City of Johannesburg recently hired a firm of environmental consultants to conduct a once-off clean-up operation in respect of Kliptown's waste. There had been huge piles of waste throughout the informal settlement and much of this had been cleared during the operation. Efforts had been made to provide residents with plastic garbage bags and designate collection points throughout the informal settlement for bags to be deposited for collection on a regular basis. No similar efforts have been made in San Jose despite the health risks arising from the presence of uncollected domestic waste.[53]

[51] R9, p591, para 13.
[52] R9, p590, para 11.
[53] R9, p592, para 19.

Despite the clean-up operation, there are still significant piles of exposed waste, including excrement, throughout Kliptown. There are also numerous pools of dirty water. They form downstream of the taps which residents use for cleaning purposes and as a result of leaking drainpipes. While walking through Kliptown I witnessed three young children playing in the dirty water that leaked from a broken drain…The waste problem in Kliptown has resulted in the proliferation of rats. The residents of Kliptown recently buried a young child who died after being bitten on the neck by a rat."[54]

54. Agingu concluded as follows –

"There are 209 381 identified shacks in informal settlements in the City's area of jurisdiction. During the course of my work I have visited many of them. I made specific reference in my earlier affidavit to Ivory Park, Thembelihle, Joe Slovo, Freedom Park, Diepsloot and Alexandra. Unfortunately the conditions which prevail in Kliptown cannot be characterised as aberrant or extreme. Rather they are typical of the conditions which prevail in informal settlements generally and specifically in those referred to above. Generally speaking these conditions are no better or worse (in a quantitative if not a qualitative sense) than the conditions which exist at San Jose. There is, in my view, no rational basis for the municipality to respond to the health and safety risks in San Jose

[54] R9, p593, para 21.

any differently to the manner in which they are responded to in Kliptown.[55]

What is qualitatively different for the occupiers of San Jose are the economic opportunities available to them by virtue of the close proximity of the property to the inner city. Those opportunities are, in my view, superior to the opportunities available to the occupiers of the informal settlements referred to above which are situated on the periphery of Johannesburg."[56]

55. The City does not respond to the health and safety risks in Kliptown, or any other informal settlement in its area of jurisdiction, by evicting people from their homes and providing them with nowhere else to go. On the contrary, the City has plans to upgrade and formalise every one of the 190 informal settlements in its area of jurisdiction. Some are to be upgraded *in situ*. Others are to be relocated. The City's plans in this regard will be discussed below.

[55] R9, p593 - 594, para 23.
[56] R9, p594, para 24, lines 7-11.

The City's Housing Plan

56. The City's Housing Plan[57] makes provision for the formalisation of all 190 informal settlements within its area of jurisdiction. These include Soweto, Alexandra, Bram Fisherville, Diepsloot, Dobsonville, Ivory Park, Orange Farm and Kliptown among others.

57. Of Johannesburg's 190 informal settlements, 103 are earmarked for wholesale relocation, because they are on land which, according to the City, is unsuitable for *in situ* upgrading. A further 42 will be upgraded *in situ*. 35 informal settlements, while in locations which allow for them to be upgraded, are too dense to allow for all of their residents to benefit from the upgrade, which will involve the installation of services and road networks. They will accordingly be upgraded but some residents will have to be relocated. The precise plans for the remaining 10 informal settlements are not yet recorded.[58]

58. The City's Housing Plan also makes provision for the conversion of all hostels within its area of jurisdiction from single sex units to family units[59] and for the relocation of the occupiers of backyard shacks in certain

[57] R6, p366 ff
[58] R8, p558, lines 29-35.
[59] R6, p371, para 6.1.

areas. For example the City plans to relocate the occupiers of backyard shacks in Soweto to the Doornkop Greenfield project.[60]

59. The City's Housing Plan does not make provision for the relocation of the applicants or the 67 000 occupiers of "bad buildings" who stand to be displaced by the Inner City Regeneration Strategy, whether in the inner city or elsewhere. This was admitted by the City in its replying affidavit in the San Jose matter in the following terms –

"The [City] has adopted a housing implementation plan, a copy of which is attached hereto as annexure 'K.' It unfortunately does not cover the present situation."[61]

60. The Supreme Court of Appeal accordingly erred (it is respectfully submitted) in making the following finding-

"The City has a housing plan for households without adequate shelter [which 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, those in the position of [the applicants], and the homeless living in the streets of the city…This

[60] R6, p376, lines 21-26.
[61] R3, p199, para 27.1.1.2.

plan provides for the settlement of those who qualify in townships around but not within the inner city."[62] (emphasis added)

61. The housing plans adopted by the City apply to the occupiers of informal settlements, hostels and backyard shacks in specific areas. They do not apply to the applicants or the broader class. The applicants and the broader class could not "register for assistance" in terms of such plans as suggested by the Supreme Court of Appeal.[63] The plans apply only to defined categories of persons.

62. The City's plans to formalise informal settlements are coupled with a zero tolerance approach to land invasions, or the unauthorised creation of new settlements. Existing informal settlements are also strictly monitored to prevent their growth.[64] The COHRE report states that –

"According to one municipal official, any growth of existing informal settlements, or erection of new shacks, in his region are promptly reported to the Johannesburg Metropolitan Police Department (JMPD). According to the official, the JMPD is empowered to evict new informal settlers within 48 hours of the establishment of their shacks 'without a court order.' This practice, if it is used, is cause for concern."[65]

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[62] R17, p1259, para 24.
[63] R17, p1259, para 24.
[64] R8, p559, lines 1-3.
[65] R8, p559, lines 3- 7.

63. The applicants and the broader class could therefore not simply erect shacks in an existing informal settlement. Obviously they could not do so on vacant land either.

64. Prior to the City's offer in the Supreme Court of Appeal to give the applicants emergency accommodation for two weeks only, raised only in an affidavit filed after oral argument had been presented in that Court,[66] the City had not made any proposal regarding the applicants' relocation, whether in an informal settlement or elsewhere. The Supreme Court of Appeal accordingly erred (it is respectfully submitted) in making the following finding –

"The [High Court] also rejected a proposal that [the applicants] be relocated to an informal settlement, probably because of its finding…that [the applicants] 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."[67] (emphasis added)

65. There was, with respect, never a proposal by the City that the applicants be accommodated in a particular informal settlement.

[66] R16, p1146, lines 11-14.
[67] R17, p1260, para 27.

66. The City's attitude is that the applicants must simply find somewhere else to live. Having regard to the above, it is, with respect, difficult to fathom where the applicants could legally do so. This aspect will be dealt with in more detail below.

The Absence of Alternative Accommodation for the Present Applicants and the Broader Class

67. The cheapest private rental accommodation available in the inner city costs about R850.00 per month, for a single room with cooking facilities and a bathroom. This rate excludes water and electricity which, assuming a household of four people, would push the cost of renting such a unit up to just over R1000.00 a month. Realistically only a household with an income of about R3200.00 a month (at 31.5% of household income spent on housing) could afford to stay in such a room, and then probably in rather overcrowded conditions.[68]

68. None of the applicants earn R3200.00 a month. That figure is over five times the average monthly income of R600.00 earned by the San Jose occupants – and they have to use their earnings to pay for other basic necessities such as food and clothing. Private rental accommodation is accordingly beyond their means.

[68] R3, p161, para 7.

69. The demand for subsidised housing units in the inner city far outstrips supply. At the time of drafting the answering affidavit in the San Jose matter, Lauren Roysten, one of the applicants' experts, stated that *"the unmet demand for affordable accommodation in the inner city is around 18 000 households."*[69]

70. The situation has worsened since then as the Co-operative Housing Trust ("COPE"), a low-cost housing provider in the inner city, has ceased to operate. COPE had provided 702 low cost housing units in the inner city and had planned to provide 500 more annually in the years between 2006 and 2010.[70]

71. The Supreme Court of Appeal found that the applicants had *"refused to register for housing assistance."*[71] This is, with respect, incorrect. The occupiers of San Jose formed a section 21 company through which they applied for the institutional housing subsidies for which they qualify.[72] Thereafter they submitted a bid to acquire ownership of San Jose through the Vusanimadholoba Housing Company, a wholly owned agency of the Gauteng Provincial Department of Housing ("Vusani"). The plan was that Vusani would upgrade the building using the institutional housing subsidies and manage it for an interim period of three to four

[69] R3, p163, lines 20 -21.
[70] R16, p1165-1166, para 6.1.
[71] R17, p1259, para 24.
[72] R2, p92, para 139.

years during which time the occupiers would be trained in building management. Once this had been done Vusani would transfer ownership of San Jose to the occupiers.[73]

72. The occupiers' bid was however unsuccessful and San Jose was awarded to en entity called the Ithemba Property Trust.[74] The City's urgent application for the occupiers' eviction on health and safety grounds was launched just weeks after the award of San Jose to the Ithemba Property Trust. This aspect is dealt with in more detail below.

73. It is important to note that, having regard to the above, the institutional housing subsidies for which the occupiers of San Jose qualify have not been utilised. This constitutes a source of funding available to the City to assist the occupiers. The occupiers of the Zinns building also qualify for institutional housing subsidies.[75]

74. The applicants stated in their affidavits that they were advised by their attorneys that they also qualify for "RDP" housing subsidies.[76] The

[73] R2, p91, para 135.
[74] R2, p92 - 93, para 143.
[75] The COHRE Report explains that "the Institutional Housing Subsidy ("IHS") caters for housing organisations (which can be private, governmental or non-governmental entities) providing accommodation to qualifying beneficiaries, in a form other than immediate ownership. The IHS can be used to finance rental, rent-to-buy, co-operative and share block schemes, which are collectively known as social housing projects. The IHS amounts to a flat subsidy of R25.529 for every beneficiary earning less than R3.500 a month." R8, p513, lines 25-30.
[76] R2, p95, para 154.

applicants did not "refuse"[77] to register for these housing subsidies, they were unaware of their entitlement to do so. These subsidies would entitle the applicants to apply for a subsidised house on a greenfield low-cost development located on the urban periphery. The difficulty with this, apart from being located far from economic opportunities, is that the waiting list for housing of this kind, in the City's area of jurisdiction alone, is some 300 000 households long.[78] It would therefore take many years before any of the applicants could realistically be accommodated in this way.

75. Having regard to the above the only realistic options available to the applicants and the broader class in the medium term would be to move into another "bad building" in the inner city or to erect a shack either in an existing informal settlement or on vacant land. All these options are illegal. All would accordingly expose the applicants and the broader class to eviction again.

The City's Inner City Regeneration Strategy

76. The goal of the Inner City Regeneration Strategy ("the ICRS")[79] is to "raise and sustain private investment leading to a steady rise in property values in the Johannesburg inner city."[80]

[77] R17, p1259, para 24.
[78] R3, p163, para 10.
[79] R4, p231ff
[80] R4, p242, para 4.1.

77. In order to achieve this goal, the ICRS seeks to reverse "inner city decay" through, *inter alia,* the "eradication" of dilapidated buildings - termed "bad" buildings or "sinkholes" in the Strategy.[81] The City has identified 235 "bad" buildings in the Johannesburg inner city. The "eradication" of "bad" buildings in terms of the ICRS entails "clearing" them of their current occupiers in order to facilitate the transfer of the properties to private property developers.

78. One of the mechanisms through which this is achieved is the City's Better Buildings Programme ("BBP"). The aim of the BBP is to expand the stock of residential and commercial accommodation available for private rental or sale in the inner city.[82] The BBP's six step rehabilitation process has been described by the City in the following terms –

"Step 1 is the identification of the buildings and the creation of a database of bad buildings…

Step 2 sees the BBP making the properties available to investors, who once screened can tender for them.

In Step 3 the BBP adjudicates the responses and feasibility studies submitted by the investors and uses criteria such as projected costs,

[81] R4, p242, para 4.2.
[82] R14, p1011, para 7.1.

BEE components, amount offered for the building and rehabilitation plans, to select who gets onto the database…

In Step 4, agreements are signed with the successful potential investor, while in step 5 the building is acquired from the owner and transferred to the new owner, often a lengthy process.

In Step 6, the real work starts – getting rid of illegal occupants, paying the City for the write-off of arrears of rates, electricity and water, and starting the refurbishment process."[83] (emphasis added)

79. The 235 "bad" buildings sought to be "eradicated" by the City in terms of the ICRS are occupied by approximately 67 000 poor people.[84] Notwithstanding this, the ICRS makes no provision – indeed it is completely silent – as to where these people should go after their eviction from these buildings, even in the short term.

80. While the Supreme Court of Appeal ordered the City to provide emergency accommodation to the 118 applicants in this case it also held that *"the powers of the City to order the vacation of unsafe buildings are*

[83] This is quoted from an article on the City's website "*Bad Buildings await Better Days"* R9, p585 at p 586.
[84] According to 2001census figures a total of 67 000 people live in the inner city without the means to access affordable accommodation. R8, p524, footnote 72.

not dependant upon it being able to offer alternative housing to the occupants."[85]

81. As we have seen above the City's Housing Plan also makes no provision for where the occupiers of inner city bad buildings are to live after these buildings have been "cleared."

The City's Practice of Evictions in the Inner City

82. The City goes about clearing "bad" buildings in terms of the NBRA, the provisions of the Health Act[86] and its fire by-laws. The COHRE report describes the City's *modus operandi* in this regard as follows[87] -

82.1. When a "bad" building is identified it is inspected by an "inter disciplinary task team" comprising an environmental health officer, a building control officer and an officer of the municipal fire department.

82.2. The City may then issue any number of notices to the owner or person in charge of the "bad" building. These notices seldom make their way to the occupiers of the building in question until they appear annexed to the eviction application. Typical notices

[85] R17, p1251, para 5.
[86] Act 63 of 1977.
[87] R8, p543, line 26 - p547, line 17. See also R2, pp112-119.

include warnings to provide fire fighting equipment and notices under the Health Act and/or the Accommodation Establishment By-Laws, to improve any condition of the building which is perceived to threaten health and safety.

82.3. If after a second visit, some months later, the task team is not satisfied that conditions in the building have sufficiently improved, the City issues a notice in terms of section 12(4)(b) of the NBRA, declaring the building unfit for occupation and ordering all its residents to vacate the building within one week of the date of the notice.

82.4. The aforesaid notice does not explain exactly how the building in question poses a health hazard, or a threat to heath and safety. This is itself problematic since it is usually the first that residents hear that action may be taken to evict them. Residents must usually visit the City's headquarters to find out exactly what repairs or improvements to the property the City requires.

82.5. The notice provides no indication of where the residents of a building should go and live. The arbitrary blanket application of a week long period to leave the building does not take account of the specific circumstances of particularly vulnerable residents

of a building (especially the old, the disabled, children and single mothers). No hearing is convened. Residents are not given an opportunity to make representations to the City either prior to or in response to the issuing of the notice.

82.6. Shortly (sometimes just a day) after a notice in terms of the NBRA is issued, the City lodges an application to the High Court for an interdict, ordering the residents of the building to vacate it and not to re-occupy it without the City's written permission. This is generally done on an urgent basis with barely a few days notice. The practical effect of the interdict, once obtained, is the same as a permanent eviction. The COHRE researchers were unable to uncover any case in which, after having obtained an interdict, the City granted the residents of a building permission to re-occupy it. Nor is this likely to occur in the future. The reality is that where these buildings are rented out after refurbishment it is at rates way beyond the means of the original residents.

82.7. The City's eviction applications are invariably brought against "the occupiers" of the relevant building as an anonymous group. The City makes no attempt to find out who the occupiers of the relevant building are, how long they have been there, whether their number include particularly vulnerable people such as the

elderly, disabled and children, or whether the occupiers will have anywhere to live after their eviction. The City's eviction applications are in the nature of standard from applications in which the description of the relevant property is simply inserted. Thus applications contain allegations of "illegal partitioning constructed of combustible material" and "the proliferation of unsafe electrical wiring" even where these conditions do not exist on a particular property.[88] The claim that properties are "unfit for human habitation" is also a standard form allegation.

82.8. Eviction applications under the NBRA tend to be unopposed since the occupiers of the buildings struggle to obtain adequate legal representation. This is exacerbated by the fact that the applications are invariably brought on an urgent basis. This is despite the fact that the properties have generally been in a dilapidated condition for many years with inspections having taken place many months earlier. COHRE researchers found that where the urgent applications are unopposed it can take as little as 12 days from the filing of the application, to the granting of the eviction order. Execution of the order can then occur immediately.

[88] R7, p444, paras 24.1 and 24.2

82.9. Where on the other hand, occupiers secure legal representation and defend the applications, or lodge an appeal subsequent to the granting of the eviction order, the City often takes no further action and the application is postponed indefinitely. This occurred in seven applications of which the Centre for Applied Legal Studies ("CALS") was aware at the time of filing of the applicants' answering affidavit in the San Jose matter.[89]

The City's Eviction Applications in respect of San Jose and the Zinns building

83. The City's eviction applications in respect of San Jose and the Zinns building accorded in all respects with its *modus operandi* set out above.

84. The City's first inspection of the Zinns building took place on 28 January 2003.[90] The conditions of which the City now complains were identified. A second inspection took place on 9 September 2003.[91] The condition of the building was found to be unchanged. The City's eviction application was launched on an urgent basis on 25 September 2003[92] - almost 9 months after the first inspection. The City's notice in terms of s 12(4)(b) of the NBRA is dated 14 May 2003, four months before the urgent

[89] R2, p62, para 20.5 – p 64, para 20.5.6.
[90] R12, p863, lines 19-20.
[91] R12, p867, para 22.
[92] R12, p852.

application was launched.[93] Despite this the occupiers of the Zinns building were afforded no hearing prior to the City's decision to issue the notice. In terms of the relief as prayed for in the City's notice of motion, the occupiers would be given one week to vacate the property.[94]

85. Prior to instituting its eviction application the City did not approach the occupiers to discuss whether and how any steps to improve health or safety on the property might be taken or the question of suitable alternative accommodation for the occupiers.

86. The process followed in respect of San Jose was identical.

87. The City's first inspection of San Jose took place on 20 August 2003.[95] The conditions of which the City now complains were identified. A second inspection took place on 31 March 2004.[96] The condition of the building was found to be unchanged. The City's eviction application was launched on an urgent basis on 24 June 2004 – 10 months after the first inspection.[97] The City issued its notice in terms of s 12(4)(b) of the NBRA on 23 June 2004, the day before launching its urgent eviction application.[98] Despite the fact that there has been no electricity in San

[93] R12, p879.
[94] R12, p854, para 4.
[95] R1, p34, para 103.
[96] R1, p37, para 112.
[97] R1, p1.
[98] R1, p55.

Jose since September 2003, the City's founding affidavit was replete with references to the "proliferation of unsafe electrical wiring."[99] The occupiers of San Jose were afforded no hearing prior to or in response to the City's decision to issue the s 12(4)(b) notice. In terms of the relief as prayed for in the City's notice of motion the occupiers would be given one week to vacate the property.[100]

88. As with the Zinns building, the City made no attempt to approach the occupiers of San Jose prior to instituting its eviction application to discuss how any steps to improve health or safety on the property might be taken or the question of suitable alternative accommodation for the occupiers.

89. In between the City's initial inspection of the property and the launch of its urgent eviction application, San Jose was awarded to an entity called the Ithemba Property Trust ("Ithemba") in terms of the BPP. This occurred on or about 12 May 2004.[101] The award is stated to be provisional *"subject to the resolution of the occupiers' issues."*[102] The City's eviction application was launched on an urgent basis just weeks after this.

[99] R1, p35, para 107; R2, p59, para 14.
[100] R1, p8, para 5.
[101] R2, p126-127.
[102] R2, p126.

90. Once the Zinns and the San Jose eviction applications became opposed the City lost the sense of urgency which it professed to rely on initially.

91. The applicants' answering affidavit and counter application in the Zinns matter were delivered on 25 September 2003. Thereafter for a period of over eighteen months the City did nothing. Only on 25 April 2005, after correspondence from Webber Wentzel Bowens advising that the applicants intended to set their counter-application down, did the City deliver its replying affidavit.[103] The San Jose matter followed a similar trajectory.[104]

92. It is in the light of these facts that the applicable law will now be considered.

B SECTION 26 OF THE CONSTITUTION

93. Section 26 of the Constitution is central to this case. It provides as follows –

"Housing

26 (1) Everyone has the right to have access to adequate housing.

[103] R13, p987, para 4.3.5.
[104] R2, p64 –65, para 22.

(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."

94. As stated in our introduction we respectfully submit that the Supreme Court of Appeal erred in its interpretation of the content and reach of s 26(1), (2) and (3) of the Constitution. We shall deal with each of these subsections in turn below.

Section 26(1)

95. As the Supreme Court of Appeal, with respect, correctly held, s 26(1) has a positive and a negative aspect. The positive aspect is circumscribed by section 26(2), which we shall consider below. The negative aspect of s 26(1) is the *"obligation placed upon the state and all other entities and persons to desist from preventing or impairing the right of access to adequate housing."*[105]

[105] R17, p1264 -1265, para 38; *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) at para 34.

96. While the negative aspect of s 26(1) has not yet been considered by this Court in any detail,[106] this Court has ruled that *"at the very least, any measure which permits a person to be deprived of existing access to adequate housing, limits the rights protected in section 26(1)."*[107] Such a limitation may be justified under s 36 of the Constitution.[108]

97. In order to determine whether the negative aspect of s 26(1) has been infringed in this case, it is necessary to interpret the phrase "access to adequate housing." The Supreme Court of Appeal ruled on what "access to adequate housing" is not, holding that *"the contention that to deprive a person of unsafe housing denies him or her access to adequate housing is not correct."*[109] We respectfully disagree. Before setting out our reasons for doing so we shall attempt to interpret s 26(1) to determine what "access to adequate housing" entails. We emphasise that this is not a minimum core argument, but simply an attempt to give content to the negative aspect of s 26(1) for purposes of this case.

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[106] *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others* 2005 (2) SA 140 (CC) at para 31.
[107] *Jaftha v Schoeman* at para 34.
[108] *Jaftha v Schoeman* at para 34.
[109] R17, p1269, para 46.

Giving Content to the Negative Aspect of s 26(1): What Does "Access to Adequate Housing" Entail?

98. We submit that "access to adequate housing" must be interpreted purposively[110] and generously.[111]

99. Purposive interpretation is aimed at identifying the interests the right is meant to protect, in the light of the historical legacy the denial of rights has created, and with a view to promoting an open and democratic society based on human dignity, equality and freedom.[112] As Jajbhay J stated in his judgment in this matter in the High Court –

"The decision in Grootboom confirms that the bill of rights is a transformative document which is aimed at achieving a society where

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[110] *S v Zuma and Others* 1995 (2) SA 642 (CC); *S v Makwanyane and Another* 1995 (3) SA 391 (CC); *Minister of Health and Another NO v New Clicks South Africa and Others (Treatment Action Campaign and Another as Amici Curiae)* 2006 (2) SA 311 CC.

[111] *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd,* as yet unreported judgment of the Constitutional Court handed down on 6 June 2007 under case number CCT 69/06 at para 53.

[112] The dictum on purposive interpretation in the Canadian judgment in *R v Big M Drug Mart Ltd (*1985) 18 DLR (4th) 321 at 359-360 has frequently been quoted with approval by this Court. Dickson J, writing about the Canadian Charter of Rights and Freedoms, held as follows –

> *"The meaning of a right or freedom guaranteed in the Charter was to be ascertained by an analysis of the purpose of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect. In my view, this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and larger objects of the Charter itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the Charter. The interpretation should be ……. A generous rather than a legalistic one, aimed at fulfilling the purpose of a guarantee and securing for individuals the full benefit of the Charter's protection."*

people will be able to live their lives in dignity, free from poverty, hunger and disease. Our Constitution encompasses a transformative vision."[113]

100. Generous interpretation requires that rights bearers be given the full measure of the protection afforded by the right in question. As Moseneke DCJ held in the recent judgment of this Court in *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd* –

"We must prefer a generous construction over a merely textual or legalistic one in order to afford claimants the fullest possible protection of their constitutional guarantees."[114]

101. The legacy of racism in our country has meant that insufficient housing has been provided for black people, causing them to live in overcrowded and squalid conditions. But this legacy is also fundamentally about the location of housing. Historically, where housing was provided to black people, it was provided in economically barren Bantustans and townships without any commercial or industrial base, on the peripheries of towns and cities. Black people were simultaneously banned from living or working in economically viable centres. In short, the location of housing has systematically denied black people access to economic

[113] R17, p1237, para 51.
[114] *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd* supra at para 53.

opportunities. This spatial segregation and its attendant economic consequences are still in existence today.

102. We submit that "access to adequate housing" ought to be interpreted in a manner which addresses this legacy, and certainly not in manner which reinforces it. We submit further that "access to adequate housing" ought to be interpreted in a manner which improves or at the very least does not intensify the marginalisation of the poorest and most vulnerable members of our society. The applicants and the broader class on whose behalf they act clearly fall into this category.

103. International law recognises that the poorest and most vulnerable members of society deserve particular protection. The United Nations Committee on Economic, Social and Cultural Rights has stated that –

"Even in times of severe resource constraints, vulnerable members of society can and indeed must be protected by the adoption of relatively low cost targeted programmes."[115]

104. This principle was recognised by this Court in the judgment in *Port Elizabeth Municipality v Various Occupiers*[116] *("the PE Municipality judgment").* Sachs J held that –

[115] CESCR, General Comment 3 at para 12.
[116] 2005 (1) SA 217 (CC).

"It is not only the dignity of the poor that is assailed when homeless people are driven from pillar to post in a desperate quest for a place where they and their families can rest their heads. Our society as a whole is demeaned <u>when state action intensifies rather than mitigates their marginalisation. The integrity of the rights based vision of the Constitution is punctured when governmental action augments rather than reduces the claims of the desperately poor to a decent existence.</u>"[117] (emphasis added)

105. Interpreting "access to adequate housing" generously means that it should not be interpreted to connote merely "access to adequate shelter." The United Nations Committee on Economic, Social and Cultural Rights has stated as follows in this regard –

"In the Committee's view, the right to housing should not be interpreted in a narrow or restrictive sense which equates it with, for example, the shelter provided by merely having a roof over one's head, or views shelter exclusively as a commodity. Rather, it should be seen as the right to live somewhere in security, peace and dignity. This is appropriate for at least two reasons. In the first place, the right to housing is integrally linked to other human rights and to the fundamental principles upon which the Covenant is premised. This 'the inherent dignity of the human person' from which the rights in the Covenant are said to derive requires

[117] At para 18.

that the term housing be interpreted so as to take account of a variety of other considerations. Secondly, the reference in article 11(1) must be read as referring not just to housing but to adequate housing."[118]

106. This Court has recognised that "housing" in s 26 encompasses more than just a shelter from the elements. In the *P E Municipality* judgment this Court held that –

"Section 26(3) evinces special constitutional regard for a person's place of abode. It acknowledges that a home is more than just a shelter from the elements. It is a zone of personal intimacy and family security. Often it will be the only relatively secure space of privacy and tranquillity in what (for poor people in particular) is a turbulent and hostile world. Forced removal is a shock for any family, the more so for one that has established itself on a site that has become its familiar habitat."[119]

107. The importance of location as part of adequate housing, with particular reference to proximity to employment options, has been recognised in international human rights law. The United Nations Committee on Economic Social and Cultural Rights has stated that –

[118] CESCR, General Comment 4 at para 7.
[119] At para 17.

"adequate housing must be in a location which allows access to employment options, health care services, schools, child-care centres and other social facilities. This is true in both large cities and in rural areas where the temporal and financial costs of getting to and from the place of work can place excessive demands upon the budgets of poor households." [120] (emphasis added)

108. The Special Rapporteur on Adequate Housing, Miloon Kothari, recently authored a report on the implementation of the right to adequate housing in various countries.[121] Kothari's Report states that –

"As recognised by several human rights bodies, forced evictions constitute prima facie violations of a wide range of internationally recognised human rights and can only be carried out in exceptional circumstances and in full accordance with human rights law. As a result of forced evictions, people are often left homeless and destitute, without means of earning a livelihood and, in practice, with no effective access to legal or other remedies. Forced evictions are often associated with physical and psychological injuries to those affected, with a particular

[120] CESCR, General Comment 4 at para 8(f).
[121] *"Implementation of General Assembly Resolution 60/251 of 15 March 2006, entitled 'Human Rights Council' Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, Miloon Kothari,"* 5 February 2007.

impact on women and on persons already living in extreme poverty, children, indigenous peoples, minorities and other vulnerable groups."[122]

109. Kothari's Report records that an International Workshop on Forced Evictions was held in Berlin in June 2005, for the purpose of developing guidelines aimed at assisting States and the international community in developing policies and legislation to address forced evictions.[123] Those guidelines have been developed and are attached to Kothari's report.[124] They are entitled *"Basic Principles and Guidelines on Development Based Evictions and Displacement."* They were accepted by the Human Rights Council at its 5th session on 11 June 2007. For convenience we shall refer to them as the *"the International Eviction Guidelines."* We shall refer to their content in greater detail below. At this stage it is important to note that they require evictees to be provided with alternative housing which *"should be situated as close as possible to the original place of residence and source of livelihood of those evicted."*[125] (emphasis added)

110. In *Victoria and Alfred Waterfront (Pty) Ltd and Another v Police Commissioner, Western Cape and Others*[126] the Cape High Court recognised that the right to life includes the right to livelihood.[127] The

[122] At para 21.
[123] At para 22.
[124] As Annex 1.
[125] At para 43 of the Guidelines.
[126] 2004 (4) SA 444.
[127] At 448E-F.

Court referred in this regard to the judgment in *Olga Tellis v Bombay Municipal Corporation,*[128] handed down by the Supreme Court of India in 1985, a judgment which is instructive in the present case.

111. The *Olga Tellis* case is often referred to as "the Bombay Pavement Dwellers Case." The petitioners were a group of pavement and slum dwellers in Bombay City. They challenged a decision of the Bombay Municipality, taken in terms of the Bombay Municipal Corporation Act, to evict them and demolish their unlawful pavement and slum dwellings.

112. The Indian Constitution does not include a right to adequate housing or – at least formally – justiciable socio-economic rights.[129] The petitioners' case was based on the right to life guaranteed in the Indian Constitution in the following terms –

[128] (1985) 3 SCC 545.

[129] The Indian Constitution of 1949 contains two distinct parts. Part III (Articles 12 to 35) guarantees fundamental rights – broadly civil and political rights – to all citizens, and some of these, including the right to life (Article 21) to all persons. Part IV (Articles 36 to 51) contains the "Directive Principles of State Policy" ("the Directive Principles"), many of which correspond with the provisions of the International Covenant on Economic, Social and Cultural Rights. Article 37 stipulates that the socio-economic provisions of the Directive Principles are considered to be "fundamental in the governance of the country," but that they "shall not be enforceable by any court," instead "it shall be the duty of the state to apply these principles in making laws."

The Indian judiciary has however infused the fundamental rights in Part III with the content of the Directive Principles in Part IV, effectively rendering the latter justiciable. In *Keshavananda Bharati v State of Kerala* (1973) 4 SCC 225 the court declared that "in building up a just social order it is sometimes imperative that the fundamental rights should be subordinated to directive principles." This view has prevailed since and today the Directive Principles are viewed as critical aids to interpret the Constitution and, more specifically, as forming the basis, scope and extent of the fundamental rights.

*"**21 Protection of life and personal liberty** - No person shall be deprived of his life or personal liberty except according to procedure established by law."*

113. The petitioners contended that their eviction would destroy their means of livelihood and that this would amount to an unjustifiable infringement of their right to life.

114. The Indian Supreme Court, per Chandrachud CJ, explained the petitioners' case in the following terms –

"They do not contend that they have a right to live on the pavements. Their contention is that they have a right to live, a right which cannot be exercised without the means of livelihood. They have no option but to flock to big cities like Bombay which provide the means of bare subsistence. They only choose a pavement or a slum which is nearest to their place of work. In a word, their plea is that the right to life is illusory without a right to the protection of the means by which alone life can be lived. And, the right to life can only be taken away or abridged by a procedure established by law, which has to be fair and reasonable, not fanciful or arbitrary such as is prescribed by the Bombay Municipal Corporation Act."[130] (emphasis added)

[130] At para 2.

115. The predicament of the Bombay pavement and slum dwellers was strikingly similar to the predicament of the applicants and the broader class in this case. As the Indian Supreme Court stated –

"The petitioners live in slums and on pavements because they have small jobs to nurse in the city and there is nowhere else to live. Evidently, they choose a pavement or a slum in the vicinity of their place of work, the time otherwise taken in commuting and its cost being forbidding to their slender means. To lose the pavement or the slum is to lose the job."[131]

116. The Court found that it was in the public interest that public places such as pavements and paths were not encroached upon.[132] However the Court also found that the eviction of the petitioners from their dwellings would result in the deprivation of their livelihood and that the right to life in the Indian Constitution included the right to livelihood. The Court quoted Douglas J who had held as follows in the US Supreme Court matter of *Baksey v Board of Regents*[133] –

"The right to work, I have assumed was the most precious liberty that man possesses. Man has indeed, as much right to work as he has to live,

[131] At para 36.
[132] At para 11.
[133] 347 MD 442 (1954).

to be free and to own property. To work means to eat and it also means to live."[134]

117. The Indian Supreme Court then ruled as follows –

"An important facet of [the right to life] is the right to livelihood because no person can live without the means of living, that is, the means of livelihood….. Deprive a person of his right to livelihood and you shall have deprived him of his life. Indeed, that explains the massive migration of the rural population to big cities. They migrate because they have no means of livelihood in the villages. The motive force which propels their desertion of their hearths and homes in the village is the struggle for survival, that is, the struggle for life. So unimpeachable is the evidence of the nexus between life and the means of livelihood. They have to eat to live: Only a handful can afford the luxury of living to eat. That they can do, namely, eat, only if they have the means of livelihood. That was the context in which it was said by Douglas J in Baksey that the right to work is the most precious liberty that man possesses. It is the most precious liberty because it sustains and enables a man to live and the right to life is a precious freedom. 'Life' as observed by Field J in Munn v Illinois[135] *means something more than mere animal existence and the inhibition*

[134] At para 21.
[135] (1877) 94 US 113.

against the deprivation of life extends to all those limits and faculties by which life is enjoyed."[136] (emphasis added)

118. The Court held that the right to livelihood imposed negative rather than positive duties on the State –

"The State may not, by affirmative action, be compellable to provide adequate means of livelihood or work to the citizens. But any person, who is deprived of his right to livelihood except according to just and fair procedure established by law, can challenge the deprivation as offending the right to life conferred by Article 21."[137]

119. In the result the Court held that, despite the fact that it infringed the right to life, the eviction of the pavement and slum dwellers was justified by the provisions of the Bombay Municipal Corporation Act.[138] However the Court ordered the state to provide alternate sites for pavement and slum dwellers who had been in occupation for significant periods of time. The Court ordered that these sites were to be provided at Malavani, an area in the City which had been proposed by the government, *"or at such other convenient place as the Government considers reasonable <u>but not further away in terms of distance</u>."* The Court ordered further that the Slum Upgradation Programme under which basic amenities are given to

[136] At para 32.
[137] At para 33.
[138] At para 42.

slum dwellers be *"implemented without delay"* and that *"highest priority must be given by the State Government to the resettlement of these unfortunate persons."* Finally the Court ordered that *"in order to minimise the hardship involved in any eviction, it is directed that the slums will not be removed until one month after the end of the current monsoon season, that is, until October 31, 1985, and thereafter only in accordance with the present judgment."*[139]

120. In this case the applicants and the broader class are in their present predicament by virtue of an historical legacy which has denied them both sufficient shelter and access to economic opportunities. They are the poorest and most marginalised members of our society. They have notwithstanding this historical legacy, and without any assistance from the state, found shelter, albeit of poor quality, and small jobs to nurse. They have thereby fulfilled two needs necessary to sustain life: they have a measure of protection from the elements and they are able to eat. "Adequate" is defined in the Collins Dictionary as "*able to fulfil a need without being abundant or outstanding.*"[140] We submit that, since the housing currently occupied by the applicants fulfils these two life-sustaining needs it must be regarded as "access to adequate housing" in terms of s 26(1) of the Constitution. This is not to say it is good enough. But it is does fulfil at least two crucial interests – interests which in our

[139] At para 57.
[140] p 14.

submission s 26(1), read with s 11 (the right to life) and s 10 (the right to human dignity), is designed to protect.

121. If the overall purpose of s 26 of the Constitution is to progressively achieve access to adequate housing for all in our country, then it cannot be contemplated that people may be deprived of the housing needs they have managed to fulfil on their own, particularly when to do so would further marginalise the poorest and most vulnerable members of our society.

122. We submit that the negative aspect of s 26(1) is necessarily infringed when State action deprives the desperately poor of housing needs which they have managed to fulfil on their own, albeit in a meagre and limited fashion.

123. We submit that such housing needs must include, not only shelter from the elements, but also the need to be housed in close proximity to livelihood opportunities, perhaps not in every case, but certainly in this case where the desperate circumstances of the applicants and the broader class mean that the loss of their livelihoods will threaten their survival. To use the terminology in the Bombay Pavement Dwellers Case: to lose the bad building is to lose the job which is to lose the ability to eat. This threatens life itself. In the Supreme Court of Appeal judgment

the Court referred by way of comparison to the decision in *Soobramoney v Minister of Health, Kwa-Zulu-Natal*[141] and noted that in that case *"the patient's right to life, which is at least morally of a higher order than the right to housing"*[142] was compromised. We submit that the right to life is directly implicated in this case,[143] as is the right to human dignity.[144]

124. We accordingly submit that the Supreme Court of Appeal ought to have ruled that evicting the applicants in their present circumstances would infringe their right of access to adequate housing in terms of s 26(1). The City should then have been called upon to justify this infringement under s 36.

125. It is to the Supreme Court of Appeal's judgment on this aspect that we now turn.

The SCA Judgment on s 26(1)

126. The Supreme Court of Appeal found that evicting the applicants would not violate their right of access to adequate housing because the housing in which they are currently living is unsafe. As Harms ADP put it –

[141] 1998 (1) SA 765 (CC).
[142] R17, p1267, para 45.
[143] Section 11 of the Constitution.
[144] Section 10 of the Constitution.

"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 a person poisonous food is to deny that person food."[145]

127. We submit, with respect, that this approach fails to adopt a purposive and generous interpretation to the right of access to adequate housing and to identify the interests the right is meant to protect. As we have submitted above these interests must include shelter from the elements and, at least in this case, proximity to livelihood opportunities.

128. We submit further, with respect, that the Supreme Court of Appeal failed to ask the question "adequate relative to what?" Reducing the applicants to homelessness would deprive them of <u>any</u> shelter from the elements at all. Moreover it would expose them to a far greater risk of danger and disease than that which they presently face in the buildings. As this Court ruled in *Jaftha v Schoeman* –

"<u>Relative to homelessness</u>, to have a home one calls one's own, even under the most basic circumstances, can be a most empowering and dignifying human experience."[146]

[145] R17, p1269, para 46.
[146] At para 39.

129. Millions of people in our country live in conditions which pose risks to their health and safety. This includes approximately 800 000 people living in the 190 informal settlements in the City's area of jurisdiction. We submit that it cannot be correct that depriving these people of their meagre shelters, in circumstances which would leave them worse off, would not infringe their right of access to adequate housing. We submit, with respect, that the corollary of the Supreme Court of Appeal's ruling on this aspect, is that the State may deprive a person of the little food she has which keeps her from starving. The State does not thereby violate any constitutional right because the food is not sufficiently nutritious.

130. In its judgment the Supreme Court of Appeal referred to a finding of the High Court that *"the City was not entitled to infringe the respondents' right to unsafe (inadequate) housing."*[147] We respectfully submit that the High Court did not make such a finding. It is however important to emphasise that the applicants do not claim a positive right to live in unsafe buildings. What the applicants and the broader class claim is a negative right not to be deprived of the limited housing needs they have managed to secure for themselves. The difference is illustrated by the Bombay Pavement Dwellers Case. It is also illustrated by *Jones v City of Los Angeles*, a judgment of the United States Court of Appeals for the Ninth Circuit.[148]

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[147] R17, p1268, para 46.
[148] *Jones v City of Los Angeles*, No 04 – 55324 (9th Cir, April 14, 2006), as yet unreported.

131. *Jones v City of Los Angeles* was an appeal against a decision of the United States District Court for the Central District of California dismissing a petition for a permanent injunction preventing the City of Los Angeles from enforcing an ordinance that criminalised sitting, lying and sleeping on public streets and pavements at all times within the City limits.

132. The appellants were six homeless people who were arrested and convicted for violating this ordinance. They sought an injunction restraining the City from enforcing the ordinance between 9:00pm and 6:30am, or at any time against the temporarily infirm or permanently disabled.

133. The appellants based their case on the 8th amendment to the United States Constitution which prohibits cruel and unusual punishment. The substance of the claim was that enforcing a provision which criminalised homelessness in circumstances where a lack of available and affordable accommodation forced the appellants to sleep on the streets at night constituted cruel and unusual punishment. The appellants were successful. The Court of Appeal held as follows –

"There is obviously a homeless problem in the City of Los Angeles, which the City is free to address in any way that it sees fit, consistent with the

constitutional principles we have articulated. By our decision we in no way dictate to the City that it must provide sufficient shelter for the homeless or allow anyone who wishes to sit, lie or sleep on the streets of Los Angeles at any time and at any place within the City. All we hold is that, so long as there is a greater number of homeless individuals in Los Angeles than the number of available beds, the City may not enforce section 41.18(d) at all times and places throughout the City against homeless individuals for involuntarily sitting, lying and sleeping in public. Appellants are entitled, at a minimum to a narrowly tailored injunction against the City's enforcement of section 41.18(d) at certain times and places."

134. Clearly the appellants had no right to sit, lie or sleep in public. Indeed the relevant ordinance made this a criminal offence. However the ordinance, despite being valid in all respects, could not be enforced in circumstances in which the constitutional rights of the appellants would be violated. Subject to the fact that we also attack the constitutionality of the NBRA, the principle on which the case for the applicants and the broader class is based, is the same.

135. Although the Supreme Court of Appeal in the present matter found that evicting the applicants would not violate their right of access to adequate housing, it did find as follows –

"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 applicants] is not to be found in the Constitution."[149]

136. The "right" to which the Supreme Court of Appeal refers is the perceived claim by the applicants to permanent housing in the inner city of Johannesburg and nowhere else. As has been explained above the applicants have never demanded accommodation in the inner city as of right.

137. What is important however is the Supreme Court of Appeal's recognition that location, with particular reference to proximity to employment opportunities, is part of adequate housing. That is, with respect, all that the applicants say.

138. The Supreme Court of Appeal found that *"the powers of the City to order the vacation of unsafe buildings are not dependent upon its being able to offer alternative accommodation to the occupants."*[150] It also found that *"the eviction of occupants triggers a constitutional obligation on the City to provide at least minimum shelter to those occupants who have no*

[149] R17, p267, para 44.
[150] R17, p1251, para 5.

access to alternative housing."[151] These two findings appear to us, with respect, to be mutually contradictory. Furthermore the source of the constitutional obligation referred to in the latter finding is not clear from the judgment. The source may be s 26(2), since the Supreme Court of Appeal refers to the judgment of this Court in *Grootboom* and to the Emergency Housing Policy which was adopted in response to the *Grootboom* judgment.[152]

139. It is to section 26(2) of the Constitution that we now turn.

Section 26(2)

140. S 26(2) circumscribes the positive aspect of s 26(1). It grants positive rights to rights bearers and imposes positive duties on the state.

The City's Obligations in terms of s 26(2)

141. In terms of the positive duties imposed by section 26(2), the state, including local government, is required to devise and implement a "reasonable" housing programme. The *Grootboom* judgment set out the broad principles which a housing programme must comply with in order

[151] R17, p1251, para 5.
[152] R17, p1269, para 47.

to be reasonable within the meaning of s 26(2). In summary, a state housing programme must –

- be comprehensive, coherent and effective;[153]

- have sufficient regard for the social, economic and historical context of widespread deprivation;[154]

- have sufficient regard for the availability of the state's resources;[155]

- make short, medium and long term provision for housing needs;[156]

- give special attention to the needs of the poor and the most vulnerable;[157]

- seek to lower administrative, operational and financial barriers over time;[158]

- allocate responsibilities and tasks clearly to all three spheres of government;[159]

[153] *Grootboom* at para 40.
[154] *Grootboom* at para 43.
[155] *Grootboom* at para 46.
[156] *Grootboom* at para 43.
[157] *Grootboom* at para 42.
[158] *Grootboom* at para 45

- be adequately resourced and free of bureaucratic inefficiency and onerous regulations;[160]

- be implemented reasonably;[161]

- respond with care and concern to the needs of the most desperate;[162]

- achieve more than a mere statistical advance in the numbers of people accessing housing by demonstrating that the needs of the most vulnerable are being catered for;[163] and

- a program that excludes a significant segment of society cannot be said to be reasonable.[164]

The Housing Act

142. The Housing Act[165] was promulgated in order to give effect to the state's positive obligations in terms of s 26 of the Constitution.

143. Thus its Preamble records that –

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[159] *Grootboom* at para 39
[160] *Grootboom* at para 42
[161] *Grootboom* at para 42
[162] *Grootboom* at para 44
[163] *Grootboom* at para 44
[164] *Grootboom* at para 43.
[165] Act 107 of 1997.

"In terms of section 26 of the Constitution of the Republic of South Africa, 1996, everyone has the right to have access to adequate housing, and the state must take reasonable legislative and other measures within its available resources, to achieve the progressive realisation of this right."

144. The Housing Act imposes specific obligations on local government in this regard. Section 9 requires every municipality to take all reasonable and necessary steps within the framework of national and provincial housing legislation and policy to –

- ensure that the inhabitants of its area of jurisdiction have access to adequate housing on a progressive basis;[166]

- set housing delivery goals in respect of its area of jurisdiction;[167]

- identify and designate land for housing development;[168]

- ensure that conditions not conducive to the health and safety of the inhabitants of its area of jurisdiction are removed;[169]

[166] Section 9(1)(a)(i)
[167] Section 9(1)(b)
[168] Section 9(1)(c)
[169] Section 9(1)(a)(ii).

- create and maintain a public environment conducive to housing development which is financially and socially viable.[170]

- promote the resolution of conflicts arising in the housing development process;[171] and

- initiate, plan, co-ordinate, facilitate, promote and enable appropriate housing development in its area of jurisdiction.[172]

145. In terms of section 2 of the Housing Act municipalities must perform the above functions in a manner which –

- gives priority to the needs of the poor in respect of housing development;[173]

- involves meaningful consultation with individuals and communities affected by housing development;[174]

- ensures that housing development is economically, fiscally, socially and financially affordable and sustainable;[175] and

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[170] Section 9(1)(d)
[171] Section 9(1)(e)
[172] Section 9(1)(f)
[173] Section 2(1)(a). Notably section 2 of the Rental Housing Act 50 of 1999 also requires priority to be given to the poor.
[174] Section 2(1)(b)

- ensures that housing development is administered in a transparent, accountable and equitable manner and upholds the practice of good governance.[176]

146. In relation to the requirement to give priority to the needs of the poor, the following remarks of Nugent JA in the judgment in *MEC, Department of Welfare, Eastern Cape v Kate,*[177] *albeit* in the welfare context, are apposite –

"To be held in poverty is a cursed condition. Quite apart from the physical discomfort of deprivation, it reduces a human in his or her dignity. The inevitable result of being unlawfully deprived of a grant that is required for daily sustenance is the unnecessary further endurance of that condition for as long as the unlawfulness endures."[178]

The Emergency Housing Programme

147. The National Housing Code's "Programme for Housing Assistance in Emergency Housing Circumstances," adopted in terms of the Housing Act, ("the Emergency Housing Programme"),[179] was a direct response to *Grootboom's* ruling that the State's positive obligations in terms of

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[175] Section 2(1)(c)(ii)
[176] Section 2(1)(c)(iv)
[177] 2006 (4) SA 478 (SCA).
[178] At para 33.
[179] R5, p306 ff

section 26 of the Constitution include an obligation to provide temporary relief for persons in crisis or in a desperate situation –

"The Grootboom judgment suggested that a reasonable part of the national budget be devoted to providing relief for those in desperate need. Consequently, this programme is instituted in terms of section 3(4)(g) of the Housing Act, 1997, and will be referred to as the National Housing Programme for Housing Assistance in Emergency Housing Circumstances. Essentially, the objective is to provide temporary relief to people in urban and rural areas who find themselves in emergencies as defined and described in this Chapter."[180]

148. Clause 12.3.1 of the Emergency Housing Programme defines an emergency as, *inter alia*, a situation where –

"the affected persons are, owing to circumstances beyond their control, evicted or threatened with imminent eviction from land or unsafe buildings, or situations where pro-active steps ought to be taken to forestall such consequences or whose homes are demolished or threatened with imminent demolition, or situations where pro-active steps ought to be taken to forestall such consequences."[181]

[180] R5, p307, lines 6-19.
[181] R5, p310.

149. The Programme makes funding available from the Provincial Departments of Housing for emergency housing assistance.

150. The Programme requires municipalities to investigate and assess the emergency housing need in their areas of jurisdiction and to *"plan proactively"* therefor. Where an emergency housing need is foreseen, municipalities must apply to the relevant Provincial Department of Housing for funding for the necessary assistance. After approval by the MEC of the relevant Provincial Department of Housing, the funding is made available to the municipality for direct implementation of the assistance. In terms of the Programme the Provincial Department of Housing may provide support to ensure the successful implementation of the assistance.

151. While the Programme is flexible to cater for diverse situations, it lays down certain minimum standards. It requires that water and sanitation be provided and that the floor area of a temporary shelter be at least 24 metres squared. Notably an amount of R 23 892.00, including VAT, may be made available to municipalities, per grant.[182]

152. The Emergency Housing Programme is premised on the approach that emergency assistance under the programme should represent an initial

[182] R23 892.00 was the figure at the time of the adoption of the Emergency Housing Programme in 2004. The figure has increased significantly since then.

phase towards a permanent housing solution.[183] This is reflected in each of the seven "categories of emergency housing situations" described in the Programme.[184]

153. We submit that the Emergency Housing Programme clearly envisages that temporary shelter is to be provided to address the needs of those in a crisis situation and that this will be a precursor to a more permanent housing solution – without any hiatus between the temporary and permanent solutions. It would make no rational sense, nor would it be constitutionally justifiable to have a situation where an occupier who faces an eviction is granted temporary shelter for a few weeks, but is then evicted from that temporary shelter and again faces a crisis of homelessness.

The City's Failure to comply with its Obligations in terms of s 26(2)

154. The City's Housing Plan has been discussed above. It leaves the applicants and the broader class entirely out of account. This despite the fact that they stand to be displaced by the ICRS and despite the fact that they constitute some of the poorest and most vulnerable members of our society. The City's Housing Plan makes no short, medium or long term provision for these people.

[183] R5, p309, lines 19-20.
[184] R5, p313-314.

155. We submit, with respect, that the Supreme Court of Appeal ought accordingly to have found that the City's Housing Plan fails to comply with the requirements of s 26(2) of the Constitution.

156. While paragraph 2.1 of the order of the Supreme Court of Appeal orders the City to provide emergency housing for the applicants in this matter we respectfully submit that this does not go far enough. We submit that s 26(1) and (2) of the Constitution require the City to make provision for where the applicants are to live after this temporary stay; to take account of the applicants' livelihood strategies in the location of both the temporary accommodation and the accommodation or land made available to the applicants thereafter and to make similar provision for the broader class on whose behalf the applicants act.

157. We submit that the City's claim that it does not have the necessary funds is simply not borne out by the evidence on the papers. As we have seen above, the Emergency Housing Programme allows the City to obtain funding from Provincial Government. Furthermore, the applicants and the members of the broader class qualify for institutional housing subsidies which could be used to assist them.

158. We submit that the affidavit of Karen Brits, filed on 25 February 2007 after the hearing of argument in the Supreme Court of Appeal,[185] reveals that the City does indeed have funds available to provide temporary accommodation to people in crisis and that where buildings are unsafe or unhealthy it is at least in some instances a viable alternative to eviction for the City to take control of the building, provide basic services and use the building to provide temporary accommodation until alternative accommodation is available.[186]

159. Furthermore the affidavit of Sandra Liebenberg, filed in response to Brits' affidavit on 6 March 2007,[187] reveals that the City has since December 2005 resolved to investigate "affordable rental accommodation" available "in or on the periphery of the inner city."[188] This appears from a document emanating from the City's mayoral committee dated 1 December 2005.[189] This document reveals that the City itself considers it feasible to rent accommodation to inner city inhabitants at between R500 and R800 per month.[190]

160. We point out that the applicants and the broader class do not say that they must all be provided with permanent accommodation immediately.

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[185] R16, p1143
[186] R16, p1144 -1145, paras 7-8.
[187] R16, p1170.
[188] R16, p1173, para 8.
[189] R16, pp1175-1180.
[190] R16, p1176, lines 12-18.

All they say is that the City must devise a plan. This is entirely reasonable in circumstances in which the displacement of 67 000 people is sought.

161. Notably the International Eviction Guidelines provide as follows in this regard –

"All persons, groups and communities have the right to resettlement, which includes the right to alternative land of better or equal quality and housing that must satisfy the following criteria for adequacy: accessibility, affordability, habitability, security of tenure, cultural adequacy, suitability of location, and access to essential services such as health and education."[191] (emphasis added)

162. Moreover, at the very least -

"Evictions should not result in individuals being rendered homeless or vulnerable to the violation of other human rights. The state must make provision for the adoption of all appropriate measures, to the maximum of its available resources, especially for those who are unable to provide for themselves, to ensure that adequate alternative housing, resettlement or access to productive land, as they case may be, is available and provided. Alternative housing should be situated as close as possible to

[191] International Eviction Guidelines, p17, para 16.

the original place of residence and source of livelihood of those evicted"[192] (emphasis added)

163. The order of the Supreme Court of Appeal in the present case orders the eviction of the applicants within one month.[193] While it orders the City to relocate the applicants to a "temporary settlement area" in terms of the Emergency Housing Policy,[194] there is no indication of where such temporary settlement area will be and in particular whether it will be close to the applicants' sources of livelihood in the inner city, what it will consist of, whether shelters still need to be constructed or indeed whether the temporary settlement area will be ready for occupation within one month. There is thus the very real risk of the applicants being rendered homeless and their constitutional rights being violated in the interim.

164. We submit that having ruled that the City has a constitutional obligation to provide at least minimum shelter to evictees who have no access to alternative housing,[195] the Supreme Court of Appeal ought to have ordered that the applicants could not be evicted until such shelter was ready for occupation. At the very least, an order of eviction should have been made contingent on the making available of suitable adequate

[192] International Eviction Guidelines, p 21, para 43.
[193] R17, p1279, para 78 (c) 1.2 and 1.3
[194] R17, p1280, para 2.1.
[195] R17, p1251, para 5.

shelter readily accessible to the applicants' sources of livelihood in the inner city.

165. This would accord with the International Eviction Guidelines which provide as follows –

"All resettlement measures such as construction of homes, provision of water and electricity, sanitation, schools, access roads and allocation of land and sites, must be consistent with present guidelines and internationally recognised human rights principles and completed before those who are evicted are moved from their original areas of dwelling."[196] (emphasis added)

166. We now turn to s 26(3) of the Constitution.

Section 26(3)

167. We shall argue in our section D below that ss 12(4)(b), 12(5) and 12(6) of the NBRA violate s 26(3) of the Constitution by permitting evictions without a court order and arbitrary evictions.

168. We also submit that a consideration of the relevant circumstances, in terms of s 26(3), ought to have precluded, or at least required the City to

[196] International Eviction Guidelines, p 21, para 44.

justify, the eviction of the applicants in the present case. The Supreme Court of Appeal disagreed. It is thus necessary to examine the meaning of "relevant circumstances" for the purposes of s 26(3).

What are "the relevant circumstances" in terms of s 26(3)?

169. We submit that "the relevant circumstances" in s 26(3) must be interpreted purposively and generously.

170. This Court endorsed such an approach in the *PE Municipality* judgment, in the following terms -

"A third aspect of section 26(3) is the emphasis it places on the need to seek concrete and case specific solutions to the difficult problems that arise. Absent the historical background outlined above, the statement in the Constitution that the courts must do what courts are normally expected to do would appear otiose (superfluous), even odd. Its use in section 26(3), however, serves a clear constitutional purpose. It is there precisely to underline how non-prescriptive the provision is intended to be. The way in which the courts are to manage the process has accordingly been left as wide open as constitutional language could

achieve, by design and not by accident, by deliberate purpose and not by omission."[197]

171. We submit that if, as we contend, the eviction of the applicants would infringe their rights in terms of s 26(1) or other constitutional rights such as the right to sufficient food and water,[198] the right to life[199] or the right to human dignity[200] then those are relevant – indeed fundamentally significant – circumstances which a court not only may but should take into account in deciding whether or not to grant an eviction order. Similarly, if an organ of state is seeking an eviction order and is in breach of its positive duties in terms of s 26(2) in respect of the proposed evictees then we submit that that is a relevant circumstance which may and should be taken into account.

172. We submit that this accords with the dictum of this Court in *Grootboom* that "*all State action in relation to housing falls to be assessed against the requirements of section 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."*[201] (emphasis added)

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[197] At para 22.
[198] Section 27(1)(b) of the Constitution.
[199] Section 11 of the Constitution.
[200] Section 10 of the Constitution.
[201] At para 82.

173. Similarly in *Jaftha v Schoeman* this Court held that s 26 as a whole is *"is aimed at creating a dispensation in which every person has adequate housing and in which the state may not interfere with such access unless it would be justifiable to do so."*[202] (emphasis added)

174. The dispensation created by s 26 as a whole and the infusion of the right to human dignity into that dispensation were reflected in this Court's ruling in *Grootboom* that the state has an obligation, at the very least, to ensure that evictions are humanely executed.[203]

175. In *Modderklip East Squatters v Modderklip Boerdery (Pty) Ltd ("Modderklip")*[204] the Supreme Court of Appeal held that –

"There is another angle. To the extent that we are concerned with the execution of the court order, Grootboom made it clear that the government has an obligation to ensure, at the very least, that evictions are executed humanely. As must be abundantly clear by now, the order cannot be executed – humanely or otherwise – unless the state provides some land."[205] (emphasis added)

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[202] At para 28.
[203] At para 88.
[204] 2004 (6) SA 40 (SCA).
[205] At para 26.

176. The above dictum makes it clear that availability of alternative land is relevant, at the very least, to the question of whether an eviction may be humanely executed. Of course *Modderklip* concerned an eviction application at the instance of a private landowner. We submit that the above principle must apply with even greater force where – as here – the eviction application is brought by the state itself.[206]

177. Simply put, our argument is that, whatever else the phrase means, "relevant circumstances" in s 26(3) must include the breach of relevant constitutional rights. Indeed we submit that this would be so even if the phrase *"after considering all relevant circumstances"* did not appear in s 26(3).

178. We submit that the above proposition does not conflict with, and in fact accords with, the judgment of the Supreme Court of Appeal in *Brisley v Drotsky.*[207] In that judgment the Supreme Court of Appeal ruled that the term "relevant circumstances" in s 26(3) refers to the legally relevant

[206] For an analysis of the judgments in the *Modderklip* and *P E Municipa*lity cases and the impact of section 26 rights in the context of the eviction of homeless persons see Professor A J Van der Walt: "*Transformative Constitutionalism and the Development of South African Property Law"* Part 1 TSAR 2005 (4) 655 and Part 2 TSAR 2006 (1) 1. See also A J Van der Walt *"The State's Duty to Protect Property Owners v the State's Duty to Provide Housing: Thoughts on the Modderklip Case"* (2005) 21 SAJHR 144; A J Van der Walt *Constitutional Property Law* 1st ed 2005 p 24-5; Theunis Roux : "*Continuity and Change in a Transforming Legal Order: The Impact of Section 26(3) of the Constitution on South African Law*" (2004) SALJ 466; Pierre de Vos " "*Grootboom, The Right of Access to Housing and Substantive Equality as Contextual Fairness*" (2001) 17 SAJHR 258; Raylene Keightley : "*The Impact of the Extension of Security of Tenure Act on an Owner's Right to Vindicate Immovable Property*" (1999) 15 SAJHR 277 and Rautenbach : "*The Limitation of Rights and 'Reasonableness' in the Right to Just Administrative Action and the Rights to Access to Adequate Housing, Health Services and Social Security*" (2005) TSAR 627.

[207] 2002 (4) SA 1 (SCA)

circumstances, that is, the circumstances determined by the relevant law. Plainly that would include the Constitution. Indeed, the judgment in *Brisley v Drotsky* recognised that where an eviction order is sought by an organ of state the state's obligations under s 26(1) and (2) might possibly and in certain circumstances place a limitation on the right of eviction. The Court held as follows in this regard -

"Artikel 26(3) vereis dat alle relevante omstandighede in ag geneem moet word maar bepaal nie self dat enige omstandighede relevant sal wees nie.

Daarvoor moet na die algemeen geldende reg gekyk word. Omstandighede kan slegs relevant wees indien hulle regtens relevant is... Regtens is `n eienaar geregtig op besit van sy eiendom en op `n uitsettingsbevel teen `n persoon wat sy eiendom onregmatiglik okkupeer behalwe indien daardie reg beperk word deur die Grondwet, `n ander wet, `n kontrak of op een of ander ander regsbasis. 'n Voorbeeld van sodanige beperking is te vinde in die Wet op die Voorkoming van Onwettige Uitsetting en Onregmatige Besetting wat, soos hierbo aangetoon, `n uitsettingsbevel in die omstandighede genoem in daardie wet onderhewig maak aan die uitoefening van `n diskresie deur die hof. Artikel 26(2), wat sekere behuisingsverpligtinge op die Staat plaas, mag moontlik in bepaalde gevalle so 'n beperking op die Staat se

eiendomsreg plaas. Vir doeleindes van hierdie saak is dit egter nie nodig om te beslis of dit wel die geval is nie." (emphasis added)

179. It is necessary to deal with the example given in the judgment of the Supreme Court of Appeal in this matter to explain the meaning it sought to give to "relevant circumstances" in s 26(3). This was the following –

"Suppose a law of general application prohibits the use of a national heritage site for residential purposes and criminalises such 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 the 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."[208]

180. It is important to emphasise that we do not argue that s 26(3) gives the courts a general discretion in respect of eviction applications (where PIE does not apply) or that such discretion would include considerations such as the length of or motivation behind the occupation. Our argument accepts that those considerations would be relevant only if PIE applied.

[208] R17, p1266, para 41.

(While we argue below that PIE does apply, we accept here for the sake of this argument that it does not).

181. Our argument is that the breach of relevant constitutional rights constitutes a relevant circumstance which may legitimately – and indeed ought to be – taken into account by a court in deciding whether or not to grant an eviction order. To use the Supreme Court of Appeal's example – if evicting the occupiers of the national heritage site would render them homeless or deprive them of their source of livelihood (say for example that they survived exclusively on fishing at the site) these would be relevant circumstances that a court could and should take into account. This is because their eviction would infringe their rights in terms of s 26(1) and possibly other constitutional rights such as the right to life and the right to human dignity. Also relevant would be the steps taken by the state to give effect to its positive obligations in terms s 26(2) in relation to the proposed evictees. In our submission these factors would be relevant even if the law in terms of which the state sought to evict the occupiers of the national heritage site was constitutional. This point is illustrated by the decision in *Jones v City of Los Angeles* discussed above.

182. We accordingly submit that the Supreme Court of Appeal ought to have found that "relevant circumstances" for purposes of s 26(3) include the

breach of relevant constitutional rights, in this case, *inter alia* s 26(1) and (2) of the Constitution.

D THE UNCONSTITUTIONALITY OF THE NBRA

183. Sections 12(4)(b), 12(5) and 12(6) of the NBRA provide as follows –

> *"(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) …….*
>
> *(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…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."

Evictions without a Court Order

184. It was argued on behalf of the applicants before the Supreme Court of Appeal that these sections allow for eviction without a court order in violation of s 26(3) of the Constitution. The Supreme Court of Appeal rejected this argument on the following basis –

"The case for 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[209]*..... Administrative orders and notices 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*

[209] R17, p1271, para53.

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."[210]

185. We submit, with respect, that the Supreme Court of Appeal's reasoning pays insufficient regard to the meaning of the term "evict." PIE defines evict as *"to deprive a person of occupation of a building or structure, or the land on which such building or structure is erected <u>against his or her will</u> and 'eviction' has a corresponding meaning."*[211] We submit that a notice in terms of s 12(4)(b) does just this, without a court order.

186. The Supreme Court of Appeal held that *"it is only in the event of a failure to comply [with a notice in terms of s 12(4)(b)] that the need for a court order arises."* We submit, with respect, that there is no such need in terms of the regime created by ss 12(4)(b), 12(5) and 12(6) of the NBRA. In terms of those provisions people are ordered to vacate their homes on pain of criminal conviction and a fine. The fine is R100.00 for every day on which the occupier remained in occupation of the building after the period specified in the notice to vacate has expired. This is not contingent on nor does this period run from the issuing of a court order. Occupiers, and particularly poor people, are likely to vacate by virtue of the mere threat of such a fine. This, in our submission, is classic constructive eviction. The "need" for a court order simply does not arise. The fact that

[210] R17, p1271, para 55.
[211] Section 1 of PIE.

the City chooses to approach the courts for an eviction order does not change the fact that these provisions of the NBRA are capable of depriving people of their homes without one.

187. We submit, with respect, that the Supreme Court of Appeal ought accordingly to have found that the NBRA purports to allow for allow for eviction without a court order and that this violates s 26(3) of the Constitution.

Arbitrary Evictions

188. We submit that the NBRA is unconstitutional in a further respect – it permits arbitrary evictions. We submit that this is so by virtue of the absence of any guidelines or criteria for the exercise of a local authority's discretion in terms of s 12(4)(b).

189. A local authority may issue a notice ordering any number of people to vacate their homes on pain of criminal sanction *"if it deems it necessary for the safety of any person."* There is no requirement that vacation be deemed necessary for the safety of the residents of the relevant building. "Any person" might be a member of the public.

190. Nor are there any requirements or guidelines as to the degree of risk that ought to be present before people are ordered to vacate their homes. We point out that the City abandoned its eviction applications in respect of four properties in Joel Street, Berea (which were initially before the High Court together with the present applications) after the occupiers had cleared away the refuse on those properties. Ought the presence of refuse to constitute sufficient reason to order people out of their homes? We submit not.

191. We submit that when people stand to lose their homes there ought, at the very least, to be some differentiation between a property that is for example structurally unsound and in danger of collapse and one that has quantities of refuse on it. The NBRA provides no such differentiation.

192. Moreover the NBRA makes no provision for a local authority to approach the residents of a building to discuss any remedial steps that might be taken. This would go to some way towards ensuring that a s 12(4)(b) notice is only issued as a last resort. Had the City approached the occupiers of the Joel Street properties and asked them to take the necessary remedial steps there would have been no need to issue s 12(4)(b) notices and launch eviction applications in respect of those properties. Although the evictions applications in the Joel Street matters were ultimately not pursued by the City, the s 12(4)(b) notices have not

been withdrawn, making the continued occupation of those properties unlawful and subject to criminal prosecution and punishment.

193. While the NBRA does authorise a local authority to issue notices to building owners ordering them to take the necessary remedial steps[212] and while the City frequently does this, it is generally an exercise in futility. Owners have invariably abandoned their buildings many years ago and no longer have any interest in them.

194. Pre s 12(4)(b) notices issued to owners seldom make their way to the residents of bad buildings. The receipt of a s 12(4)(b) notice is generally the first the residents hear that their eviction is sought. The s 12(4)(b) notices do not explain exactly how the building in question poses a health hazard, or a threat to heath and safety and residents must usually visit the City's headquarters to find out exactly what repairs or improvements to the building the City requires. But by then the residents have already been ordered to vacate the building on pain of criminal sanction.

195. We submit that all of the above creates the very real risk of arbitrary evictions, that is, evictions without sufficient reason.[213] Such evictions have the potential to violate not only the right of access to adequate

[212] Section 12(1) of the NBRA.
[213] *First National Bank of SA Ltd t/a Wesbank v Commissioner for the SA Revenue Service* 2002 (4) SA 768 (CC) at para 100.

housing but a host of other constitutional rights, including the right to life and the right to human dignity.

196. Since the NBRA makes no provision for a local authority, prior to issuing a s 12(4)(b) notice, to obtain any information about the residents of a building, such as whether their number includes particularly vulnerable persons such as the elderly and disabled persons or children, or whether they have anywhere to live after their eviction, the local authority has no way of assessing the potential for the violation of constitutional rights.

197. International human rights law states that legislation dealing with evictions is *"an essential basis upon which to build a system of effective protection."* The UN Committee on Economic, Social and Cultural Rights has stated that such legislation must be *"designed to control strictly the circumstances under which evictions may be carried out."*[214] Similarly, the UN Human Rights Committee has stated that any interference with a person's home may take place only in terms of law and that *"relevant legislation must specify in detail the precise circumstances in which such interferences may be permitted."*[215] We submit that the NBRA falls dramatically short of these standards.

[214] CESCR, General Comment 7 at para 10.
[215] UN Human Rights Committee, General Comment 16, paras 3 and 8.

198. In *Dawood, Shalabi and Thomas v Minister of Home Affairs*[216] this Court stressed the importance of guidelines and criteria to guide the exercise of discretionary powers granted by legislation, particularly where constitutional rights are implicated.

199. This Court held as follows in this regard –

> *"It is an important principle of the rule of law that rules be stated in a clear and accessible manner. It is because of this principle that s 36 requires that limitations of rights may be justifiable only if they are authorised by a law of general application. Moreover if broad discretionary powers contain no express constraints, those who are affected by the exercise of the broad discretionary powers will not know what is relevant to the exercise of those powers or in what circumstances they are entitled to seek relief from an adverse decision. In the absence of any clear statement to that effect in the legislation, it would not be obvious to a potential applicant that the exercise of the discretionary powers.... is constrained by the provisions in the bill of rights…If rights are to be infringed without redress, the very purposes of the Constitution are defeated."*[217]

[216] 2000 (3) SA 936 (CC).
[217] At para 47.

200. This Court held that legislative criteria to guide the exercise of discretionary powers may be necessary despite the fact that government officials are required to exercise their powers in accordance with the Constitution –

"The Constitution makes it plain that all government officials when exercising their powers are bound by the provisions of the Constitution….. There is however a difference between requiring a court or tribunal in exercising a discretion to interpret legislation in a manner that is consistent with the Constitution and conferring a broad discretion upon an official who might be quite untrained in law and constitutional interpretation, and expecting that official, in the absence of direct guidance to exercise the discretion in a manner consistent with the provisions of the bill of rights. Officials are often extremely busy and have to respond quickly and efficiently to many requests or applications. The nature of their work does not permit considered reflection on the scope of constitutional rights or the circumstances in which a limitation of such rights is justifiable. It is true that as employees of the state they bear a constitutional obligation to promote the bill of rights as well. But it is important to interpret that obligation within the context of the role that administrative officials play in the framework of government, which is different from that played by judicial officers."[218]

[218] At para 46.

201. Having regard to the above this Court held that –

> *"It is therefore not ordinarily sufficient for the legislature merely to say that discretionary powers that could limit rights should be read in a manner consistent with the Constitution in the light of the constitutional obligation placed upon such officials to respect the Constitution. Such an approach would often not promote the spirit, purport and object of the Bill of Rights. Guidance will often be required to ensure that the Constitution takes root in the daily practice of governance. Where necessary such guidance must be given."*[219]

202. Furthermore, this Court held that legislative criteria may be necessary to guide the exercise of discretion despite the fact that the decisions of the relevant government officials would be subject to review in terms of the Promotion of Administrative Justice Act ("PAJA")[220] This is particularly so where constitutional rights are at stake.[221] This Court held that –

> *"The legislature must take care when legislation is drafted to limit the risk of an unconstitutional exercise of the discretionary powers it confers."*[222]

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[219] At para 54.
[220] Act 3 of 2000.
[221] At para 55.
[222] At para 48.

203. In *Dawood* this Court concluded that the failure of relevant provisions of the Aliens Control Act[223] to identify the criteria relevant to the exercise of the discretionary powers conferred, introduced an element of arbitrariness which was inconsistent with the Constitutional protection of the right to marry and establish a family.[224]

204. The Court held that the effect of the above was -

"*almost invariably that constitutional rights will be unjustifiably limited in some cases. Of even greater concern is the fact that those infringements may often go unchallenged and unremedied."*

205. We submit that this is precisely such a case. As we have stated above the City's eviction applications under the NBRA are in the vast majority of cases unopposed. This is because the residents of bad buildings are poor and struggle to obtain legal representation. This is exacerbated by the fact that the City's applications are invariably brought on an urgent basis.

[223] Act 96 of 1991.
[224] At para 58.

The Appropriate Remedy

206. In our submission neither of the constitutional defects from which the NBRA suffers can be cured by "reading down."[225] We submit that ss 12(4)(b), 12(5) and 12(6) of the NBRA must accordingly be declared unconstitutional.[226]

207. In our submission this is not a case in which "reading in" would constitute an effective or appropriate remedy. As this Court held in *Dawood* –

> *"Where, as in the present case, a range of possibilities exists, and the Court is able to afford appropriate interim relief to affected persons, it will ordinarily be appropriate to leave the legislature to determine in the first instance how the unconstitutionality should be cured. The Court should be slow to make choices which are primarily choices suitable for the legislature."*[227]

208. It seems to us that it is for the legislature to design constitutionally compliant principles and procedures to govern the eviction of people on health and safety grounds. There are a variety of ways in which the legislature could do this.

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[225] Compare *De Beer NO v North-Central Local Council & South Central Local Council* 2002 (1) SA 429 (CC)
[226] S 172(1)(a) of the Constitution; *Dawood* at para 59.
[227] *Dawood* at para 64.

209. We submit that a fair and equitable remedy in this case would be the making of an order of suspended invalidity and the crafting of fair and constitutionally competent procedures to apply during the period of suspended invalidity.[228]

210. We now turn to the question of the applicability of PIE to this matter and to eviction applications under the NBRA generally.

E THE APPLICABILITY OF PIE

211. The Supreme Court of Appeal ruled that PIE is of no application to this matter or to eviction applications under the NBRA generally. We respectfully submit that the Supreme Court of Appeal erred in this regard.

212. Harms ADP accepted the City's argument that the purpose of PIE is to regulate the clash between private ownership rights and unlawful occupation.[229] We submit that PIE is not to be limited in this way.

213. We submit that PIE must be understood purposively and generously because it is legislation *"umbilically linked to the Constitution."*[230] In the

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[228] *Zondi v Member of the Executive Council for Traditional and Local Government Affairs and Others* 2005 (3) SA 589 (CC).
[229] R17, p1273, para 58.
[230] *Department of Land Affairs & Others v Goedgelegen Tropical Fruits (Pty) Ltd* supra at para 53.

P E Municipality judgment this Court described the *raison d'etre* of PIE in the following terms –

"[PIE] was adopted with the manifest objective of overcoming the above [historical] abuses and ensuring that evictions in future took place in manner consistent with the values of the new constitutional dispensation. Its provisions have to be interpreted against this background.[231]

PIE not only repealed PISA[232] *but in a sense inverted it. Squatting was decriminalised and the eviction process was made subject to a number of requirements, some necessary to comply with the demands of the Bill of Rights. The overlay between public and private law continued but in a reversed fashion, with the name, character, tone and context of the statute being turned around. Thus, the first part of the title of the new law emphasised a shift in thrust from prevention of illegal squatting to prevention of illegal eviction. The former objective of reinforcing common-law remedies, while reducing common law protections, was reversed so as to temper common law remedies with strong procedural and substantive protections; and the overall objective of facilitating the displacement and relocation of poor and landless black people was replaced by acknowledgment of the necessitous quest for homes for victims of past racist policies. While awaiting access to new housing*

[231] At para 11.
[232] The Prevention of Illegal Squatting Act 52 of 1951.

development programmes, such homeless people had to be treated with dignity and respect.[233]

Thus the former depersonalised processes that took no account of the life circumstances of those being expelled were replaced by humanised procedures that focused on fairness to all. People once regarded as anonymous squatters now became entitled to dignified and individualised treatment with special consideration for the most vulnerable. At the same time the second part of the title established that unlawful occupation was also to be prevented. The courts now had a new role to play namely to hold the balance between illegal eviction and unlawful occupation. Rescuing the courts from their invidious role as instruments directed by statute to effect callous removals, the new law guided them as to how they should fulfil their new complex and constitutionally ordained, function: when evictions were being sought, the courts were to ensure that justice and equity prevailed in relation to all concerned."[234] (emphasis added)

214. We submit that it is clear from the above that the central purpose of PIE is to achieve an equitable balance between unlawful occupation and eviction – by whomever it may be sought. PIE's definition of unlawful occupier must be interpreted in the light of this purpose.

[233] At para 12.
[234] At para 13.

215. An "unlawful occupier" in terms of PIE is someone who *"occupies without the express or tacit consent of the owner or without any other right in law to occupy such land."*[235] The Supreme Court of Appeal found that the applicants were not unlawful occupiers because *"by abandoning their properties the owners by necessary implication gave tacit consent to whomsoever to occupy."*[236] We submit, with respect, that this is an extraordinary interpretation of the term "tacit consent." It suggests the conclusion of tacit lease agreements between the absentee owners and the occupiers of the buildings. Yet the occupiers of San Jose have not paid rent since 2000. The occupiers of the Zinns building have never paid rent. Moreover the occupation of the buildings has not been static over the years. Have the absentee owners entered into new tacit lease agreements with people whom they do not know? We respectfully submit that this interpretation of tacit consent cannot be correct. Moreover, it is a legalistic interpretation which denies the protection of PIE to a large category of poor and vulnerable people who stand to be evicted from their homes. As such we submit that it is not an interpretation which promotes the spirit, purport and objects of the Bill of Rights.[237]

216. We submit that, in any event, it is clear that the applicants' occupation became unlawful once they were issued with the s 12(4)(b) notices which ordered them to vacate the buildings and criminalised their continued

[235] Section 1 of PIE.
[236] R17, p1273, para 59.
[237] Section 39(2) of the Constitution.

occupation thereof. PIE's definition of unlawful occupier includes a person "without any other right in law to occupy" the building or land. We accordingly submit that even if the applicants had the tacit consent of the absentee owners to occupy the buildings (which we deny) they became unlawful occupiers once the s 12(4)(b) notices were served on them.

217. For all of the above reasons we respectfully submit that the Supreme Court of Appeal ought to have found that the applicants are unlawful occupiers in terms of PIE.

218. The Supreme Court found that the argument that PIE applied to the present case would lead 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."*[238] We submit, with respect, that this is not an incongruous result when once considers that unlawful occupiers are often the poorest and most vulnerable members of our society. In an emergency situation lawful occupiers will frequently have the means to find somewhere else to live, whereas unlawful occupiers will not. This is precisely why PIE affords unlawful occupiers special protection. The Supreme Court of Appeal also expressed its disinclination to accept that PIE applies *"to*

[238] R17, p1272, para 57.

orders that are directed at preventing illegal conduct."[239] But, with respect, PIE always deals with illegal conduct. It is there precisely in order to balance, in a just and equitable manner, occupation – which will always be illegal - against the need for eviction.

219. We submit that, having found an overlap between s 6 of PIE and s 12(4)(b) of the NBRA,[240] the Supreme Court of Appeal ought to have applied the principle that where a later statute, manifestly dealing with the same subject matter, is irreconcilable with an earlier statute, the latter must be regarded as having been impliedly repealed to the extent of the inconsistency.[241]

220. In our submission the textual considerations referred to by the Supreme Court of Appeal[242] do not change the fact that s 12(4)(b) of the NBRA is, in substance, fundamentally irreconcilable with s 6 of PIE. The Supreme Court of Appeal held that *"PIE does not permit an organ of state to apply for urgent relief."*[243] We respectfully submit that the definition of "owner or person in charge" in s 5 of PIE, which deals with urgent proceedings for eviction, includes an organ of state.[244] We respectfully submit further that there would be nothing to stop an organ of state from bringing an

[239] R17, p1273, 58.
[240] R17, p1273, para 80.
[241] *R v Sutherland* 1961 (2) SA 806 (A) at 815.
[242] R17, p1273, para 60.
[243] R17, p1273, para 60.
[244] Section 1 of PIE.

urgent PIE application in terms of Rule 6(6) of the Uniform Rules of Court in appropriate cases.

221. In our respectful submission the Supreme Court of Appeal ought to have dealt with the substantive conflict between s 12(4)(b) of the NBRA and s 6 of PIE by applying the ordinary principles of statutory interpretation. Moreover the Court ought to have found that these principles apply with even greater force because PIE is constitutional legislation. That, we submit, ought to have been decisive of this aspect.

F THE REVIEW APPLICATION

222. The applicants argued in the Supreme Court of Appeal that even if s 12(4)(b) of the NBRA is constitutionally valid, the City's decisions to issue the 12(4)(b) notices in respect of San Jose and the Zinns building fell to be reviewed and set aside because –

222.1. the City had afforded the applicants no opportunity to be heard;

222.2. the City failed to take relevant considerations into account; and

222.3. the City's decisions were irrational, taken for an ulterior purpose and in bad faith.

223. The Supreme Court of Appeal dismissed the review application on each of the above grounds. We respectfully submit that the Supreme Court of Appeal erred in this regard. We shall deal with each ground of review in turn below.

The City's Failure to Afford the Applicants an Opportunity to be Heard

224. The Supreme Court of Appeal found that the City had not been required to give the applicants an opportunity to be heard because *"in cases of crisis the audi principle can hardly apply."*[245]

225. In the first place we submit that this seems to contradict the Court's earlier finding that the applicants were not in an emergency situation but in *"an ongoing state of affairs."*[246]

226. We submit that it cannot be suggested on the facts on this case that the issuing of the s 12(4)(b) notices was urgent. In respect of the Zinns building 9 months separated the initial inspection of the building and the issuing of the s 12(4)(b) notice. In respect of San Jose this period was 10 months. Manifestly the situation was not one of crisis. There is, in our submission, no reason why the City could not have afforded the applicants a hearing during these extremely lengthy intervening periods.

[245] R17, p1275, para 63.
[246] R17, p1268, para 45.

227. The second justification accepted by the Supreme Court of Appeal for the City's non-compliance with s 3(2)(b) of PAJA was *"the problem in establishing the number apart from the identity of the occupiers."*[247]

228. In our submission this was not a serious problem. The number and identity of the applicants are set out in the applicants' papers. The City could have obtained this information if it had simply engaged with the applicants. It did not. As we have stated above the City, as a matter of general practice, does not engage with the occupiers of bad buildings in the inner city. We submit that the City's attitude in this regard is fundamentally problematic: not only does it treat the occupiers of bad buildings as "anonymous squatters" but the failure to ascertain who the occupiers of bad buildings are and whether they have anywhere else to go, means that the City is unable to establish whether any constitutional rights may be violated by the issuing of a s 12(4)(b) notice.

229. Even however if establishing the number and identity of the applicants were arguably a problem, (which we deny), the City should have followed s 4 of PAJA which specifically provides for procedural fairness where "any group or class of the public" is affected.

230. The third justification accepted by the Supreme Court of Appeal for the City's non-compliance with s 3(2)(b) of PAJA was that *"there was no*

[247] R17, p1275, para 63.

suggestion that the applicants wished to make any representations."[248] We have shown above that this finding was incorrect on the facts. The point however, in our submission, is that the applicants were entitled to make representations. Even if those representations had had a limited substantive outcome, the right of procedural fairness serves deeper more fundamental interests. As Milne JA held in *South African Roads Board v Johannesburg City Council*[249] -

"The audi principle applies where the authority exercising the power is obliged to consider the particular circumstances of the individual affected. Its application has a two-fold effect. It satisfies the individual's desire to be heard before he is adversely affected; and it provides an opportunity for the repository of the power to acquire information which may be pertinent to the just and proper exercise of the power." (emphasis added)

231. Satisfying the individual's desire to be heard before he is adversely affected achieves a sense of participation and self-worth, thereby promoting the value of human dignity. As Geo Quinot[250] stated in a review of the Supreme Court of Appeal judgment in the present matter in the ESR Review[251] –

[248] R17, p1275, para 63.
[249] 1991 (4) SA 1 (A) at 13B-C. See also *Urban Housing Co v Oxford City Council* [1940] Ch. 70, 85 (CA, 1939).
[250] Geo Quinot is a senior lecturer in the Department of Public Law at Stellenbosch University.
[251] Vol 8, no 1, 1 May 2007.

"Procedural fairness can help reinforce the dignity of beneficiaries of state socio-economic programmes. Comprehensive socio-economic assistance from the state invariably runs the risk of creating a culture of dependence. The problem is not so much dependence on the provision of the actual assistance (eg food, housing, social assistance), but the perception it may create of recipients as passive, weak, subjugated 'external objects of judgment.' It is the latter perception that principally undermines such beneficiaries' dignity. By affording them the opportunity to actively participate in the provision of state assistance, procedural fairness can achieve much in giving beneficiaries a sense of control, participation and accordingly, significance and self worth. Even where a hearing allegedly cannot achieve much by way of substantive outcome (as the SCA seems to suggest in Rand Properties), this important function of procedural fairness remains unaffected."[252]

232. We submit that the above applies with even greater force where, as here, the applicants stood to lose their homes as a result of state action.

233. Consultation with proposed evictees is fundamental in international law. The UN Committee on Economic, Social and Cultural Rights has stated that *"there must be an opportunity for genuine consultation with those affected."*[253]

[252] At p 27.
[253] CESCR, General Comment 7 at para 15.

234. The International Eviction Guidelines require the following –

> *"States should explore fully all possible alternatives to evictions. All potentially affected groups and persons, including women, indigenous peoples and persons with disabilities, as well as others working on behalf of the affected, have the right to relevant information, full consultation and participation throughout the entire process, and to propose alternatives that authorities should duly consider. In the event that agreement cannot be reached on a proposed alternative among concerned parties, an independent body having constitutional authority, such as a court of law, tribunal or ombudsman should mediate, arbitrate or adjudicate as appropriate.*
>
> *During planning processes, opportunities for dialogue and consultation must be extended effectively to the full spectrum of affected persons, including women and vulnerable and marginalised groups, and, when necessary, through the adoption of special measures and procedures.*
>
> *Prior to any decision to initiate an eviction, authorities must demonstrate that the eviction is unavoidable and consistent with international human rights commitments protective of the general welfare."*[254] (emphasis added)

[254] International Eviction Guidelines, p 20, paras 38-40.

235. In this case the Supreme Court of Appeal found that the applicants had no right to be heard whatsoever. Moreover it did so without even considering the factors listed in s 3(4)(b) of PAJA, aimed at assessing whether a departure from the procedural requirements of s 3 would be "reasonable and justifiable in the circumstances." We submit, with respect, that the Supreme Court of Appeal's ruling on this aspect does not accord with the new constitutional and administrative law in our country.[255]

236. We respectfully submit that the Supreme Court of Appeal ought to have ruled that the applicants were entitled to be heard in relation to the City's decisions to issue the s 12(4)(b) notices and that the City's failure to afford the applicants this right constituted a reviewable irregularity warranting the setting aside of the notices.

237. The fact that the High Court application proceedings gave the applicants an opportunity to be heard is no answer to this challenge. The decisions to issue the s 12(4)(b) notices were taken before the High Court applications were launched. What was required was a proper opportunity to be heard before the s 12(4)(b) notices were decided upon and issued.

[255] Compare *Earthlife Africa (Cape-Town) v Director-General: Department of Environmental Affairs and Tourism and Another* 2005 (3) SA 145 (C).

The City's Failure to take Relevant Considerations into Account

238. We submit that prior to taking its decisions to issue the s 12(4)(b) notices in this matter, the City ought to have considered whether evicting the applicants would be likely to render them homeless, for if so, there would at least potentially be an infringement of their rights in terms of, *inter alia*, s 26(1) of the Constitution. We submit that the City ought also to have considered whether there was any provision for the applicants in terms of the City's Housing Plan, particularly if eviction would be likely to render the applicants homeless. We submit that these issues constituted relevant considerations which the City was required to take into account prior to taking its decisions to issue the s 12(4)(b) notices.[256]

239. We submit that these constituted relevant considerations by virtue of the fact that government officials are required to act in a manner which respects and promotes, and certainly not in a manner which infringes, the rights in the Bill of Rights. This is precisely why administrative action may be set aside in terms of PAJA if it is "otherwise unconstitutional."[257]

240. The Supreme Court of Appeal rejected this argument on the basis that *"it presupposes that the right to act under s 12(4)(b) and the right to access*

[256] *Kayamandi Town Committee v Mkhwaso and Others* 1991 (2) SA 630 (C)
[257] Section 6(2)(i) of PAJA.

adequate housing are reciprocal and that the former is dependent or conditional on the latter."[258]

241. We submit, with respect, that this mischaracterises the argument. The argument is simply that the City was required to consider whether ordering the applicants to vacate their homes in terms of the NBRA would be constitutional. We submit that the fact that the City tends not to give consideration to this question when acting in terms of s 12(4)(b) of the NBRA bears testimony to the arbitrariness of that provision.

242. Having regard to the above we respectfully submit that the Supreme Court of Appeal erred in failing to review and set aside the s 12(4)(b) notices on this ground.

Irrationality and Ulterior Purpose

Irrationality

243. The Supreme Court of Appeal found that –

"The decision to issue [a s 12(4)(b) notice] must 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

[258] R17, p1275, para 64.

reasonable, adopted. (In the present instance the evidence is that the buildings cannot be made safe while occupied)."[259]

244. Yet in this case reasonable alternatives to eviction were not explored. They were not explored by the City in consultation with the occupiers (as they ought to have been) because the City refused to consult with the occupiers. Nor did the City present any evidence to the effect that it had considered alternatives to eviction on its own.

245. Had the City considered alternatives to eviction in respect of the Joel Street properties, there would have been no need to issue s 12(4)(b) notices and launch the eviction applications, which the City later abandoned, in respect of those properties.

246. As stated above, there was no suggestion that San Jose or the Zinns building were structurally unsound. The risks of which the City complained would have been significantly abated if the City had reconnected the water supply, including the fire water supply, to the properties. The City did not. The City made the bald allegation that the buildings could not be made while occupied without taking the most obvious steps to make the buildings safe or explaining why it could not do so. We submit that the Supreme Court of Appeal ought not to have accepted this allegation in these circumstances.

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[259] R17, p1270, para 52.

247. We submit further that absent any exploration of reasonable alternatives to eviction or any proof that the buildings could not be made safe while occupied, the City's decisions to issue the s 12(4)(b) notices ought to have been ruled irrational.

248. We submit that the City's decisions to issue the s 12(4)(b) notices were irrational for a further reason. The City has been at pains throughout the course of these applications to use the term "evacuate" in preference to the term "evict," claiming that it is not seeking to evict the applicants, but to evacuate them for the sake of their safety. The Collins Dictionary defines the term *"evacuate"* as *"to remove from a place of danger to a safer place."* We submit that if the City claimed to be evacuating the applicants for the sake of their safety it ought to have satisfied itself that removing the applicants from the properties would in fact improve their safety. Homelessness, far from improving the applicants' safety, would expose them to a far greater risk of danger and disease than that which they face in the buildings. The City's decisions to issue the s 12(4)(b) notices accordingly amounted to decisions to remove the applicants from a place of some danger to a place of greater danger. We submit that this is manifestly irrational.

Ulterior Purpose

249. Our ulterior purpose argument is that the City is not genuinely acting to deal with health and safety issues, but is acting purely in order to clear buildings so that they may be transferred to private developers in terms of the ICRS. We submit that this is borne out by a number of aspects –

249.1. First, the City exaggerated the health and safety risks in the buildings at hand. This was the finding of the High Court after the inspection *in loco* of the properties.

249.2. Second, the City has failed to explore – or even consider - ways of dealing with health and safety risks short of evicting the occupiers. This is not only the case in this matter. It is part of the City's *modus operandi* in respect of inner city evictions generally.

249.3. Third, the City launched its eviction application in respect of San Jose immediately after the sale of the building. This was in order to remove the occupants and give vacant possession to the purchaser, not to protect the occupants.

249.4. Fourth, if the City were genuinely seeking to protect the occupiers from “imminent death by fire,” as it claims in its standard form urgent applications, one would not expect to see the lapse of many months between the initial inspection of the buildings and the launching of the eviction applications. The condition of the buildings remains unchanged throughout this time. Nor would one expect to see the disconnection of the water supply, including the fire water supply, to the buildings.

249.5. Fifth, the City takes no further steps when eviction applications are opposed by occupiers, notwithstanding having launched them on an urgent basis initially. We submit that if there were a serious and *bona fide* concern that the occupiers should be protected, the City would act with expedition in pursuing the applications as matters of the urgency that was initially claimed. This however is not done.

249.6. Sixth, if the City were truly acting to deal with health and safety it would seek to invoke the same statutory powers in relation to at least some of the dwellings in the 190 informal settlements in its area of jurisdiction, which are in the same abysmal condition as the bad buildings in the inner city. It does not. On the contrary the City leaves occupiers in those dwellings until it is

able to either upgrade them or relocate them, for which it has a plan.

249.7. Seventh, if the City were truly acting to deal with health and safety it would not seek to evict the applicants in circumstances which would render them homeless. This will expose the applicants to a far greater risk of danger and disease. Moreover it will simply and inevitably create another unsafe and unhealthy "squatting" problem elsewhere.

250. We submit that the above shows a manifest lack of any *bona fide* belief on the part of the City in either the health and safety grounds which form the basis of its applications, or the purported urgency with which its applications are invariably brought. We submit that the only reasonable inference to be drawn is that the City's applications are part of a stratagem to steamroller the litigation process, in the hope that bad buildings will be cleared quickly and cheaply, to the advantage of the commercial developers who purchase the properties and by minimising the opportunity for the occupiers (who are all people lacking in resources) to oppose the applications.

251. We submit that having regard to the above the City's decisions to issue the s 12(4)(b) notices in this case fall to be reviewed and set aside by

virtue of being taken for an ulterior purpose and in bad faith.[260] We respectfully submit that the Supreme Court of Appeal ought to have made such a finding.

252. We submit further that the City's *modus operandi,* described above is unconstitutional. It discriminates against the occupiers of bad buildings in the inner city relative to the occupiers of informal settlements without rational justification. It also violates the dignity of the applicants and the broader class, by treating them as *"anonymous squatters automatically to expelled as obnoxious social nuisances"* – the phrase used in the following passage of the judgment of this Court in the *PE Municipality* matter –

"Those seeking eviction should be encouraged not to rely on concepts of faceless and anonymous squatters automatically to be expelled as obnoxious social nuisances. Such a stereotypical approach has no place in the society envisaged by the Constitution; justice and equity require that everyone is to be treated as an individual bearer of rights entitled to respect for his or her dignity."[261]

[260] Sections 6(2)(e)(ii) and (vi) of PAJA; *Van Eck NO and Van Rensburg NO v Etna Stores* 1947 (2) SA 984 (A); *Makama and Others v Administrator Transvaal* 1992 (2) SA 278 (T).
[261] At para 41.

253. We accordingly submit that the City's *modus operandi* in relation to the eviction of the occupiers of bad buildings in the inner city ought to be declared unconstitutional by this Court.

G THE NEED FOR A STRUCTURAL INTERDICT

254. We respectfully submit that if this honourable Court finds (as we submit it ought to) that the City has failed to comply with its obligations in terms of 26(2) of the Constitution in relation to the applicants and the broader class, then a structural interdict would be an effective and appropriate form of relief.

255. While a failure to comply with a previous court order and particularly a sustained failure to do so, is a paradigmatic case for a structural interdict, this is not a requirement for this form of relief.[262]

256. We submit that a structural interdict is necessary and appropriate in this case for at least the following reasons –

256.1. The City has at best a poor appreciation of the nature and extent of its positive obligations under s 26(2) of the Constitution and is not acting to give effect to them.[263]

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[262] *Sibiya and Others v Director of Public Prosecutions, Johannesburg and Others* 2005 (5) SA 315 (CC).
[263] *N and Others v Government of Republic of South Africa and Others* (No 1) 2006 (6) SA 543 (D).

256.2. The most fundamental rights of the applicants and 67 000 of some of the poorest and most vulnerable members of our society are at stake. The consequences of even a good faith failure to comply with a court order are accordingly of an extremely serious nature;[264] and

256.3. The relief required is complex and programmatic and requires the courts to leave the City with as much latitude as possible in its design and method of implementation.[265]

H RELIEF

257. For all of the above reasons we respectfully submit that leave to appeal ought to be granted to the applicants in this matter.

258. We respectfully submit further that the following order ought to be granted –

"1. The application to the Constitutional Court for leave to appeal is granted, with costs, including the costs of two counsel.

2. The appeal is upheld with costs, including the costs of two counsel.

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[264] *N and Others v Government of the Republic of South Africa and Others* supra.
[265] *City of Cape Town v Rudolph and Others* 2004 (5) SA 39 (C).

3. *The order of the Supreme Court of Appeal is set aside and substituted with an order that, subject to paragraph 4(c)(i) hereof, the appeal against the judgment and the order of the High Court is dismissed, with costs of the appeal in the Supreme Court of Appeal, including the costs of two counsel, to be paid by the City.*

4. *The order granted in the High Court by Jajbhay J is confirmed in part and reformulated as follows –*

    a. *the City's applications are dismissed;*

    b. *the counter-applications are upheld; and*

    c. *the following order is made –*

        i. *The City is ordered to offer and provide the applicants 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.*

ii. *The location of the alternative accommodation shall be determined by the City in consultation with the applicants, taking into account the applicants' current access to jobs, livelihoods and social services in the inner city.*

iii. *The City is interdicted from evicting the applicants from their present accommodation until the alternative accommodation referred to above is available for their occupation.*

iv. *The City's decisions to issue the notices in terms of section 12(4)(b) of the National Building Regulations and Building Standards Act 103 of 1977 in respect of each of the properties occupied by the applicants are reviewed and set aside.*

v. *It is declared that the practice of the City in applying for the eviction of people (including the applicants) on the basis of section 12 of the National Building Regulations and Building Standards Act No. 103 of 1977, section 20 of the Health Act No. 63 of 1977, and section 9 of the Standard By-Laws Relating to Fire Brigade Services promulgated in Administrator's Notice 1771 on 23 December 1981 is*

inconsistent with section 9, section 26(3), and section 10 of the Constitution of the Republic of South Africa Act No. 108 of 1996.

vi. *It is declared that sections 12(4)(b), 12(5) and 12(6) of the National Building Regulations and Building Standards Act No. 103 of 1977 are inconsistent with section 26(3) of the Constitution of the Republic of South Africa Act No. 108 of 1996 and invalid.*

vii. *It is declared that the City's housing programme fails to comply with the constitutional and statutory obligations of the City in that –*

1. *It fails to provide suitable relief for people in the inner city of Johannesburg (including the applicants) who are in a crisis situation or otherwise in desperate need of accommodation.*

2. *It fails to give adequate priority and resources to people in the inner city of Johannesburg (including the occupiers) who are in a crisis situation or otherwise in desperate need of accommodation.*

viii. The City is ordered to take the necessary steps to comply with its constitutional and statutory obligations as declared in this order and to comply with the following process-

1. *The City is ordered within four months of the date of the order of the Constitutional Court to deliver (through filing at Court and serving on the applicants' attorneys) a report or reports under oath, stating what steps it has taken to comply with its constitutional and statutory obligations as declared in this order, what future steps it will take in that regard, and when such future steps will be taken.*

2. *The applicants may within one month of delivery of that report or reports, deliver commentary thereon, under oath.*

3. *The City may within one month of delivery of that commentary, deliver its reply to that commentary under oath.*

4. *Thereafter, the matter is to be enrolled on a date to be fixed by the Registrar in consultation with the presiding Judge for consideration of the aforesaid report, commentary and reply and determination of such further relief as may be deemed appropriate.*

ix. *The City is ordered to pay the costs in the High Court of the applicants in respect of both the main applications and the counter-application, such costs to include the costs of two counsel.""*

Paul Kennedy SC

Heidi Barnes

Applicants' Counsel

Chambers

Johannesburg

15 July 2007