IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO CCT 69/11

In the matter between:

THE OCCUPIERS OF PORTION 124

AND 150 OF THFARM ZANDFONTEIN **Applicants**

and

BROOKWAY PROPERTY 30 (PTY) LTD **First Respondent**

THE CITY OF TSHWANE **Second Respondent**

APPLICANTS' HEADS OF ARGUMENT

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A. INTRODUCTION

1. At the time of the proceedings *a quo*(June to August 2010), the applicants were a community of some 400 informal dwellings located on portions 124 and 150 on the farm Zandfontein 317 JR. Portion 124 is 8,9 ha in size, and portion 150 is 11,5 ha in size. In total, just under 21 hectares of land is involved. We refer to the applicants as either "the applicants" or "the occupiers". There was some dispute about whether other portions were also occupied.

   See: par 23.1, p42, Vol 1
   par 3, p 428, Vol 5
   p 66, Vol 1
   p 70, Vol 1
   par 6.2, p 279, Vol 3 (Mboweni)
   par 7.4, p 317, Vol 4 with second photograph at HdB1
   Judgment *a quo* at par 9 & 10, p 1387, Vol 15

2. The First Respondent is the owner of these two properties as well as other adjacent pieces of land which comprise some 210 ha. We refer to the First

Respondent as “the land owner”.

See: par 10, p 36, Vol 1

par 44, p 56, Vol 1 (and attached title deeds at p75, p79, p83, p87, p90)

Judgment *a quo* par 7, p 1386, Vol 15

3. It does not appear from the record exactly how many people lived in the settlement at the time of the proceedings in the court *a quo*. 429 adults signed powers of attorney. There are adults who did not sign powers of attorney as well as children and other young persons who are not yet adults. It would be fair to guess that there were probably between one and two thousand people living in the informal settlement.

See: par 3 & 4, p 428 & 429, Vol 5

Par 42, p447, Vol 5

4. The date on which the first occupants settled on this land is in dispute. This aspect is dealt with separately in section B below. It is common cause that most of the occupants are unlawful occupants, but not that all of them are

unlawful occupants. The applicants alleged in the court *a quo* that some of them enjoy ESTA rights (Extension of Security of Tenure Act 62 of 1997).

See: par 14, p431, Vol 5

par 24.5, p436, Vol 5

par 26.3, p436, Vol 5

5. The court *a quo* found against the occupiers on both these aspects, namely the date of settlement and the fact that some may be ESTA occupiers. This despite the fact that the matter was brought by way of motion proceedings and that there were clear disputes of fact on the papers, and despite the fact that the occupiers had filed 429 questionnaires, some of which stated that they had lived in the near vicinity for a very long time. See examples at pp 885 (Maake), 886 (Radebe), 888 (Kelopetswe), 894 (Ncobo), 368 (Mokwena), 534 (Majola), 537 (Mahlare) and pp 621 – 639.

See: Judgment *a quo*, par 22 – 27, p 1395 – 1400, vol 15

6. Even if all questions of fact and law are decided against the occupiers (something which is by no means conceded), the occupiers are still entitled

to an amendment of the order of the court *a quo*. We respectfully submit that the basic structure and content of the order is erroneous. First, the order does not make the eviction conditional upon the Second Respondent (City of Tshwane) making alternative land available. The order imposes certain duties on the Second Respondent to make alternative land available, but does not make such availability a precondition to eviction. In fact the judgment accepts implicitly that a court order can be the cause of a housing emergency.

See: par 16 of judgment *a quo*, p 1391, Vol 15

Par ix to xi of court order, p 1422, Vol 15

7. We submit that the leading eviction cases in this honourable court and in the Supreme Court of Appeal that have dealt with relatively large numbers of people, have always made the eviction conditional on the provision of alternative land.

8. Our law has focused more on ensuring orderly relocation and regularising the occupation of illegal occupiers than it has on simple eviction.

9. We submit that the order of the court *a* quo needs to be altered in at least three ways, if it is not altered altogether. First, there needs to be appointed a probationer to investigate if any of the occupiers have rights under ESTA (section 9(3)). Second, any eviction must be subject to the Second Respondent (City of Tshwane) making available alternative land. Third, the court must accept the indication by the City of Tshwane that they need two years to finalise the process of relocation.

10. The finding of the court *a quo* that it was dealing with a recent land invasion was also incorrect, or at the very least an oversimplification of the matter.

11. The fact that the court *a quo* ignored the allegations that it was in fact members of the South African Police Service who requested the occupiers to all settle in the one area, was a further error which goes to the very heart of this matter.

See: par 9, p430, Vol 5

B. THE APPLICATION *A QUO*, THE FINDINGS AND THE RELIEF

12. The land owner brought an urgent application in the High Court on 10 June 2010. It joined three Respondents. The first being persons it described as being people who intend invading its property. It sought an interdict against further invasions and erection of structures. The Second Respondents were the existing occupiers of the properties. The land owner sought their eviction on an urgent basis in terms of the provisions of the PIE act (Prevention of Illegal Eviction and Unlawful Occupation of Land Act 19 of 1998).

13. The land owner also cited the City of Tshwane as Third Respondent. It sought a range of relief against the City. It required the City to do an audit of all the occupiers, to report to the court on the audit and on the issue of alternative land available for resettlement of the occupiers. It even alleged that certain specific pieces of land in the vicinity is owned by the City and can be used for relocation. Finally, it requested that the Metro Police and the SAPS be "mandated" to help it evict the occupiers, should they not vacate the land by the date determined by the court.

See: prayers 6.1 to 6.3 (Part A), p23, Vol 1

prayer 3 (Part B), p 25, Vol 1

par 23.7, p 43, Vol 1

14. The land owner did not cite the provincial authorities responsible for housing. The court realised the need for the involvement of the provincial authorities as the eviction would cause a housing emergency. The court then framed an "order" in the form of an "institutional request".

See: par 37, p 1409, Vol 15

15. The eviction relief, and how it interacts with the designation of alternative land, appears from the Notice of Motion (prayer 3, Part B). It would appear that the land owner foresaw an eviction first, and then an obligation on the part of the local authority to provide alternative land for those who were on the land at the time the court order was granted.

16. The eventual court order was in slightly different terms, but also had the characteristic of ultimately disjoining the issue of alternative land and eviction. The result is that the eviction may first cause an emergency, which

should then be dealt with in terms of the Housing Code read together with the court order. We submit that the sequence should be the other way around. The emergency housing provisions should first be implemented, and then the relocation/eviction should follow. Threatened eviction also qualifies as an emergency, not only evictions already completed.

See: par (e) of 2.3.1 of the Housing Code, p 913, Vol 10

17. The underlying idea is that the alternative land should be available at the date of eviction. Yet this central idea is allowed to fail if the local authority is unable or unwilling to make alternative land available for settlement. The assumption that an organ of state will always comply with a court order, is erroneous. In the case of delivery of socio-economic rights, such an assumption is even more misplaced.

See: **Nyati v MEC for Health, Gauteng** 2008(9) BCLR 865 (CC) at par 95

18. Finally, the land owner sought an order that the City pay it compensation in the amount of almost one million rand per month until the land owner is restored in its possession.

See: prayer 4, p 26, Vol 1

19. The court ordered that the issue of compensation be postponed *sine die* and be heard at a later hearing. The final order was made on 30 September 2010.

See: Court order, par xii, p 1423, Vol 15

20. Before the final order was made in September, specifically on 26 August 2010, the court made an interim order in which it joined a local residents' association as an interested party and also ordered the occupiers and the City to engage on a number of issues.

See: p 1348, Vol 14

21. Representatives of the occupiers and the City then held a meeting on 3 September 2010 and reached agreement on all issues, save for the issues of costs and the entitlements of foreign nationals.

See: pp 1354 – 1355, vol 14

22. The essence of this agreement was that the City would identify alternative land and would then resettle the occupiers on such land. The agreement provided that the alternative land would be identified within six months and that the relocation would be finalised within eighteen months after the land had been identified. The latter period was provided to allow the City time to complete planning and budgetary processes. The City of Tshwane expressed its firm commitment to deal with the problem, given time.

See: par 34.3 – 34.6, p 295, Vol 3 (Mboweni)

23. The agreement between the City and the occupiers was not acceptable to the land owner and the matter was then finally argued on 9 September 2010.

24. The court essentially granted the relief as sought by the land owner and also rejected the occupiers legal assertion that the execution of the eviction must be subject to the alternative land being available. It also rejected the City's indication that it needed two years to complete the process. The occupiers introduced the need to trigger the emergency housing provisions of the Housing Code into the matter. The court made orders in this regard as well.

See: par 26.4, p437, Vol 5

Par ii to iv of the court order, p 1420, vol 15

25. In rejecting the essence of the agreement between the City and the occupiers, we submit that the court *a quo* erred seriously and set in motion a process that would inevitably lead to a chaotic eviction and one that would simply move the unlawful occupation elsewhere. It would probably also make it impossible for the authorities to grant effective emergency relief, as many of the occupants will be scattered around the periphery of the City. We submit it is illogical and wrong to cause or worsen a housing emergency by effecting an eviction order.

26. A court should also not order something which is otherwise unlawful. The request by the local authority that they be allowed time to follow planning processes, is not only a reasonable one, but one that is legally essential. These type of matters do not only involve unlawful occupation, they also involve the existence of illegal townships. Just as the Wesmoot Residents Association who joined in this matter is concerned about an illegal and unformalised township on their doorstep, just as much another community to

which the occupiers will be moved to, will have reason to complain and may even have legal grounds to oppose such a relocation.

27. We submit that it is not only the content of the order that is flawed, but that a careful scrutiny of the facts on record shows that the basic assumptions and findings that underlie the order, are also not justified by the evidence. All the findings were made in favour of the land owner and against the occupiers. This while the matter was decided on affidavit and the allegations of the land owner was shown to be inaccurate in a number of respects.

28. More important, it was never effectively denied that the occupiers were told by an officer of the local police station, a captain Rampiswane, to settle in the particular locality, now known to be portions 124 and 150 of Zandfontein. The attorney for the land owner made a vague allegation that he could not locate someone by the name of Captain Rampiswane.

See: par 2, p 1049, Vol 11 (More)

29. We proceed to analyse some of the important evidence. Deponent De Beer for the land owner alleged that he personally inspected the land in 2007

when it was purchased and states that there were no occupants on the land. According to him, a Mr Botha (an owner of a business in the area) informed him of the presence of occupiers and informed him that the invasion had started in January 2010. He attached a Google Earth photograph of 13 September 2009 as proof that there was no occupation in September 2009. This particular photograph showed the area at an elevation of 4.17 kilometres. It would appear from this photograph that there was indeed no one there in September 2009. However, as we will illustrate, this photograph was an attempt to mislead the court.

See: par 17, p 38, vol 1

par 21, p 40, vol 1

Annexure "F", p 94, Vol 1

30. Deponent Makhubela for the occupiers attached the same Google Earth photograph dated 13 September 2009, at an elevation of 1.76 kilometres, which image shows that there was already extensive informal settlement at that stage.

See: p 469

p 1558 (colour copy)

31. Makhubela states that the informal settlement started as follows:

"...all the occupants of Melusi have been informal residents of the immediate vicinity for some time. The informal dwellings were scattered all over the portions of Zandfontein referred to in the founding affidavits as well as the surrounding areas. During 2005 and 2006 these informal residents were requested by authorities to settle in a specific area, namely portions 150 and 124 where we presently find ourselves. The move to Melusi was an ongoing process, but most people moved there in 2008 and 2009."

32. Makhubela was even more specific about the fact that the authorities requested the informal occupiers of the area to settle in one specific area:

"I do not know who the government officials were that requested us to settle in an orderly manner on portions 124 and 150. However, I do know that a police officer from the local Police Office at Hercules, namely Captain Rampiswane, was involved as well as three other officials who identified themselves as "social workers"."

See: par 9 p 430, Vol 5

33. In reply, deponent De Beer adjusted his evidence and stated that "*a small group came upon the properties during the beginning of 2009"* The court *a quo* made nothing of the attempt to mislead it, simply accepted the adjusted date of 2009, and went on to again rely on unproven photographs presented by the land owner during reply, as the basis to reject all the evidence of the occupiers. It did so on the evidence of a town planner, one Marais, who does not anywhere allege that he is qualified to analyse aerial photographs.

See: par 7.3, p 1002, Vol 11

par 11 of judgment, p 1388, Vol 15

34. The land owner also presented aerial photographs that purported to show portion 124 and 150 during 2005 and 2007. None of the aerial photographs produced by any of the parties were ever proven in any formal way, and their content was never admitted. At least the Google Earth photographs have date inscriptions on them that appear to be contemporaneous and originate from the camera that takes them. The photographs produced by the land owner simply has the year printed on them, apparently by an ordinary printer. These photographs are not very clear either. There are no photographs on record that purport to show what the position was in 2008.

We accept that there must have been rapid settlement during the course of 2009.

See: photographs at pp 415 to 417, Vol 5

35. Ironically, the photographs attached to the founding affidavit of De Beer, would suggest that the shacks have been there for a while. They certainly don't testify to an ongoing land invasion. The court described the structures as "surprisingly well built", but then continues to find that the settlement comprises a recent invasion and that such should not be incentivised.

See: par 24 of judgment, p 1398, Vol 15
par 33 of judgment, p 1405, Vol 15

36. The shacks are generally fenced off, already completed, many occupiers have paved around their homes, internal roads have already been denuded of vegetation and the shacks seem to be reasonably ordered as far as their relative spacing is concerned. The shacks have also been numbered.

See: p 117 to 142, Vol 2

37. The appearance of the settlement rather supports the version of Makhubela. And Makhubela clearly has solid local knowledge. He tells the story of how he worked at the Corobrick factory on the very same properties during the 1990's. He also states that the employee housing which he stayed in was demolished in the late 1990's. In this regard he is corroborated one hundred percent by the evidence of deponent Botha in reply.

See: par 2.1.3 to 2.1.5, p 1044, Vol 11

38. Despite all the elements of truth in the evidence of Makhubela, and despite the fact that motion proceedings are not adjudicated on probabilities, the land owner simply dismissed all the evidence of the occupiers as lies. The court *a quo* also implicitly rejected the evidence of the occupiers. Again, we submit that these findings were in error. In fact, much criticism can be, and should have been levelled at the evidence of deponent De Beer, especially the manner in which he deals with aerial photographs.

39. The manner in which he stereotypes all the occupiers as criminals speaks of his unbalanced and prejudiced approach to the facts. He has no hesitation to

make wild and unsubstantiated allegations of criminality.

See: par 25.2, p 47, Vol 1

par 26.4 and 26.5, p48, Vol 1

par 38, p 53, Vol 1

40. Makhubela never stated that the occupiers such as himself and Brenda Mathole lived on portion 124 and 150 for the past few decades. He said they, and others, lived on the farm Zandfontein in the immediate vicinity of where they have now formed the Melusi settlement. There is nothing on record to refute his evidence.

41. Zandfontein is farmland on the edge of the City of Tshwane, more particularly the old white suburbs on the western side of Pretoria. It is highly unlikely that the land would not have housed some erstwhile farm workers and employees of peri urban industries in the area. The evidence of Marais that the settlement is surrounded by proclaimed townships is simply incorrect. The only townships are to the east, and an industrial area to the north-west. To the south is the Witwatersberge, and to the west is the rest of the farms and agricultural holdings of Zandfontein. This is the type of area

where one typically finds ESTA occupiers.

See: par 3, p 1053, Vol 11
pp 92 to 94, Vol 1
par 4, p 368, Vol 4

42. The evidence of Brenda Mathole is similarly clear. She states that she was born on the farm Zandfontein. Her parents lived in the area. The place where she grew up was approximately one kilometre to the west of where the Melusi settlement is today.

See: par 4, p 472, Vol 5

43. Her evidence cannot be rejected in the context of motion proceedings. More importantly, her evidence shows the need for a proper investigation of the tenure history of some of the occupiers. The lawyers for the occupiers cannot be expected to do a tenure investigation in the context of an urgent application.

44. The land owner's retort in reply is an unfortunate one. Deponent De Beer,

without having any basis of any kind, slanders Mathole as a criminal who is orchestrating the unlawful settlement and who makes her money out of charging for people to settle there.

See: par 40.2 to 40.6, p1038, Vol 11

45. The evidence of Mokwana is similarly important. It illustrates the profile of a typical young person who is in the process of urbanisation. He grew up with his grandparents in Groblersdal. Later he lived with his mother at her place of employment in the nearby suburb of Booysens. When he turned eighteen, he was no longer allowed to live with his mother. He then went to live in the open veld on the farm Zandfontein with other homeless people. For twelve years he lived in what he describes as a *"plat huisie"*. It would appear that these are makeshift shelters that can be moved quickly when circumstances require. Such circumstances must present themselves regularly because of the fact that they remain unlawful occupiers wherever they go.

See: pp 475 to 477, Vol 5

46. The land owner only made a dismissive attempt to deny the evidence of

Mokwana.

See: par 41 & 42, p 1039, Vol 11

47. Neither the City of Tshwane, nor the land owner made any real attempt to refute the direct evidence that the settlement was facilitated by Captain Rampiswane of the Hercules police station. The fact that other government officials were involved, namely social workers, must also be accepted.

48. Deponent Mokhari's evidence is similar to that of Mokwana. He states that he has lived in the area since 1990 and that he lived in a makeshift structure for many years.

See: p 479 – 481, Vol 5.

49. The evidence respectfully cries out for a solution to the persistent problem of homelessness on the periphery of the City. Evicting people is not going to solve anything. It won't even bring security for private land owners' property rights. It will do the opposite.

50. Both PIE and ESTA give a court a discretion to order an eviction when it is *"just and equitable"*. The exercise of this discretion relies heavily on correct findings of fact. The court *a quo* made numerous errors in its approach to the facts as well as in its actual findings. For this reason it could not exercise its discretion in the manner that the legislature requires of a court to do. It should be noted that the occupiers agreed to submit to the jurisdiction of the High Court, although the City did not.

See: sections 4(6) and (7) of PIE

Sections 11(2) and (3) of ESTA

51. Section 26(3) of the constitution (also PIE and ESTA), requires that all relevant circumstances be considered. The court criticised the evidence of the occupiers. This despite the fact that serious efforts were made to get as much information of the many occupiers before court as circumstances permitted. It is also not correct to first order an eviction, and then to order an audit of who the occupiers are. Section 26(3) of the constitution requires that all relevant circumstances be considered before an eviction order is granted.

52. Motion court proceedings are not designed to deal with cases which involve disputes of fact. Urgent proceedings are even more imperfect. At the very least a court should acknowledge this very basic truth about legal process, instead of forcing the facts to fit the remedy.

53. This type of case does not involve an individual litigant that chooses a specific legal representative and then gives detailed and regular instructions in terms of a general mandate. The attorney-client dynamic in situations such as the present is fundamentally different. The ability of public interest law clinics to spend resources on a specific case is also limited.

54. Most often the majority of the occupiers aren't represented directly. Someone is acting in their interests or on their behalf, as opposed to acting on their instructions. Lawyers often work through residents' committees in these circumstances. It is virtually impossible to place the personal circumstances of all the occupiers before the court or to do an investigation of the tenure history.

55. If a court is not satisfied with the evidence presented to it, it must order that further evidence be procured and must state what that evidence should be.

These are not commercial matters where litigants should stand or fall by the case they present. A court has a duty to ensure that those not properly represented before it, be given the opportunity to place all their circumstances before the court. Rule 6(5)(e) of the Uniform Rules of Court allows for such a further procedure. The court is also a custodian of the constitution and when the occasion calls for an inquisitorial intervention, it should make such an intervention.

C. THE CENTRAL COMPLAINT AGAINST THE ORDER *A QUO* – IT FAILS TO GUARD AGAINST HOMELESSNESS

56. Apart from the errors identified above, the Applicants' central complaint against the order of the Court *a quo* is that it fails to guard against homelessness.

57. It is respectfully submitted that it is now an established principle of our law that evictions leading to homelessness will not normally be permitted. We elaborate on this principle below. We also show in section D that protection in this regard is not only afforded to relatively settled communities.

58. It is by now axiomatic that a court will not normally grant an order for the eviction of unlawful occupiers if that order would lead to homelessness. There is an abundance of authority to support this proposition.

59. In *Port Elizabeth Municipality v Various Occupiers* this Court held that:

> *"a court should be reluctant to grant an eviction order against relatively settled occupiers unless it is satisfied that a reasonable alternative is available, even if only as an interim measure pending ultimate access to housing in the formal housing programme."*

See: 2005 (1) SA 217 (CC) at para 28.

60. In *The Occupiers, Shulana Court, 11 Hendon Road, Yeoville v Mark Lewis Steele*, the SCA held that:

> *"It will, generally, not be just and equitable for a court to grant an eviction order where the effect of such an order would be to render the occupiers of the property homeless."*

See: 2010 (9) BCLR 911 (SCA) at para 16

61. In *Government of Republic of South Africa v Grootboom ("Grootboom")*, this Court held that:

> *"The State had an obligation to ensure, at the very least, that the eviction was humanely executed."*

See: 2001 (1) SA 46 (CC) at para 88

62. In *Modderfontein Squatters, Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd ("Modderklip")* the SCA confirmed that eviction orders must be executed humanely. In circumstances where the occupiers (who had unlawfully "invaded" the land) had no alternative accommodation available to them, the SCA held that:

> *"The [eviction] order cannot be executed – humanely or otherwise – unless the state provides some land."*

This is all the occupiers ask in this case, namely "some land".

See: 2004 (6) SA 40 (SCA) at para 26

63. The ratio of *Modderklip* is accordingly not merely that it is inhumane to

evict people if there is nowhere else where they may lawfully live, the ratio of *Modderklip* is that it is also untenable to do so.

64. The courts have also refused to grant eviction orders where, while not necessarily rendering the occupiers homeless, eviction would simply render them unlawful occupiers elsewhere, and therefore liable to be evicted again. In *Baartman and Others v Port Elizabeth Muncipality*, the SCA held that the unlawful occupiers were *"merely asking that land be identified where they can put up their shacks and where they will have some measure of security of tenure."* In the absence of an assurance that the unlawful occupiers would have some measure of security of tenure at the alternative site that had been identified for them, the SCA refused to grant an order for their eviction. The SCA held as follows in this regard:

> *"The appellants do not object to being moved from the property but merely wish to settle where they will be assured of security of tenure, something to which the respondent seems reluctant to commit itself although it has vast tracts of land available. The Court a quo found that Walmer Township is alternative land to which the appellants can move. But it is certainly not in the public interest, in my view, to evict the appellants from the property only for them to be evicted again from Walmer Township on grounds of being unlawful occupiers....In*

the absence of an assurance that the appellants will have some measure of security at Walmer Township, I consider that the Court a quo should not have granted the order sought."

See: 2004 (1) SA 560 (SCA) at para 14 and 19

65. In *Residents of the Joe Slovo Community, Western Cape v Thubelisha Homes and Others*, this Court emphasised the need for eviction orders to be carefully tailored in order to safeguard against homelessness. In that case, it fashioned an order which made it clear that no occupier would be required to vacate his or her home unless and until temporary accommodation was ready and available for the occupier concerned. O'Regan J held as follows:

"The order makes it clear that no occupier may be required to move unless temporary accommodation is made available for him or her by the respondents. To the extent, therefore, that a situation arises during the course of the eviction process to the effect that there are no longer sufficient temporary residential units available to house the occupiers who are scheduled to be moved (an issue that was disputed on the papers) the eviction process must be halted until sufficient accommodation is available."

See: 2010 (3) SA 454 (CC) at para 318

66. In the matter at hand, it is clear that in the event that the Second Respondent does not comply with its obligations in terms of the order of the court *a quo*, the Applicants may nevertheless be evicted. As such, the order *a quo* fails to guard against homelessness. For the reasons set out above, we submit that this is constitutionally impermissible. We submit that this is the position whether or not the community can be described as "relatively settled" or not. We deal with this aspect in more detail below in section D.

67. We accordingly submit that any eviction order granted in this matter should be conditional on alternative land or accommodation actually being made available to the Applicants by the Second Respondent. The amendments required to the order in this regards is dealt with below.

D. NOT ONLY "RELATIVELY SETTLED OCCUIERS" ARE PROTECTED

68. Also central to the findings of the court *a quo* were the various findings that suggest that the occupiers form part of a recent and ongoing invasion, and as such are not "relatively settled occupiers". This term comes from the judgment of *Port Elizabeth v Various Occupiers* (supra). We submit that it

is important to revisit the facts of the leading eviction cases to understand properly what is meant by this phrase and also to place it in its correct context

69. First, we submit that the circumstances of when an order for eviction will be just and equitable, cannot be limited by the introduction of concepts such as "relatively settled". The exercise of the discretion must always be made after all relevant circumstances have been considered.

70. The concept of "relatively settled occupiers" was used in the *Port Elizabeth* case to come to the assistance of the occupiers. In other words, it was used to give protection to a fundamental right. That does not mean that the reasoning must be used to limit the scope of section 26(3) of the constitution in other cases where the occupiers are not relatively settled. Such an interpretation of the jurisprudence would, with respect, fly in the face of general principles of constitutional law that requires a generous and purposive interpretation of fundamental rights.

See: S v Zuma 1995(4) BCLR (CC) at para 13 to 18

71. Neither the *Grootboom*-case, nor the *Modderklip*-case involved a relatively settled community. They involved relatively large communities that had no choice but to invade private land. *Various Occupiers* involved a relatively small community.

72. In *Modderklip* it is quite apparent that the community only became relatively well settled because they resisted, from the outset, attempts to evict them and all attempts at eviction were ineffective. The community was not well settled at the beginning. The community started with 400 people erecting 50 shacks on the land in question (par -6). We submit that it is appropriate to consider the facts of the *Modderklip* matter in detail as it is set out in paragraphs 3 to 9 of the judgment of this court in that matter.

73. The *Grootboom* matter also did not involve a relatively settled community. Quite the contrary, it involved a recent land invasion. The invasion started in September 1998, and the eviction proceedings started in December 1998. An eviction was then effected without alternatives being made available. The court described it as an "aparthheid style eviction" We submit it is helpful to consider the facts of *Grootboom* properly, as it illustrates what happens to communities that constantly face eviction where the orders

against the local authority is not effective, and where evictions are allowed to be effected in an inappropriate manner. At paragraphs 7 to 11 the following:

> *Mrs Grootboom and most of the other respondents previously lived in an informal squatter settlement called Wallacedene. It lies on the edge of the municipal area of Oostenberg, which in turn is on the eastern fringe of the Cape Metro. The conditions under which most of the residents of Wallacedene lived were lamentable. .....*
>
> *Many had applied for subsidised low-cost housing from the municipality and had been on the waiting list for as long as seven years. Despite numerous enquiries from the municipality no definite answer was given. Clearly it was going to be a long wait. Faced with the prospect of remaining in intolerable conditions indefinitely, the respondents began to move out of Wallacedene at the end of September 1998. They put up their shacks and shelters on vacant land that was privately owned and had been earmarked for low-cost housing. They called the land 'New Rust'.*
>
> *They did not have the consent of the owner and on 8 December 1998 he obtained an ejectment order against them in the magistrate's court. The order was served on the occupants but they remained in occupation beyond the date by which they had been ordered to vacate. Mrs Grootboom says they had nowhere else to go: their former sites*

in Wallacedene had been filled by others. The eviction proceedings were renewed in March 1999. The respondents' attorneys in this case were appointed by the magistrate to represent them on the return day of the provisional order of eviction. Negotiations resulted in the grant of an order requiring the occupants to vacate New Rust and authorising the sheriff to evict them and to dismantle and remove any of their structures remaining on the land on 19 May 1999. The magistrate also directed that the parties and the municipality mediate to identify alternative land for the permanent or temporary occupation of the New Rust residents.

...the respondents were forcibly evicted at the municipality's expense. This was done prematurely and inhumanely: reminiscent of apartheid-style evictions. The respondents' homes were bulldozed and burnt and their possessions destroyed. Many of the residents who were not there could not even salvage their personal belongings. "

74. In the matter of **Port Elizabeth Municipality v Peoples Dialogue on Land and Shelter and Others** 2000 (2) SA 1074 (SE), the occupiers invaded serviced residential stands. The invasion of serviced stands or completed homes is obviously a serious matter that involves a completely different set of circumstances than where people want "only land"

75. The court of first instance granted a suspended eviction order (at p 1087G)

subject to alternative land or accommodation being made available. The suspension of the order was overturned on appeal to a full bench of the provincial division.

See: Port Elizabeth Municipality v Peoples Dialogue on Land and Shelter 2001(4) SA 759 (E) at p 769 B-C delivered on 7 November 2000. This judgment did not refer to either of the Grootboom judgments.

76. We submit that the full bench judgment in *People's Dialogue* is no longer authoritative law. This court, in *Various Occupiers* approved the three most central aspects of the reasoning by Horn AJ in the initial judgment of *People's Dialogue*. These were

- Each case had to be decided on its own facts
- The issue of what is just and equitable relates to the interests of both the land owner and the unlawful occupiers.
- Removals need to be done in a fair and orderly manner, and preferably with a specific plan of resettlement in mind.

See: *Various Occupiers* (supra) at par 33

77. We submit the protection afforded to relatively settled communities should not be used to limit the rights of communities not so settled. We submit that the authorities referred to here, support us in our submission.

E. REPORTS FILED BY THE CITY OF TSHWANE

78. Both the land owner and the City of Tshwane filed planning documents and reports.

79. The City of Tshwane filed its Integrated Spatial Development Framework for Kirkney, Andeon and Zandfontein. This is a draft report dated January 2008. It also filed a Housing Development plan for the City as a whole.

See: p 1069, Vol 11 to p1141, Vol 12
p 1145, Vol 12, to p 1320, Vol 14

80. The Spatial Development Framework (SDF) deals with the specific properties and area, but does not really suggest any specific solution for the Melusi informal settlement. The Housing Development Plan does not deal

with the area or the settlement at all.

81. Paragraph 3.2.2 of the SDF reports that the bulk of the land in the study area is in private ownership. There are, however, five large pockets of land of which:

71.1 the City of Tshwane owns three pockets of land. These include seven land parcels in Zandfontein area, Lady Selbourne, Cederberg area and erf 262 on the farm Daspoort further to the east;

See: p 1082, Vol 11

Par 2, p 392, Vol 4 (on the issue of alternative land)

71.2 the Gauteng Province owns four land parcels to the north of Andeon Agricultural Holdings;

71.3 Absa Bank owns an area to the south of Van der Hoff Street.

82. The report concludes that the "Kirkney/Andeon and Zandfontein ISDF Land Use Budget Precinct " is capable of being developed and the total residential

yield for the study area can accommodate 42 930 units comprising of 16 979 subsidised units (40%) and 25 952 bonded units (60%).

See: p 1121, Vol 12

83. It is difficult to speculate as to what the future intentions of Tshwane are for the area, but it does seem to be a fair assessment that the area in question is eminently developable and that there is substantial state and municipal land in the area. The plans all sound promising, but implementation is uncertain.

F. ENGAGEMENT BETWEEN THE CITY AND THE OCCUPIERS

84. We have briefly referred to the engagement process above. We make a few additional submissions, especially in respect of the undertakings given by the City. The City and the occupiers engaged formally during a meeting held on 3 September 2010. The land owner was not part of this meeting.

See: p 1354, Vol 14

85. As is apparent from the minutes, the parties thereto were of the firm view that most issues could be settled between them and that it was accepted that

the City needed two years to effect the relocation. The occupiers placed on record that they would not accept a relocation which would involve them settling more than five kilometres from their present location.

86. Planning and housing are functions which fall within the jurisdiction of administrative and executive branches of the state. A court should not, with respect, second guess another branch of government on the time it requires to complete a certain project. Structural interdicts involve an interference in the business of another branch of government, and a court should show much deference in this regard. The peculiarities presented by each case is also a reason why the parties are required to engage.

87. The court *a quo* did not show the requisite deference in this regard. The requirement of deference is also relevant when formulating a structural interdict. We submit it is necessary to have regard to the basic principles applicable to structural interdicts as they have been developed by our courts. Ultimately, the court *a quo*, ignored the engagement process of the City and the occupiers.

G. STRUCTURAL INTERDICTS

88. In S v Z and 23 similar cases the learned Judge sated that:

> *"One of the remedies that has been developed and utilised in countries that, like South Africa, are committed to the values of human dignity, equality and freedom, is the structural interdict, a remedy that orders an organ of State to perform its constitutional obligations and report on its progress in doing so from time to time.This remedy has been recognised, and accepted as a competent remedy in appropriate cases, by the Constitutional Court in Pretoria City Council v Walker and in Minister of Health and Others v Treatment Action Campaign and Others (1,)in which the court held explicitly that its power to grant mandatory relief "includes the power where it is appropriate to exercise some form of supervisory jurisdiction to ensure that the order is implemented"....."*

See: 2004 (4) BCLR 410 (E) at para 38

89. In Minister of Health and others v Treatment Action Campaign and others (No2) this Court sated at par 104 of the judgment that:

> *"The power to grant mandatory relief includes the power where it is appropriate to exercise some form of supervisory jurisdiction to ensure that the order is implemented. In Pretoria City Council v Walker,53 Langa DP said:*

"[T]he respondent could, for instance, have applied to an appropriate court for a declaration of rights or a mandamus in order to vindicate the breach of his s 8 right. By means of such an order the council could have been compelled to take appropriate steps as soon as possible to eliminate the unfair differentiation and to report back to the Court in question. The Court would then have been in a position to give such further ancillary orders or directions as might have been necessary to ensure the proper execution of its order."

See: 2002 (5) SA 721 (CC)

90. At paragraph 113 this Court stated that:

"[113] South African courts have a wide range of powers at their disposal to ensure that the Constitution is upheld. These include mandatory and structural interdicts. How they should exercise those powers depends on the circumstances of each particular case. Here due regard must be paid to the roles of the legislature and the executive in a democracy. What must be made clear, however, is that when it is appropriate to do so, courts may – and if need be must – use their wide powers to make orders that affect policy as well as legislation.

91. We submit that, although a supervisory component will not always be part of a structural interdict, it will usually be. The present case is an instance where a supervisory component should be part of the order.

H. LIKELY CONSEQUENCES OF AN EVICTION

92. Considering the possible consequences of an eviction order in this matter, should, with respect, be a necessary part of the reasoning process when considering whether it is just and equitable to grant an eviction order.

93. If the City does not make alternative land available as provided by paragraph (v) of the court order, it will presumably also not provide transport as provided in paragraph (vii) of the order.

94. The inevitable consequence will be that the eviction will be chaotic. The occupiers will have limited options, none of which will bring them tenure security nor will it bring any improvement to the position of the neighbourhood. They will either attempt to salvage their building material and move to the closest area where the court order does not apply, or they will have to abandon their belongings and settle wherever. This may or may

not be publicly owned land.

95. Many will simply wait apathetically until their dwellings are destroyed and then scatter all over the place. It is not even guaranteed that they would move off the land owner's parcel of properties. They will certainly remain in the immediate vicinity. The *Grootboom* facts (*supra)* is a real life illustration of what happens to such communities.

96. It is unrealistic to think that people will somehow "return to where they came from" and that the problem will solve itself. All the evidence presented by the occupiers show that they have nowhere else to go. They either lived in the veld in the area, or they were evicted alsewhere.

I. TO WHAT EXTENT SHOULD A COURT MAKE PROVISION FOR NON COMPLIANCE BY A STATE INSTITUTION

97. In the ideal world a court can assume that an organ of state will always comply with a court order and will do so promptly. However, in South Africa it must be accepted that many organs of state have experienced problems to comply with court orders. The issue has received some judicial

attention.

98. In **Nyathi v MEC Department of Health, Gauteng and another** this Court stated that:

> *"The problem of non-compliance with court orders has frequently confronted our courts in recent times and various solutions have been devised to ensure the satisfaction of judgment debts. In some cases, courts have opted for contempt proceedings to enforce money judgments against the State. In other cases structural interdicts have been granted. The solutions in those cases appear to have been effective in satisfying the judgment debts in question."*

See: 2008 (9) BCLR 865 (CC) at para 95

99. Neither can it be assumed that non-compliance will always be due to contemptuous attitude or actions. There may be understandable reasons why an organ of state cannot deliver on time.

100. Delivery of socio-economic rights involve complex processes dealing with budgets, procurement, planning, inter governmental interactions and finally sequencing of delivery processes through project management, monitoring and evaluation. Courts and judicial processes are not generally suited to

order or oversee these processes.

101. Courts are, however, forced to make such orders where the violation of constitutional rights are serious and require remedial action.

102. One must , with respect, almost assume that there will be difficulties in implementation of these type of orders. Structural interdicts that aim to give an organ of state room to design its own plans and methods of complying with its constitutional duties, will only be made when there is already a failure to deliver. In most cases the existing failure will be of such a serious nature that it requires of the courts to bark across the lines of the separation of powers.

103. The underlying problems that caused the lack of delivery, cannot just be assumed to have disappeared once a court order is made.

104. For this reason, structural interdicts are made flexible and allow for the parties to come back to court if problems are experienced with the implementation therof.

105. As illustrated above in the discussion relating to structural interdicts, such orders should allow for the parties to manage the progress and for the court to supervise the progress. Contempt of court proceedings should only be an option in the most extreme circumstances. The threat of contempt proceedings serve no constructive purpose and should not be the primary tool of enforcement. Contempt proceedings also waste judicial resources.

J. THE HOUSING SITUATION IN TSHWANE

106. We submit that this court can take judicial notice of the fact that the City of Tshwane is facing many housing crises. The land owner also makes reference to a number of these in its papers.

See: par 19.6 to 19.9, p 334, Vol 4

107. Tshwane also has the habit of burying its head in the sand. In the present matter it also failed to appeal an order which it knew it was not going to comply with. It did the same in the recent cases of Occupiers of Mooiplaas and Skurweplaas (CCT 25/2011 and CCT 26/2011)

K. RELIEF SOUGHT

108. We submit that the order of the court *a quo* must be amended in a number of fundamental ways, at least in the following respects:

The eviction must be conditional on the availability of alternative land.

The City of Tshwane must be given two years in which to complete the process of relocation. The City should also, at the very least, consider acquiring the land on which the occupiers live.

The order must allow for the parties to monitor the progress of the process and to approach the court *a* quofor an amendment of the order should practical problems be experienced in the implementation thereof.

Everybody who is present on the land at the date of relocation, must be relocated. It is, with respect, incorrect to exclude certain people from such relocation. Informal settlements are not static. In any event,

it won't assist the land owner if certain people are left behind because they weren't present at the time of the court order.

The City must engage with the representatives of the occupiers and the occupiers themselves on all critical aspects of the relocation.

109. We respectfully submit that this court should grant the application for leave to appeal, should uphold the appeal with costs and should grant an order in the terms sought by the occupiers in the court *a quo* as set out in paragraph 65 of their answering affidavit, page 466 in volume 5. The order should, however, make it clear that in respect of those persons found to be ESTA occupiers, their occupation should not be regarded as unlawful. Paragraph two should therefor have an exception built in for the process envisaged in paragraph 3.1. Costs in this court should be for two counsel and should be made against the City.

L. CONCLUSION

110. The facts of this case as well as other eviction cases in the municipal area of the City of Tshwane are flashing red lights for housing authorities and

private land owners. It simply will not help ignoring the increasing pressures brought about by urbanisation.

111. Urbanisation and the socio-economic phenomena which cause urbanisation needs to be recognised as the central force in urban housing matters and what we understand as the bottom line for urban land tenure. The concept of eviction must also accommodate the basic idea that simple repulsion of people who seek only land and nothing more, is constitutionally impermissible.

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10 October 2011
High Court Chambers, Tshwane