IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA
HELD AT BRAAMFONTEIN

CASE NO: CCT 42/12

In the matter between:

PONTSHO DOREEN MOTSWAGAE	First Applicant
FOURTEEN OTHERS	Second to Fifteenth Applicants

and

RUSTENBURG LOCAL MUNICIPALITY	First Respondent
PROMPTIQUE TR 9 CC	Second Respondent
LAWYERS FOR HUMAN RIGHTS	Amicus Curiae

ADDITIONAL WRITTEN SUBMISSIONS OF THE FIRST RESPONDENT

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INTRODUCTION

1 These submissions are prepared on behalf of the First Respondent and address the written submissions filed on behalf of the Amicus Curiae and the questions raised in the Chief Justice's Directions dated 5 November 2012.

2 The parties have been asked to address the following issues on the basis that the Applicants are occupiers of the property concerned, whether lawful or unlawful.

2.1 Whether section 26(3) of the Constitution or any other law confers on the Applicants any right not to be disturbed in the peaceful occupation and possession of their home without a court order, and whether the First Respondent's conduct resulted, or will in the future result, in an unlawful interference;

2.2 Whether the premises they occupy can be properly regarded as their homes within the meaning of section 26(3) of the Constitution;

2.3 Whether the conduct authorised and caused by the First Respondent can be regarded as reasonable absent any

order of court ejecting the Applicants from the property concerned.

3 In order to properly address the issues raised by the Chief Justice's directions, I deal with the following issues in these submissions:

3.1 Preliminary observations in view of the Applicant's Heads of Argument;

3.2 The High Court judgment;

3.3 The directions of the Chief Justice; and

3.4 The written submissions of the *amicus*.

PRELIMINARY OBSERVATIONS IN LIGHT OF THE APPLICANTS HEADS OF ARGUMENT

4 The issues to be determined require a consideration of the facts which gave rise to the urgent application in the Court *a quo* and which did not involve constitutional issues. The heart of the matter is the Applicants' position to participate in the First Respondent's housing policies.

5 The Applicants' case before this Court is wholly dissimilar to that made in the court *a quo*. In this Court, the Applicants have raised a constitutional issue for the first time. In their heads of argument, the Applicants contend that the constitutional issue raised by this application for leave to appeal is the nature of a municipality's obligations under Chapter 10 of the Housing Code and its relationship to the right to housing and the provisions of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 ("PIE").[1]

6 However, this application for leave to appeal relates to an order of the High Court in which no constitutional issue was ever raised, nor did the court *a quo* address itself to a constitutional issue. Instead, the question before the court *a quo* was a factual question of whether the Municipality was entitled to install engineering services in close proximity to the housing structures on the land in question.[2] It was always clear that what the Municipality was proposing involved the temporary resettlement of the residents of Thlabane Hostel in

[1] Applicant's Heads of Argument, para 92, page 31.
[2] First respondents Answering Affidavit in response to application for leave to appeal to the Constitutional Court, para 10, page 3.

order that the Municipality could upgrade and develop the buildings concerned in line with the obligations imposed upon the Municipality to give effect to the right to housing in section 26(1) of the Constitution and to respect, protect, promote and fulfil the rights in the Bill of Rights as required by section 7(2) of the Constitution. The installation of engineering services is essential for any residential development and is, in the facts under consideration and in law in general, neither an eviction nor a demolition of homes.

7 The obligations of a Municipality in respect of providing housing to the millions of homeless in South Africa may be sourced not only in section 26 of the Constitution but also in the National Housing Act 107 of 1997 ("the Housing Act"), the National Housing Code ("the Code") and the Local Government: Municipal Systems Act 32 of 2000 ("the Systems Act"). The First Respondent's role in relation to housing has been summarised by this Court in City of Johannesburg MM v Blue Moonlight properties 2012 (2) SA 104 (CC) ("Blue Moonlight") at paragraphs [22 - 23] as follows:

"[22] Chapter 7 of the Constitution sets out the functions and powers of local government. Section 152 states the objects of local government and requires municipalities to strive to achieve these objects. Section 153(a) provides that a municipality must "structure and manage its administration and budgeting and planning processes to give priority to the basic needs of the community, and to promote the social and economic development of the community. Section 156 authorises municipalities to carry out their functions.

[23] These provisions must be read with Ch 3 of the Constitution. It enshrines the principle of cooperative government."

8 The role that the First Respondent and the various other organs of state play in the Constitutional Court was described as follows in *Blue Moonlight*:

[24] The principal instruments enacted to give effect to the constitutional obligations of the various organs of State in relation to housing are the Housing Act 17 and the National Housing Code. The Housing Act expressly gives effect to the Constitution. Its long title states that it aims '(t)o provide for the facilitation of a sustainable housing development process' and 'to define the functions of national, provincial and local governments in respect of housing development'. The preamble recognises that the Act gives effect to s 26 of the Constitution and specifically mentions the right to have access to adequate housing. Section 9 obliges municipalities, as part of the process of integrated development planning, to take all reasonable and necessary steps within the framework of national and provincial housing legislation and policy to ensure, amongst other things, that the inhabitants of their respective areas have access to adequate housing."

9 In view of these obligations, the Municipality at no point attempted to evict the Applicants from their homes. In fact, the Municipality pointed out in its answering affidavit before the High Court that "*the obligation of the First Respondent in respect of homeless people through the operation of the Constitution made an eviction order as alleged by the Applicants, meaningless and illogical.*"[3]

10 In the process of providing housing, not only for the Applicants but also other inhabitants in need, the First Respondent approved the redevelopment of the Thlabane Female Hostel which will provide high-density residential units to successful Applicants of its housing program. The conflict between the parties lies therein that the Applicants will support the densification and installation of engineering services only if they obtain residential units in this development. They refused to participate in the Applicant's process in which different needs and requirements of its inhabitants are identified and provided for. By this conduct the Applicants seek to dictate to the First Respondent as to which specific residences they want notwithstanding the First Respondent's

[3] Answering Affidavit, Record Vol 1 page 5, para 11

housing criteria. We wish to draw attention to the fact that the First Respondent has not at any stage shied away from its constitutional duties to provide the Applicants access to adequate housing.

11 The nature of the hostel concept is such that it housed several families in one structure consisting of four rooms[4]. The fact that the social effect thereof is unacceptable is undoubtedly so. The practical consequence thereof is that more than one family lays claim to the same structure. The structure in itself is dilapidated and the living conditions pose a health and safety hazard. The current conditions are not conducive to raise healthy and functional families.

12 That the hostels need to be demolished and rebuilt is a logical consequence of the factual situation. The Applicants, by their conduct, want to be assured that they will obtain ownership of the new residential units which the First Respondent planned, financed and erected according to their housing program. This housing program is executed in cooperation with other statutory organisations which play a pivotal role in the

[4] Answering Affidavit, Record Volume 1 page 61 para 15.8

National Housing Code, which functionaries do not take part in these proceedings.

13 Indeed, in the answering affidavit filed on behalf of the First Respondent in the High Court, the First Respondent stated unequivocally that in view of the obligations imposed by Constitution on municipalities such as the First Respondent:

> *"It was never the First Respondent's strategy in its housing program to render the inhabitants of the Thlabane Hostel homeless. The First Respondent endeavoured through a protracted public participation process since 2005 to engage with the inhabitants of the Tlhabane Hostel in a meaningful manner in order to redevelop the Thlabane Hostel to the benefit of all interested parties."*[5]

14 The functions and responsibilities of the First Respondent are far-reaching and it has the right to do anything reasonably necessary or incidental to the effective performance of its functions and the exercise of its powers.[6]

15 In the circumstances, it is submitted that no foundation was laid in the High Court for the case now made out by the Applicants in this Court. Moreover, the relief sought by the Applicants in this Court requires this Court to effectively sit as

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[5] Answering Affidavit, Record Vol 1 page 4, para 9.
[6] *Blue Moonlight* para [25], p 113

a court of first instance in assessing the lawfulness of the First Respondent's hostel renewal project. There is simply no basis for this Court to do so.

Non-Joinder of interested parties

16 An issue of importance is the fact that interested parties have not been joined in this application.

17 To the extent that this Court entertains the so called challenge to the Upgrading of Land Tenure Act, it requires the Minister responsible for the Act to be joined as a party to the litigation which has not been done.

18 Nor is the Provincial Government represented in this case which concerns issues in which they have a direct interest. The land itself is owned by the North West Provincial Government. It is trite that as the owners of the land, the North West Provincial Government, or at the very least, the North West Housing Corporation ("the NWHC")[7], must

[7] An entity established by section 2(1) of the North West Housing Corporation Act 83 of 1982. The Municipality, the North West Province and the NWHC together seek to upgrade the properties concerned into high density residential units for participants who are the successful Applicants for the housing project. First Respondent's Answering Affidavit, para 34, page 10.

19 The Code itself is promulgated by the National Minister in terms of the Housing Act and the Minister is not represented in this Court to defend the constitutionality and implementation of the Code. This Court has made clear that the rules of this Court require the joinder of an organ of State responsible for executive, administrative or legislative conduct that is being constitutionally challenged.

> *"In view of the intertwined responsibilities of the national, provincial and local spheres of government with regard to housing, it would generally be preferable for all of them to be involved in complex legal proceedings regarding eviction and access to adequate housing. Indeed, joinder might often be essential and a failure to join fatal. Whether it is necessary to join a sphere in legal proceedings will, however, depend on the circumstances and nature of the dispute in every specific case."*
>
> *Blue Moonlight Properties 039 (Pty) Ltd and Another, City of Johannesburg Metropolitan Municipality v 2012 (2) SA 104 (CC)Para 45-46*

20 In the circumstances, it is submitted that it can not be in the interests of justice for this Court to grant leave to appeal.

THE JUDGMENT OF THE HIGH COURT

21 The findings of fact of the High Court are, it is submitted, crucial to the determination of whether this Court ought to

grant leave to appeal. Of particular importance is the following:

22 The court pointed out repeatedly:

22.1 that it was never the Municipality's strategy to render the inhabitants of the Thlabane hostel homeless.

> *"The First Respondent endeavored through a protracted public participation process since 2005 to engage with inhabitants of the Thlabane hostel in a meaningful manner in order to redevelop the Thlabane hostel to the benefit of all interested parties."*[8]

22.2 that at all relevant stages the First Respondent was alive to the fact that the redevelopment of the Thlabane hostel would result in a temporary resettlement of families or that it would have to provide alternative accommodation to them, a responsibility the Municipality accepted.[9]

23 The Court also recorded that that a survey was conducted during March 2009 of all the residents occupying the buildings on the relevant stands and that the survey indicated: [10]

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[8] Para 6 of the High Court judgment.
[9] Para 8 of the judgment.
[10] Para 9 of the judgment.

23.1 the current occupants as registered residents and the number of shacks erected on the specific stands.

23.2 only seven of the Applicants are reflected in the survey as occupants.

23.3 the remaining Applicants were not occupants during March 2009 when the survey was conducted.

23.4 several of the occupants sub-let these properties to third parties who live in desperate circumstances which are unsafe and do not comply with health and building requirements.[11]

24 The High Court found that the Applicants are currently occupying the dwellings concerned without any contractual basis therefore.[12]

25 The High Court judgment also records that the First Respondent's health department and building control department inspected the Thlabane hostels and recorded their finding in reports which were before the High Court. The

[11] Paragraph 11 of the judgment.
[12] Para 11 of the judgment.

health report of the hostels records the following in respect of the houses:

25.1 The houses are in a dilapidated state;

25.2 Two different households share limited space and entrances;

25.3 The living conditions pose a health hazard and threat;

25.4 There is not sufficient cross-ventilation which creates a risk for transmission of communicable diseases;

25.5 There is no privacy for the inhabitants due to the limited space and children living in the facilities; and

25.6 The facilities are not conducive to raise a healthy and functional family.

26 The Building Control Department's report concluded that:

26.1 The houses are severely damaged.

26.2 The houses can collapse at any time and are unsafe for residential purposes.

26.3 The houses are $36m^2$ and are divided by walls which consist of one bedroom and kitchen which also serves as living quarters.

26.4 There is only one window and the bedroom facility has no window.

26.5 According to the National Building Regulations a bedroom should be $6m^2$ for habitable space and these facilities do not meet the minimum requirements.

26.6 The foundation walls are not firmly attached and the structures are unsafe and have visible structural defects.

26.7 The dwelling units should be demolished.[13]

27 While it is accepted that the condition of the buildings is but one of the many relevant factors that a Court must take into consideration in assessing the validity of a hostel renewal process such as the one undertaken by the First Respondent, it is submitted that what is clear from the above factors is that upgrading of the building in question are now at a critical stage. When this is taken together with the fact that the First Respondent has provided suitable alternative

[13] Paras 12 and 13 of the judgment.

accommodation, the reasonableness of the renewal program is clear.

28 With respect to the motivations of the Municipality in respect of housing, the Court accepted that one of the Municipality's priorities and obligations is to provide low cost housing and deliver housing to the various communities under its area of control. It did so in the context of a shortage of land for RDP housing which necessitated the use of existing townships for maximum benefit.[14]

29 The judgment records that most of the Applicants and affected parties were not satisfied to accept alternative accommodation in Seraleng in 2007. This concern was later addressed by the First Respondent when other facilities in Karlienpark were tendered to the affected parties.[15]

30 Finally and of importance, the Court held that the Code had been complied with.[16]

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[14] High Court judgment, Record Vol 3, para 14
[15] Ibid, para 20
[16] Ibid, para 16

31 In respect of the ownership of the land, the High Court judgment records [17] that some of the affected parties contended that they held ownership of the land concerned through a Deed of Grant in terms of the provisions of the Native Trusts and Land Act. These persons were called upon to show proof of such ownership. The meeting was also assured that new development would be rented out at affordable prices and that affected parties were encouraged to apply for RDP housing due to the fact that it would be free and in certain specified circumstances people would gain ownership if they qualified for it. The meeting was informed that the RDP houses would be erected in Karlienpark which is also an RDP development within the First Respondent's housing programme and was offered to the affected parties due to the fact that they were not happy with the RDP project in Seraleng.

32 In response to the demand for proof of ownership by way of Deed of Grant, a number of occupants presented the First Respondent with Deeds of Grant. However, none of the

[17] At para 24.

Applicants are holders of Deeds of Grant and can claim ownership to the properties concerned.

33 The High Court accordingly held that the Applicants did not have a clear right to the property in question.[18]

34 Of particular interest is the finding of the High Court in relation to the availability of alternative remedies. At paragraph 33 and 34 of its judgment, the High Court found that in fact there were alternative remedies available to the Applicants in the form of a review of the decision of the municipality to redevelop the hostel. This decision had been taken on 30 August 2004 and was not challenged at any point during the process. In fact the municipality received no opposition to its administrative decision and this motivated it to put the construction out to tender between 2005 and 2007 and to follow up on this process. Subsequent thereto several public meetings took place on 13 February 2008, 15 May 2008 and 12 February 2009. The Applicants derailed the public meeting in February 2009 when they refused to participate in the housing project.

[18] High Court Judgment, Vol 3 para 30

35 The finding of the High Court was therefore that there was in fact an alternative remedy available to the Applicants and that therefore the requirements of the final interdict had not been met.

36 Of importance the High Court notes at paragraph 36 of the judgment that the First Respondent in its counter-application makes clear that it does not seek an eviction order against the Applicants. In actual fact the First Respondent tendered alternative accommodation to the Applicants. The High Court therefore found that the Applicants had failed to meet the requisites for the granting of the final interdict and failed to make out a case for the granting of the relief sought and dismissed the application with costs and upheld the counter-application.

THE QUESTIONS RAISED BY THE CHIEF JUSTICE

37 I now turn to deal with each of the questions raised by the Chief Justice in his directions dated 5 November 2012. The parties have been asked to address the following issues on the basis that the Applicants are occupiers of the property concerned, whether lawful or unlawful.

37.1 Whether section 26(3) of the Constitution or any other law confers on the Applicants any right not to be disturbed in the peaceful occupation and possession of their home without a court order;

37.2 Whether the premises they occupy can be properly regarded as their homes within the meaning of section 26(3) of the Constitution;

37.3 Whether the conduct authorised and caused by the First Respondent can be regarded as reasonable absent any order of court ejecting the Applicants from the property concerned.

WHETHER SECTION 26(3) OF THE CONSTITUTION OR ANY OTHER LAW CONFERS ON THE APPLICANTS ANY RIGHT NOT TO BE DISTURBED IN THE PEACEFUL OCCUPATION AND POSSESSION OF THEIR HOME WITHOUT A COURT ORDER AND WHETHER THE FIRST RESPONDENT'S CONDUCT RESULTED, OR WILL IN THE FUTURE RESULT, IN AN UNLAWFUL INTERFERENCE

38 The First Respondent denies that it had contravened the provisions of section 26(3) of the Constitution or any other law in this context.

39 Section 26(1) of the Constitution provides that everyone has the right to have access to adequate housing. Section 26(2) requires the State to take reasonable legislative and other measures within its available resources, to achieve the progressive realisation of this right. Finally, section 26(3) provides that 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 and that no legislation may permit arbitrary evictions.

40 Section 26 does not address the concept of a "disturbance" of one's peaceful occupation of one's property. When the Municipality began installing engineering services on the properties concerned, it may have constituted a "disturbance" in ordinary parlance but this is not a disturbance of peaceful occupation as envisaged by the law of property.

41 The Applicants are lawful occupiers for purposes of section 26 of the Constitution and the Prevention of Illegal Eviction from and Unlawful Occupation of Land 19 of 1998 ("PIE"). This is because they have resided in the properties concerned with

the permission of the owners of the land, the North West Housing Corporation ("the NWHC").[19]

42 The First Respondent accepts that the property concerned, despite being owned by the NWHC, constitutes the home of the Applicants as defined in our jurisprudence. However, I point out that the Applicants are not the owners of the property concerned and could only become owners through the ordinary application of the law of property.

43 The First Respondent did not evict or attempt to evict the Applicants from their homes. Instead, the First Respondent was following the procedure set out in the Code, for the upgrading and re-development of the properties concerned.

44 The First Respondent attempted through its public participation processes to engage meaningfully with the Applicants and other members of their community. However, on their attorney's advice, the Applicants stopped participating in the public meetings and chose to absent themselves from this forum.[20] In so doing, the Applicants frustrated any

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[19] Insert reference
[20] Answering Affidavit, Record Vol 1, Record page 57-58

meaningful dialogue between the parties, a process which they now claim was not provided for by the First Respondent.

45 In *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg and Others 2008 (3) SA 208 (CC)*, this Court held:

> *"It must be understood that the process of engagement will work only if both sides act reasonably and in good faith. The people who might be rendered homeless as a result of an order of eviction must, in their turn, not content themselves with an intransigent attitude or nullify the engagement process by making non-negotiable, unreasonable demands. People in need of housing are not, and must not be regarded as a disempowered mass. They must be encouraged to be pro-active and not purely defensive. Civil society organisations that support the people's claims should preferably facilitate the engagement process in every possible way."*

46 This Court has repeatedly affirmed the importance of a meaningful dialogue and engagement between parties to contentious eviction and similar disputes concerning the housing right.

> *"Thus, 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. At the same time, those who find themselves compelled by poverty and landlessness to live in shacks on the land of others, should be discouraged from regarding themselves as helpless victims, lacking the possibilities of personal moral agency. The tenacity and ingenuity they show in making homes out of discarded material, in finding work and sending their children to school, are a tribute to their capacity for survival and adaptation. Justice and equity oblige them to rely on this same resourcefulness in seeking a solution to their plight and to explore all reasonable possibilities of securing suitable alternative accommodation or land.

Not only can mediation reduce the expenses of litigation, it can help avoid the exacerbation of tensions that forensic combat produces. By bringing the parties together, narrowing the areas of dispute between them and facilitating mutual give-and-take, mediators can find ways round sticking-points in a manner that the adversarial judicial process might not be able to do. Money that otherwise might be spent on unpleasant and polarising litigation can be better used to facilitate an outcome that ends a stand-off, promotes respect for human dignity and underlines the fact that we all live in a shared society.

In South African conditions, where communities have long been divided and placed in hostile camps, mediation has a particularly significant role to play. The process enables parties to relate to each other in pragmatic and sensible ways, building up prospects of respectful good neighbourliness for the future. Nowhere is this more required than in relation to the intensely emotional and historically charged problems with which PIE deals. Given the special nature of the competing interests involved in eviction proceedings launched under s 6 of PIE, absent special circumstances, it would not ordinarily be just and equitable to order eviction if proper discussions, and where appropriate, mediation, have not been attempted.

Port Elizabeth Municipality v Various Occupiers 2005 (1) SA 217 (CC) at para 41-43

Schubart Park Residents Association and Others v City of Tshwane Metropolitan Municipality and Others [2012] ZACC 26

WHETHER THE CONDUCT AUTHORISED AND CAUSED BY THE FIRST RESPONDENT CAN BE REGARDED AS REASONABLE ABSENT ANY ORDER OF COURT EJECTING THE APPLICANTS FROM THE PROPERTY CONCERNED

47 Due to the fact that the installation of engineering services did not require a demolition of the hostel units, the question in relation to ejection is not relevant.

48 The role and responsibilities of a Municipality to provide housing for the millions of South Africans without homes have been set out above. The First Respondent has always accepted these responsibilities. It is submitted that the conduct of the First Respondent has been more than reasonable when considered in the light of the following factors:

48.1 The hostel renewal program is at a crucial stage as evidenced by the reports of various experts cited above which clearly show that the properties concerned are in

an advanced state of disrepair and are overcrowded, unhygienic and unsafe.

48.2 The First Respondent attempted to engage meaningfully with the Applicants but they absented themselves from this process on the instructions of their attorneys.

48.3 The Applicants were all offered suitable alternative accommodation and when they were not satisfied with the location of such accommodation, they were provided an alternative location which suited them.

48.4 Those Applicants who were able to pay the nominal rent were entitled to remain in occupation of the hostels after they had been upgraded and rendered safe for habitation. Those who could not afford the rent were guaranteed RDP housing free of charge at an acceptable location. The Applicants have never suggested that the alternative accommodation is not suitable.

48.5 Importantly, no Applicant was rendered homeless nor will anyone be rendered homeless as a result of the upgrading of the hostels.

49 In the circumstances, it is submitted that the conduct of the Municipality was eminently reasonable absent a court order evicting the Applicants from the buildings concerned. It is pointed out nevertheless, that the High Court did consider all relevant factors in coming to its decision whether to grant the interdict and found that the Applicants had no lawful basis to remain on the land concerned.

THE WRITTEN SUBMISSIONS OF THE *AMICUS CURIAE*

50 These submissions are premised on the need to give some permanent right to the Applicants as a result of historical statutory provisions and practices which were implemented in a discriminatory manner. While it is accepted that there may be merit in these arguments, these issues are simply not before this Court for determination.

51 In order to give effect to the arguments of the *Amicus Curiae*, this Court would have to convey ownership in circumstances where:

51.1 There is no challenge to the Housing Code nor to any of the statutes which had historically been used in a discriminatory manner;

51.2 This Court is simply not empowered to grant ownership contrary to the ordinary processes of conveying ownership of land in South Africa.

52 Moreover, in order to give effect to the relief contended for by the Amicus, this Court would have to effectively legislate, a function which runs counter to the principle of the separation of powers.

THE INTERESTS OF JUSTICE REQUIRE THAT THE APPLICATION BE DISMISSED

53 This Court has repeatedly held that it is not in the interests of justice for it to sit as a court of first instance and that constitutional issues must be validly raised and adjudicated in the High Court before the Constitutional Court will deal with the matter.

Billiton Aluminium SA Ltd t/a Hillside Aluminium v Khanyile and Others 2010 (5) BCLR 422 (CC) at paras 16 – 24

Cherangani Trade & Invest 107 (Pty) Ltd v Mason and Others 2011 (11) BCLR 1123 (CC) at paras 12-17 and 22

"In respect of the development of the common law of contract, the High Court and the Supreme Court of Appeal have a vital role to play. There are no compelling reasons for us to deal with the issues

raised by the Applicant as a court of first and last instance. Besides, the further exploration that was necessary to enable the proper adjudication of the issues now raised by the Applicant was understandably not undertaken by Msimeki AJ. Furthermore, disputes unrelated to the narrow question before him did not require resolution. Litigants are once again reminded that care should be taken to identify properly at the time of the institution of proceedings which constitutional issue they wish to have addressed so that they, the courts and practitioners can ensure that all the necessary material is available to enable proper adjudication of cases at all levels of the judicial system."

Crown Restaurant CC v Gold Reef City Theme Park (Pty) Ltd 2008 (4) SA 16 (CC) at para 6

54 On another occasion this Court held:

"It is not ordinarily in the interests of justice for a Court to sit as a Court of first and last instance, without there being any possibility of an appeal against its decisions. Nor is it in the interests of justice for 11 Judges of the highest Court in constitutional matters to hear matters at first instance which can conveniently be dealt with by a single Judge of a High Court."

Dormehl v Minister of Justice and Others 2000 (2) SA 987 (CC) at para

55 This principle has been repeatedly enunciated by the Constitutional Court.

See: Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another 2009 (4) SA 529 (CC) at para 295

Phillips and Others v National Director of Public Prosecutions 2006 (1) SA 505 (CC) (2006 (2) BCLR 274);

National Gambling Board v Premier Kwazulu-Natal and Others 2002 (2) SA 715 (CC) (2002 (2) BCLR 156);

Lane and Fey NNO v Dabelstein and Others 2001 (2) SA 1187 (CC) (2001 (4) BCLR 312);

Bruce and Another v Fleecytex Johannesburg CC and Others 1998 (2) SA 1143 (CC) (1998 (4) BCLR 415).

56 This Court has also held that it will not decide a constitutional issue in circumstances where that issue would not be decisive of the case.

S v Bequinot 1997 (2) SA 887 (CC) at para 15.

57 The effect of the relief sought by the Applicant is to require this Court to second guess findings of fact by the judge in the High Court, in circumstances where it is a court of appeal and bound by the record of proceedings and findings of fact by the court below.

Litigants are reminded that care should be taken at the time of the institution of proceedings to identify properly which constitutional issue they wish to have addressed so that they, the courts and practitioners can ensure that all the necessary material is available to enable proper adjudication of the matter at hand.

Crown Restaurant (supra) at para 6

Prophet v National Director of Public Prosecutions 2007 (6) SA 169 (CC) at paras 49-53;

Shaik v Minister of Justice and Constitutional Development 2004 (3) SA 599 (CC) at para 40;

Prince v President, Cape Law Society, and Others 2001 (2) SA 388 (CC) at para 22.

58 Constitutional litigation requires accuracy in the identification of statutory provisions that are attached on the grounds of their constitutional invalidity and reasonable precision in the formulation of the attacks and disciplined compliance with the Rules.

Prophet v National Director of Public Prosecutions 2007(6) SA 169 (CC) at para 53

59 The placing of relevant information is necessary to warn the other party of the case it has to meet. This is particularly so to enable the other party to place sufficient factual evidence and argument before the Court to meet the other party's case. It is simply not sufficient to raise these issues in the replying affidavit or in the heads of argument on appeal, as the present Applicants do, without laying a proper basis for the case in the founding papers in the High Court.

Prince v President, Cape Law Society and Others 2001(2) SA 388 (CC) at para 22

60 In the circumstances, it is submitted that the Applicants' case must fail at the starting blocks as the interests of justice require that leave to appeal is not granted.

LGF PUTTER

N RAJAB-BUDLENDER

COUNSEL FOR THE FIRST RESPONDENT

Chambers, Sandton 15 November 2012

TABLE OF AUTHORITIES

1. *Phillips and Others v National Director of Public Prosecutions 2006 (1) SA 505 (CC) (2006 (2) BCLR 274);*
2. *National Gambling Board v Premier Kwazulu-Natal and Others 2002 (2) SA 715 (CC) (2002 (2) BCLR 156);*
3. *Lane and Fey NNO v Dabelstein and Others 2001 (2) SA 1187 (CC) (2001 (4) BCLR 312);*
4. *Schubart Park Residents Association and Others v City of Tshwane Metropolitan Municipality and Others [2012] ZACC 26*
5. *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 039 (Pty) Ltd and Another 2012 (2) SA 104 (CC)*
6. *Cherangani Trade & Invest 107 (Pty) Ltd v Mason and Others 2011 (11) BCLR 1123 (CC) at paras 12-17 and 22*
7. *Billiton Aluminium SA Ltd t/a Hillside Aluminium v Khanyile and Others 2010 (5) BCLR 422 (CC) at paras 16 – 24*
8. *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another 2009 (4) SA 529 (CC) at para 295*
9. *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg and Others 2008 (3) SA 208 (CC)*
10. *Prophet v National Director of Public Prosecutions 2007(6) SA 169 (CC)*
11. *Port Elizabeth Municipality v Various Occupiers 2005 (1) SA 217 (CC) at para 41-43*
12. *Shaik v Minister of Justice and Constitutional Development 2004 (3) SA 599 (CC)*
13. *Prince v President, Cape Law Society and Others 2001(2) SA 388 (CC)*
14. *Bruce and Another v Fleecytex Johannesburg CC and Others 1998 (2) SA 1143 (CC) (1998 (4) BCLR 415).*
15. *S v Bequinot 1997* (2) SA 887 (CC)