IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO:	**CCT 42/12**
CASE NO *A QUO:*	**1413/2009 NWHC**

In the matter between:

PONTSHO DOREEN MOTSWAGAE	**First Applicant**
FOURTEEN OTHERS	**Second to Fifteenth Applicant**

and

RUSTENBERG LOCAL MUNICIPALITY	**First Respondent**
PROMTIQUE TR 9 CC	**Second Respondent**

APPLICANTS' SUBMISSIONS

LEGAL RESOURCES CENTRE
c/o GILFILLAN DU PLESSIS INC.
Per: L. du Plessis
Tel: (012) 320-2943 ext 124
E-mail: admin@communitylaw.co.za

TABLE OF CONTENTS

A. INTRODUCTION………………………………………………………… 3

B. THE RELEVANT FACTS………………………..…..…..…..….. 8

The history of the applicants' occupation of the properties…..…..…. 8

The Housing Code and the proposed hostels upgrade…..……… 13

C. THE HIGH COURT'S JUDGMENT…………..………………....... 25

D. APPLICATION FOR LEAVE TO APPEAL…..…………………..… 29

Constitutional issues of substance…..………………………......... 29

Prospects of success…….………………………………………...... 30

Interests of justice and public interest…….……………………..... 30

E. NON-COMPLIANCE WITH THE PROVISIONS OF CHAPTER 10 OF THE NATIONAL HOUSING CODE….………………………… 31

F. NON-COMPLIANCE WITH SECTION 26(3) OF THE CONSTITUTION.. 39

G. THE REQUIREMENTS FOR A FINAL INTERDICT…………..... 43

H. THE COUNTER APPLICATION….……………………………………. 44

I. THE ORDER SOUGHT IN THE CASE…………….……………… 45

J. CONCLUSION………………………………………………………… 46

A. INTRODUCTION

1. This is an application for leave to appeal against an order of the North West High Court, Mafikeng per Hendriks J handed down on 15 September 2011[1] *("the order"),* dismissing an application for spoliation - related relief and a prohibitory interdict[2] brought by the applicants and granting a counter application for interdictory relief brought by the first respondent, the Rustenburg Local Municipality *("the municipality").*[3]

2. Whilst the second respondent did not oppose the relief claimed by the applicants, the municipality opposed the relief on the strength of the provisions of the National Housing Code ("the Housing Code"). The municipalities' counter application is based on the contents of the answering affidavit and consequently the relief claimed by the municipality in the counter application is also premised on the provisions of the Housing Code. In their replying affidavit the applicants denied the first respondent's right to rely on the Housing Code and dealt extensively with the grounds of their opposition to the relief claimed in the counter application. The first respondent failed to file a reply to these allegations.

---

1 The order of the North West High Court granted on 15 September 2011 under case number 1413/2009; Record: Vol. 3, p. 282.

2 Notice of Motion *("NOM"),* Record: Vol. 1, p. 2.

3 Record: Vol. 1, p. 86; Judgment, Record: Vol. 1, p. 19; Vol. 4, p. 322.

3. The application concerns a hostel redevelopment programme by the municipality, the so-called *"Thlabane Female Hostels upgrade"*, in terms of chapter 10 of the Housing Code, which redevelopment envisaged the complete demolition of the applicants' homes and the construction of 83 high density rental accommodation units.

4. The constitutional question for determination is the nature of a municipality's obligations and duties under chapter 10 of the Housing Code, which governs public sector hostel redevelopments.

5. This question arises in the context of construction, which was commenced on the property occupied by the first applicant, without her consent. The construction by the Second Respondent, Promtique TR 9 CC, was in terms of a service level agreement entered into with the municipality *("the SLA"),* appointing the second respondent to redevelop the Thlabane hostel stands.[4] The municipality did not obtain an eviction order prior to commencing such construction, although it indicated that the hostels had to be vacated for purposes of their demolition and such construction work, and the terms of reference of the SLA (which works were to be concluded on or before 31 December 2008)[5] explicitly included monitoring of *"the demolition"* and

[4] Record: Vol. 1, p. 61, para 16.1; Annexure "SLA", Record: Vol. 2, p. 148 – 161.
[5] Record: Vol. 2, p. 149, para 2.2.

"construction" of the Thlabane hostel redevelopment. The other applicants therefore faces the same fate as the first applicant.

6. The proceedings in the High Court were initiated on an urgent basis by the applicants, who sought an order prohibiting the Respondents from unlawfully disturbing and/or interfering with applicants' peaceful possession of their properties,[6] and an interdict in amplification thereof, prohibiting the respondents from entering upon the properties of the applicants, demolishing the structures on the properties or from threatening the applicants in any way whatsoever.[7]

7. The application contemplated a subsequent process which would determine the applicants' housing rights or the finalisation of any arbitration proceedings.[8]

8. An interim order, *inter alia* preserving the *status quo* of the applicants' tenure pending the finalisation of the application, was granted by agreement between the parties. [9]

9. The relevant factual background, elaborated upon below, indicates that the municipality failed to comply with the mandatory prescripts of the Housing Code in respect of hostel redevelopments.

---

[6] Record: Vol. 1, p. 1, para 2.
[7] Record: Vol. 1, p. 2, para 2.1 - 2.3.
[8] Record: Vol. 2, p. 2, para 2.4.
[9] Record: Vol 5, p 426 - 429

10. In addition, the applicants (who are all women) allege that the properties in question were originally allocated to them by Certificates of Occupation issued in terms of the Regulations for the Administration and Control of Townships in Bantu Areas, Proclamation No. 293 of 1962 as amended (*"the Regulations"*), which permitted them to reside in so - called female hostels. This arrangement, according to the applicants, was necessitated by virtue of the fact that the applicants, due to their gender, were denied the same old order land rights as men. As part of the process required by the Housing Code to determine the eligibility of the residents to participate in the hostel redevelopment, the municipality ought to have investigated the applicants' claims in this regard, as well as their claims to the upgrading of their security of tenure in respect of the properties. Such an investigation ought to have included whether the applicants' rights are protected under the Interim Protection of Informal Land Rights Act 31 of 1996 *("IPILRA"),* and whether they can be upgraded by virtue of the Upgrading of Land Tenure Rights Act 112 of 1981 *("the Upgrading Act"*), and if not, whether the applicants' legally insecure tenure could be afforded redress through other means, such as the Housing Code's Enhanced Extended Discount Benefit Scheme, discussed further below.

11. The court below, on the assumption that the applicants had no rights in respect of the properties in question (which is registered in the name of

the North – West Provincial Government *("the North West"),*[10] and which it intends to transfer to the municipality) granted the interdictory relief sought by the municipality in its counter-application,[11] thereby permitting the construction activities contemplated in the SLA with the second respondent and prohibiting the applicants from interfering with such activities.[12]

12. Such relief was granted despite the municipality's failure to comply with the requirements of chapter 10 of the Housing Code prior to concluding the SLA, or the building works commencing thereunder.

13. Because the terms of reference of the SLA contemplated the demolition of the existing hostels and the construction of the proposed new development, the order effectively entitled the municipality to evict the applicants. That their removal would be required for such construction, is evidenced in the order, by it being made subject to *"alternative accommodation is hereby tendered to the applicants, at a township*

---

10 The basis of registration in the name of the North West Provincial Government is dealt with in the unreported Judgment in Khoete Churchill Khoete v Judith Nomathemba Dimbaza, Free State High Court Appeal Number A448/07 at p 15 – 20, a copy of which is delivered with these submissions. See also DVB Behuising v North West Provincial Government 2001 (1) SA 500 (CC).

11 Order "PM5", Record: Vol.3, p. 252; Judgment, Record: Vol. 4, p. 306, para 5.

12 The order in the counter application also authorises the Municipality and its agents *"to enter onto the land known as the Tlhabane Hostel, together with its employees and that it is entitled to bring onto the land any plant, machinery or equipment and build, construct or lay down any surface or underground infrastructure which may be required to complete the Service Level Agreement between the First Respondent and Phepedi Consulting Engineers.".*

known as Karlien Park, alternatively any other accommodation within the First Respondent's Housing Program."[13]

14. The order in the counter – application was granted in the absence of the municipality instituting eviction proceedings, and consequently in the absence of the court considering all the relevant circumstances or whether an eviction order was just and equitable.

15. Furthermore, the order in the counter application was granted:

    15.1 despite the Court *a quo* being explicitly advised that the municipality had waived the counter application as it had become academic (consequently, no relief was sought in terms thereof at the hearing in the court *a quo*);[14]

    15.2 on the mistaken assumption that the counter application was unopposed and no answer had been filed by the applicants.[15]

16. It is these orders, and their implications for the applicants, which constitute the subject-matter of the application before this Court.

17. In the event that leave is granted to the applicants, the applicants seek to set aside the order and replace it with the following order:

---

[13] Notice of Counter Application, Record: Vol 1, p. 86, para 2.
[14] Record: Vol. 3, p. 285, para 19; Vol. 4, p. 412, para 49.2.
[15] Record: Vol. 3, p 305 - 306, para 2.

> *"5.1 An order declaring that the First Respondent's implementation of the Thlabane female hostel renewal project is unlawful insofar as it involves the disturbance of the peaceful possession by the applicants of their properties at Thlabane and/or the destruction of the applicants' homes in Thlabane;*
>
> *5.2 An order interdicting the First and Second Respondents from implementing the Thlabane female hostel renewal project, more specifically to refrain from digging trenches in the applicants' properties or to destroy the applicants homes, without the permission of the applicants or a court order authorising them to do so;*
>
> *5.3 That First Respondent pay the costs of the applicants on the scale as between attorney and client."*

18. For reasons set out below, we submit that the court *a quo* misconstrued the requirements of the Housing Code, and its Judgment is entirely inconsistent with the Constitution. Our submissions follow the scheme set out in the table of contents.

B. <u>THE RELEVANT FACTS</u>

<u>The history of the applicants' occupation of the properties</u>

19. The applicants allege that:

    19.1 they reside in homes located on ten stands in the Thlabane township;[16]

    19.2 four of the applicants have occupied their property since the 1970's, nine since the 1980's and three since the 1990's, the most recent occupation being from 1997;[17] and

    19.3 with the exception of the tenth, twelfth and fourteenth applicants, the applicants reside on adjacent properties forming a block located between Khumalo Street and Nkosi Street.[18]

20. Although the houses in which the applicants live are referred to as *"hostels",* this is a misnomer. They are in fact self-standing four roomed houses, of which two rooms per house are allocated to a single woman.[19] They do not differ from the other houses in Thlabane,[20] and are situated on fairly large erven[21] of approximately 500 square metres.

21. The applicants further allege that they have always had exclusive use of their yards, which are fenced off, and in which they have established

---

[16] Fourth, fifth and ninth applicants occupy Stand 1451. The eighth and third applicants occupy Stand 1450. The sixth and thirteenth applicant occupy Stand 1455. The first applicant occupies Stand 1441. Although it is stated that second applicant occupies Stand 1952, that is an error and meant to refer to Stand 1452. The seventh applicant resides on Stand 1429, the tenth applicant on Stand 1414, the eleventh applicant on Stand 1454, the twelfth applicant on Stand 1387 and the fifteenth applicant on Stand 1453.

[17] Annexure "A", Record: Vol. 1, p. 17.

[18] Record: Vol. 1, p.61, para 15.9; Annexure "AA2", Record: Vol. 1, p. 92.

[19] Record: Vol. 2, p. 113, para 2.

[20] Record: Vol. 3, p. 204, para 16.3.

[21] Record: Vol. 1, p. 8, para 8.

vegetable gardens and fruit trees.[22] This is consistent with the provisions of the Regulations pertaining to such sites, which define a *"letting unit"* to include the site upon which it is erected.

22. The municipality appears to accept that the applicants were historically registered as tenants of the properties during the 1970's, and paid a nominal rent to the municipality's predecessors in terms of lease agreements until the municipality terminated such collections during 2004.[23] However, the municipality disputes the occupancy of the second, third, sixth, eighth, ninth and twelfth to fourteenth applicants, on the basis of a survey conducted by a municipal employee in March 2009, two months prior to the application being launched,[24] and not on the basis of its historic records, as would be expected.

23. In view of the applicants' lengthy periods of occupation of the properties in question (the protection of which prompted the applicants to launch a High Court application) the applicants understandably consider the survey to be fatally flawed.[25]

24. The applicants allege that when they were allocated the stands by the municipality or its predecessors in terms of the Regulations, the Certificates of Occupation referred to the houses which they occupied

---

[22] Record: Vol 3, p. 225, para 69.

[23] Record: Vol 1, p 59 para. 15.4. However, see Annexure "D" to founding affidavit which shows payments being made until January 2007, Record: Vol. 1, p. 21.

[24] Record: Vol. 1, p.58 - 59, para 15.2, 15.5 and 15.6.

[25] Record: Vol. 3, p. 208, para 24.

as *"female hostels"* because of the provisions of the Regulations, which discriminated against women, and ordinarily only entitled a male head of household to be allocated a stand.[26] As they held Certificates of Occupation in respect of the letting units in question,[27] albeit for a *"female hostel",* the applicants allege that they ought to have their rights of occupation upgraded to ownership in terms of the Upgrading Act,[28] and that they are the *de facto* owners of the properties in question.

25. The municipality denies that specific housing allocations took place in respect of the applicants,[29] and asserts that the applicants occupation of the dwellings lacks any contractual basis.[30] Notably, the municipality does not disclose the identity of the occupiers to whom allocations to the sites were purportedly made (if they were not in fact made to the applicants), nor is it explained why the first and tenth applicant (as hostel dwellers) were nominated to represent other hostel dwellers in a committee elected in terms of the Housing Code for purposes of the hostel redevelopment (if they were unlawful occupiers of the properties in question), nor has it responded to the Certificates of Occupation produced by certain applicants.[31]

---

26 Record: Vol. 3, p. 221, para 56.3.
27 Record: Vol. 1, p. 7 to 8; Annexure "H", Record: Vol. 1, p. 26 – 27.
28 Record: Vol. 3, p. 213 para 35.
29 Record: Vol. 1, p. 63, para 18.1.
30 Record: Vol. 1, p. 64, para 18.3.
31 Record: Vol. 3, p 230 - 231. No replying affidavit was filed by the Municipality in the Counter Application.

26. The properties in question are registered in the name of the Provincial Government of the North West Province.[32] The North West Province has made the land available to the municipality for the hostel redevelopment project. The North West Housing Corporation *("the Housing Corporation")* is currently attending to the transfer of ownership of all the Thlabane Unit 1 Township stands,[33] and intends to transfer the properties in question to the municipality. It is not clear to whom the other stands in Thlabane Unit 1 Township will be transferred to. According to the municipality, the Housing Corporation condones the conduct of the municipality and supports its opposition to the application.[34]

27. The applicants allege that they paid a monthly fee of R 100, 00 to reside on their stands until 2006.[35] The municipality disputes this - contending that the payments were made in respect of water and electricity. Although the municipality alleges that it was responsible for the termination of the collection of rent *"during approximately 2004",* due to the status of the dwellings, it repeatedly refers to the non-payment of rent in support of its claims.[36]

---

[32] Record: Vol.2, p. 159 - 160, p. 162 – 180, see fn. 10 above.
[33] Record: Vol.1, p. 56, para 8.
[34] Record: Vol.1, p. 61, para 15. 8.
[35] Record: Vol.1, p. 8, para 10; Vol. 3, p. 212, para 34.1; Annexure "PDM10", Record: Vol. 3, p. 244 – 246.
[36] See Record: Vol 1 p.72, para 19 - 20 and specifically p.73, para 19 - 29 where it alleges that the real motive of the applicants is *"to abuse the current unhealthy and unsafe circumstances due to the fact that it is for free"*.

28. The municipality further states that the *"registration of lessees also terminated when the collections of rent terminated."*[37] Although the municipality does not explain the concept of the termination *"of registration of lessees,"* to the extent that the municipality thereby seeks to allege it cancelled the applicants' occupation certificates, it does not adduce any evidence in support thereof. In terms of section 23 of the Regulations, cancellation of an Occupation Certificate is only permitted in limited circumstances. No suggestion is made that any of the disqualifying factors contained therein are present in respect of the applicants. Furthermore, the applicants deny that their occupational rights have been cancelled under the Regulations.[38]

The Housing Code and the proposed hostels upgrade

29. The municipality is obliged to comply with the Housing Code in undertaking housing developments, in terms of section 4(6) of the Housing Act, 107 of 1997 *("the Housing Act").* Chapter 10 of the Housing Code provides for the redevelopment of existing hostels situated in townships.

30. During 2004, the municipality motivated the re-development of 27 stands, including the stands occupied by the applicants, on which houses rented out to the public for a nominal rental fee are located

[37] Record: Vol.1, p. 59, para 15.4.
[38] Record: Vol. 3, p.212, para 33.

(referred to as hostels) to its Council. The memorandum that served before the Mayoral Committee on 25 August 2004,[39] motivating the upgrade of the development confirmed that the hostels are *"actually four roomed houses of which two (2) rooms per house are allocated to a single women"* and stated that *"the occupied hostels need redevelopment in order to enhance the living conditions of their occupants."* (our emphasis)

31. The wording of the memorandum indicates that the redevelopment would be aimed at improving the living conditions of the existing occupants. In view of its denial that specific allocations took place in respect of the applicants, the municipality has yet to identify *"the occupants"* referred to in the memorandum. In any event, no mention is made of the relocation of the existing occupants.

32. The resolution of the municipality authorising the project (allegedly taken on 30 August 2004) does not form part of the Court record. [40] It was presumably premised upon (and confined to) the memorandum's recommendation.

33. Although the municipality repeatedly alleges a protracted public participation process in respect of the hostel upgrade from 2005, no evidence is adduced in respect of the required process under the

[39] Annexure "AA5", Record: Vol. 2, p.113.

[40] Record: Vol. 1,p. 69, para 19.8 - 19.9; Replying Affidavit, Record: Vol. 3, p. 218, para 45.

Housing Code. According to the municipality, only four meetings were held over a period of 5 years, between 2005 and 2009.

34. The first meeting was held on 5 May 2005.[41] The stated purpose of the meeting was to elect the Local Negotiating Group *("LNG"),* which is required by the Housing Code, and discussed further below.[42]

35. At the meeting a municipal unit manager "*assured the meeting that the existing occupiers would be accommodated in the future housing"*…and *"he advised occupiers to apply for RDP housing in order to ensure and secure future housing. The meeting was assured that no one would lose their right to housing or be left homeless because of the redevelopment program."*[43]

36. The form of redevelopment, as required by the Housing Code,[44] as a rental or ownership redevelopment scheme was not discussed at the meeting.

37. The municipality's recollection of events indicate that the purpose of the meeting was to inform the applicants of the redevelopment program.[45]

---

[41] The minutes are attached as "AA7" (Record: Vol.2, p.116) and the attendance record as "AA8" (Record: Vol. 2, p.117). See also Record: Vol. 3, p. 200, para 14.1 and the invitation to the meeting at Record: Vol. 3, p. 232 to 233.

[42] See minutes at Record: Vol. 2, p 116.

[43] Record: Vol. 1, p 71 para 19.16.

[44] Record: Vol. 2, p. 123.

[45] Record: Vol. 1, p. 70, para 19.10.

38. The applicants allege that an official of the municipality informed them that a contractor would renovate the houses and after the renovation, the houses would be given to them through Title Deeds. At that stage no mention was made of the payment of rent. [46] This allegation corresponds with the contents of the letter from the North West Housing Corporation dated 6 February 2009. (Record, Vol 3, p. 242)

39. This is the only recorded meeting of the LNG referred to by the municipality. The applicants further confirm that this was the only occasion that they as the representatives of the Thlabane Female Hostels were invited to a meeting of the LNG. They contend that that the LNG never met again.[47]

40. After a so - called Imbizo meeting held in October 2006 between the mayor, councillors and the broader community, on or about 22 November 2006, the applicants addressed a letter to the Housing Corporation about statements made by the mayor at the Imbizo to the effect that he will demolish the houses that they live in, requesting clarity and a meeting, to which no response was received.[48]

---

[46] Record: Vol. 3, p. 200, para 14.3.

[47] Record: Vol. 3, p. 200, para 14.4.

[48] Record: Vol. 3, p 201 para 14.6 - 14.7.

41. The municipality alleges that from 2005 to 2007 it put the redevelopment out to tender. [49]

42. Thereafter, in 2007 the municipality sent correspondence advising that it was *"in the process of redeveloping Thlabane Female Hostels".* [50]

43. The letter stated further that *"the process of redevelopment will involve the demolition of all existing female hostels and the new buildings will be erected."*

44. On 3 September 2007 the applicants' legal representatives responded thereto, detailing their concerns in respect of the proposal and requested information in relation thereto.[51] The response (which was not received by the applicants' lawyers)[52] is dated almost a year later - 10 August 2008.

45. On 13 February 2008, the second public meeting was held, almost three years after the initial meeting. The municipality alleges the meeting was disrupted by Jeff Moletsi and others but does not specifically allege by whom. [53]

46. The applicants allege that at the meeting:

---

[49] Record: Vol. 1, p. 74, para 19.30.

[50] Annexure "E", Record: Vol. 1, p. 22.

[51] Record: Vol. 1, p. 10, para 14.1 - 14.2, Annexure "F", Record: Vol. 1, p. 23 - 24.

[52] Record: Vol. 1, p. 10, para 15; Vol. 1 p 74 para 19.32, and letter attached as Annexure "AA10", Record: Vol. 2, p. 132, Record: Vol. 3 p 222 para. 59.2.

[53] Record: Vol. 1, p. 75, para 19.34.

46.1 they were told to apply for RDP houses in Seraleng, an area about 12 kilometres away from where their houses are located;

46.2 they were introduced to the contractor and shown plans for the proposed new development;

46.3 informed (for the first time) that only persons who earned at least R 2 500,00 qualified to rent premises in the new development (None of the applicants earn R 2 500,00 per month);

46.4 Councillor Pule was advised that their legal representative had written to the municipality during 2007, and a copy of the letter was proferred;

46.5 Councillor Pule refused to accept the letter and a heated argued ensued and as a result the meeting could not continue. [54]

47. Thereafter, applicants allege that a meeting took place in February 2008, the agenda of which concerned contractors and registration for RDP houses, and their situation was explained to the municipality's director of human settlement and planning who undertook to respond.[55]

---

[54] Record: Vol. 3, p. 202, para 14.9.
[55] Record: Vol. 3 p 203 para 14.10.

48. In his response, dated 18 February 2007, he explained again that the houses are for rental purposes, that only people with an income will qualify and that those who cannot afford to pay rent will be helped with RDP houses.[56]

49. On 20 February 2008, the municipality signed a Service Level Agreement *("SLA")* with the Second Respondent.[57] The SLA indicates the duration of the project to be from 7 January 2008 to 31 December 2008.[58]

50. The SLA included the preparation of tender and contract documents for the demolition of the current hostels and construction of the new structures as well as the co-ordination and monitoring of all construction work with the developer.[59]

51. The SLA includes a penalty clause[60] which requires compensation to be paid to the Second Respondent for any losses occurred due to the postponement of the projects.

52. Thereafter, in response to the disrupted meeting, a notice was addressed to the occupants on 15 May 2008, written in Sesotho,

---

56 Record: Vol. 3, p. 203, para 14.10, Annexure "PDM6", Record: Vol. 3, p. 238 - 239.
57 Record: Vol. 1, p. 61, para 16.1; p. 75, para 19.36; Annexure "SLA", p. 148.
58 Annexure "SLA", Record: Vol. 2, p. 149.
59 Annexure "SLA", Record: Vol. 2, p. 155 - 156.
60 Record: Vol. 2, p. 152, clause 14.

directed to Mr Jeff Moletsi and the parties who assisted him in disrupting the earlier meeting.[61]

53. On 15 May 2008, a further notice was distributed to the applicants, advising that *"legal action will be taken against those who are disrupting the project and they will be evicted from the Thlabane Female Hostel."*[62]

54. On 25 June 2008, a final notice was sent to the applicants informing them that arrangements have been made in connection with the rebuilding of their houses, that those people who wished to apply for RDP houses must urgently apply *"as that is the only chance the municipality will provide you to get accommodation. Those people who are not satisfied with this arrangement must find their own alternative accommodation."*[63]

55. During February 2009 the applicants received letters from the North West Housing Corporation in respect of the handing over of old stock houses to beneficiaries for free.[64]

56. The letter explains that old stock houses which were built by the old South African Government before the Bophuthatswana Government was formed, to occupants were allocated through 99 year leases which effectively denied occupants full ownership, that the North West

[61] Record: Vol. 1, p. 75, para 19.37.
[62] Record: Vol. 1, p. 76, para 19.37, Annexure "AA11", Vol. 2: p 134-5.
[63] Record: Vol. 3, p. 203, para 14.11; Annexure "PDM7", Vol. 3, p. 241 - 242.
[64] Record: Vol. 3, p. 204, para 16.1; Annexure "PDM8", Vol. 3, p. 242.

Housing Corporation has approved that in line with the presidential proclamation regarding old stock houses in the democratic South Africa, these houses should be given to the beneficiaries for free. It referred to a survey to be conducted to identify legitimate beneficiaries in order to give them Title Deeds for the houses in question. Structural assessments will also be done to determine if renovations will be required on the properties.

57. According to the municipality, a third meeting was held on 11 February 2009.[65] At the meeting, the effected parties were informed that the municipality was proceeding with the development of 83 family units, that construction would commence within 6 months, that they would be permitted to rent units in the newly erected development and that persons affected could apply for RDP housing and were assured that nobody would be removed from the existing dwellings before an RDP house allocated to them had been completed. As some of the applicants' contended that they held ownership of the land through a Deed of Grant in terms of the Native Trust and Land Act, these persons were called upon to show proof of such ownership.[66]

---

[65] Record: Vol. 1, p. 76 - 77, para 19.39.
[66] Record: Vol. 1, p. 78, para 19.43.

58. At the meeting, the municipality erroneously advised that the applicants' lawyers were happy with the project.[67]

59. The applicants' claims to the ownership in terms of the Act (based on their occupation of the properties and Certificates of Occupation) were not investigated further.[68] The municipality states that a number of other hostel occupants presented the First Respondent with Deeds of Grant but denies that the applicants are holders of such deeds and can claim ownership to property in the township.[69]

60. The applicants invited the municipality to indicate to the Court in their replying affidavit on what basis certain houses in the township were given in ownership to beneficiaries for free and theirs were not. [70] No response was received. Having regard to the fact that the applicants properties are exactly the same as the other properties in Thlabane, a response would have been enlightening.

61. In March 2009, a list of the residents occupying the buildings was compiled by an employee of the municipality, [71] to which the

---

67 Record: Vol. 3, p. 203, para 14.12 -14.13; Annexure "AA12", Record: Vol. 2, p. 137.
68 Replying Affidavit (Answering Affidavit in Counter Application), Record: Vol. 2, p. 223, para 65.
69 Record: Vol. 1, p. 79, para 19.48.
70 Record: Vol. 3, p. 210, para 27.1.
71 Record: Vol. 1, p. 58, para 15.2.

municipality seeks to ascribe the status of *"a socio-economic survey"* as required by the Code. [72]

62. According to the municipality a fourth (and final) meeting was held on 6 May 2009,[73] which was not attended by the applicants on the advice of their attorney. At that meeting a new steering committee was elected - the municipality alleged that it thereby replaced the first and tenth applicant on the LNG.[74] The relationship between the LNG and the steering committee is not explained. At the meeting a representative of the Housing Corporation, who was invited to clarify the issue of the letters received by tenants concerning the handing over of old stock houses to beneficiaries, explained that *"the letters were meant for GG residents and not the female hostel, as they are owned by the municipality. The municipality can therefore decide what it is that they want to do with them."*[75] It is not clear who qualifies as GG residents.

63. On 10 April 2009, the contractor started to mark up building sites on the applicants' properties. [76]

64. On Sunday, 19 April 2009, a bulldozer commenced digging a trench next to first applicant's house. [77] The trench was filled up after an altercation between some of the applicants and the contractor.

---

72 Record: Vol. 1, p. 58, para 15.2 to 15.5; Annexure "AA1", Record: Vol. 1, p. 88 – 90.
73 Record: Annexure "AA14", Vol. 2, p. 141.
74 Record: Vol. 1, p. 78 -79, para 19.52.
75 Record: Annexure "AA14", Vol. 2, p. 143.
76 Record: Vol. 1, p. 10, para 16.

65. On 12 May 2009, the applicants' attorney addressed correspondence to the municipality in which she confirms that the applicants' houses *"were allocated to them in terms of proclamation R293 of 1962. The houses were given to them as 'female hostels' because of the discriminatory gender laws that existed in the area, which prevented women from obtaining houses in townships...".*[78]

66. She confirmed that a Councillor Pule had informed her that the applicants would have to be relocated, as the hostels need to be upgraded and that the contractor would commence renovations that week. [79]

67. Furthermore, she confirmed her opinion that the applicants ought to acquire title of their properties. An undertaking was sought that the construction / renovation of the houses was halted and that the title be transferred to the applicants.

68. The applicants contend that if the municipality had properly consulted them, and considered their claims, the status of their rights to the properties would have been resolved. [80]

69. Thereafter, on 26 May 2009, a bulldozer again commenced opening the filled up trenches.

---

77 Record: Vol. 1, p. 10, para 17.

78 Record: Annexure "H", Vol. 1, p. 26.

79 Record: Vol. 1, p. 27, para 6.

80 Record: Vol. 3, p. 199, para 13; p. 223, para 65.

70. Despite the clear requirements of inclusivity for a hostels re-development programme contained in Chapter 10(3)(b) of the Housing Code, elucidated upon below, and the applicants claims to upgrade their insecure apartheid tenure to ownership (and their allegations of gender discrimination in respect of allocations of similar housing to men in Thlabane township), these facts demonstrate that the municipality unilaterally decided on the form of the redevelopment, which would require the removal of the applicants and other similarly situated women from their homes and the community in which they have lived, some of them for more than twenty years. The applicants were not guaranteed new RDP houses as required by par 10(3)(c) of the Housing Code. They were merely told to apply for RDP housing. They also had not accepted the alternative accommodation offered some twelve kilometres away, which ought to have been a precondition for any upgrade application to be considered.

71. When the applicants' unwillingness to accept the municipality's decision became clear, the second respondent began construction work on the applicants' properties, despite their continued occupation. This necessitated the urgent application, which was launched on 29 May 2009.

72. Thereafter, on 22 June 2009, an Environmental Health Inspection was conducted in respect of the hostels and the dilapidated state of the houses was noted. [81]

73. An investigation by a building inspector under the National Building Regulations and Building Standards Act 103 of 1997 noted that the house were damaged and dilapidated and are a safety hazard. [82] The building inspector also notes that the bedrooms are not 6 metres squared as required by National Building Regulation 0400.[83]

74. Insofar as the poor living conditions are concerned, while the applicants welcome the municipality's concern in respect thereof, it is noteworthy that many thousands of people live in exactly the same or worse conditions and are not being forced to vacate their properties. [84] The applicants assert that if the condition of these houses require demolition, then all similar houses in Thlabane should also be demolished. [85]

C. THE HIGH COURT'S JUDGMENT

75. We have already mentioned the flawed premise of the High Court's Judgment. Although the municipality had waived the counter

[81] Record: Annexure "AA3", Vol. 1, p. 94.
[82] Record: Annexure "AA4", Vol. 2, p. 97.
[83] Record: Vol. 2, p. 97.
[84] Record: Vol. 3, p. 213, para 36 - 37.
[85] Record: Vol. 3, p. 214, para 38.1.

application, the Court nevertheless proceeded to grant relief therein, and on the mistaken assumption that it was unopposed, and a replying affidavit was not delivered.

76. Consequently, the Court had regard only to the factual exposition recorded in the municipality's answering affidavit. While such facts were undoubtedly relevant to the determination of relief sought in the main application,[86] the counter application had to be determined with reference to the facts contained in the applicants' replying affidavit, which also served as its answering affidavit in the counter application, and to which no reply was delivered.[87]

77. When viewed in this light, the findings made in the Judgment in respect of the counter - application are unsupportable.

78. As we demonstrate below, the true position is that even on the municipality's version, they had not complied with Chapter 10 of the Housing Code, and acted unconstitutionally in not adhering to that policy. Despite the evidence to the contrary, the Judge accepted that it was never the municipality's strategy to render the inhabitants of the

[86] On the basis of the trite principle contained in Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A).

[87] One would have expected the municipality to have sought to do this, if it had a response thereto, particularly as the applicants had made imputations about the truthfulness of certain statements contained in the answering affidavit. See e.g. Da Mata v Otto NO 1972 (3) SA 858 (A) at 868G-869E; Pretoria Portland Cement Co Ltd and Another v Competition Commission and Others 2003 (2) SA 385 (SCA) at para 63; Thint (Pty) Ltd v National Director of Public Prosecutions and Others; Zuma and Another v National Director of Public Prosecutions and Others 2009 (1) SA 1 (CC) at para 325 and fn. 112.

hostel homeless, as well as that the municipality had engaged in a protracted public participation process since 2005, [88] and by implication that it had complied with its obligations under the Housing Code.

79. The Court seemingly accepted that if the municipality provided alternative accommodation to the applicants, it was entitled to proceed with the redevelopment process. [89]

80. The flawed premise of the Judgment is also evident from the acceptance of the survey conducted by the municipality during March 2009, which allegedly indicated only 7 of the applicants to be the occupants of the properties in question. Furthermore the Judgment concludes that the applicants are currently occupying the dwellings without any contractual basis, [90] on the mere say so of the municipality, absent any proof of termination of the applicants' occupation in terms of the Regulations, or the disclosure of the identity of the legitimate occupants of the properties.

81. The Court also accepted the reports recording the inspections of the municipality's Health Department and Building Control Department, compiled after the application was launched, which recorded the

---

88 Record: Vol. 4, p. 307, para 6.
89 Record: Vol. 4, p. 307, para 8.
90 Record: Vol. 4, p. 305, para 11.

dilapidated state of the houses and that they were unsafe for residential purposes, and recommended their demolition.[91]

82. The Court failed to consider the legitimate claims of the applicants to remain in occupation of the properties, and instead found support in the principle of densification, which allegedly motivated the municipality to promote the development in question. [92]

83. Whilst the Judgment addresses chapter 10 of the Housing Code and the Court accepted in principle that the municipality was bound to comply with its requirements, its analysis referred to selective parts of the Code. We demonstrate below, that although the municipality failed to comply with even the most basic requirements of chapter 10, the Court failed to consider the shortcomings in the municipality's approach, which, on its version, amounted to four meetings held over a period of five years.

84. The Court's fundamentally flawed findings were drawn directly from the allegations contained in the municipality's answering affidavit.[93]

85. Whereas the municipality stopped collecting rental and the applicants pay for services, [94] the Court *a quo's* approach appears to be that as

---

[91] Record: Vol. 4, p. 308 to 309, para 12 – 13.

[92] Record: Vol. 4, p. 309, para 14.

[93] Record Vol. 4, p. 312 – 314.

[94] See annexure "D" to founding affidavit which shows payments being made until January 2007, Municipality alleges payments iro water and electricity. Record: Vol. 1, p.64, para 18.5.

the dwellings on the stands pose health and safety risks and the occupants are residing rent free in the structures, the applicants' real motive is to abuse their current unhealthy and unsafe circumstances, due to the fact that their occupation is for free.

86. The Court did not consider the fact that a significant number of families would be displaced, in order to erect housing for 83 families and seemed to support the municipality's intention of using the land more effectively and in an orderly manner. This approach is erroneous. The High Court demonstratively failed to assess whether the municipality had complied with its obligations under Chapter 10 of the Housing Code, or to acknowledge that the applicants consent was required for such a development, failing which a dispute resolution process, and that the applicants could not be evicted from the hostel (albeit to alternative accommodation), without a Court order.

87. Furthermore, the Court accepted that it was only those parties who held ownership of the land through a Deed of Grant who had rights to the property in question. It did not interrogate the applicants' claims in respect of Certificates of Occupation.

88. In respect of the requirement of a *"clear right",* the Court made an equally fundamental misdirection, it failed to acknowledge the applicants right to remain in the structures, either pending their consent

to the development and voluntary removal (as contemplated by Chapter 10 of the Housing Code), or an eviction order granted under PIE and section 26 of the Constitution, which would require a consideration of all relevant circumstances, including whether the eviction was just and equitable, also require the municipality to demonstrate the unlawful nature of the applicants' occupation of the properties.

89. Furthermore, the Court erroneously upheld the claim of the municipality that the applicants were entitled to contest the administrative decision taken on 30 August 2004 to redevelop the hostel stands. The Court seemingly disregarded the fact that the decision explicitly referred to the upgrading being for the benefit of its inhabitants. There was no basis for the applicants to contest the decision, as on the face of it, it seemed to be taken in their favour and for their benefit.

90. Consequently, the Court *a quo* dismissed the application for an interdict and granted the counter application with costs. [95]

D. APPLICATION FOR LEAVE TO APPEAL

91. We submit that the application for leave to appeal should be granted. We deal with the relevant criteria in turn:

Constitutional issues of substance

[95] Record: Vol. 4, p. 321 - 322

92. The proceedings raise the important Constitutional question of 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").*

93. This issue is a matter which is a constitutional issue of substance, in respect of which this Court has jurisdiction, and which it is desirable that this Court gives clarity particularly in respect of the ambit of a municipality's obligations under Chapter 10 of the Housing Code.

Prospects of success

94. We respectfully submit that the Judgment of the Court below in respect of the implementation of the Housing Code demonstrates many material errors in its underlying reasoning.

95. Were a sound constitutional approach adopted by the Court below, the application would have been upheld, and the counter application dismissed. We therefore submit that there are substantial prospects of success in an appeal to this Court.

Interests of justice and public interest

96. The interests of justice and the public interest require a pronouncement by this Court upon the issues arising in this application. There are no new issues or factual material which arise in the appeal.

97. It is in the public interest that this Court pronounce on the obligations of local government to comply with the requirements of Chapter 10 of the Housing Code.

98. Moreover, the questions raised by this appeal have not been considered by this Court previously. They are novel issues which require this Court's attention in order to ensure that the municipality approaches their obligations under Chapter 10 of the Housing Code and in terms of section 26 of the Constitution appropriately.

99. We therefore respectfully submit that the necessary criteria are met and that the application for leave to appeal should be granted.

E. NON-COMPLIANCE WITH THE PROVISIONS OF CHAPTER 10 OF THE NATIONAL HOUSING CODE

100. The provision of housing forms part of the municipality's constitutional obligation to provide services under section 152(1)(b) of the Constitution, to prioritise the basic needs of the community and their

social and economic development under section 153(a) thereof, as well as its obligations under section 26(2) of the Constitution to take every reasonable step within its available resources to achieve the progressive realisation of the right to have access to adequate housing.[96]

101. The Housing Code was first published on 21 October 2000.[97] In Abahlali baseMojondolo Movement SA and Another v Premier of the Province of KwaZulu-Natal and Others,[98] this Court described the Code, with reference to the right to adequate housing conferred by section 26 of the Constitution, as representing *"a legislative effort to give effect to the rights conferred by this constitutional mandate"* together with the PIE Act and the Housing Act. The purpose of the Code was further described in City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another [99] as setting out *"the principles, guidelines and standards that apply to the various programmes effected by the State in relation to housing".*

102. In terms of section 4(6) of the Housing Act[100], the Code is binding on all provincial and local spheres of Government. The municipality

---

96 As highlighted in Occupiers of 51 Olivia Road and 197 Main Street, Johannesburg v City of Johannesburg 2008 (3) SA 208 (CC) at para 16-17.

97 A revised code was adopted and published in February 2009. Certain programmes were removed from the new Code. The rules of the 2000 Code apply to programmes not specifically addressed in the revised Code.

98 Abahlali Basemjondolo Movement SA v Premier of the Province of KZN 2010 (2) BCLR 99 (CC) at para 14.

99 2012 (2) SA 104 (CC) at para. 27, p.114.

100 Sub-section 6 was added by section 3(*b*) of the Amendment Act 4 of 2001.

acknowledged that *"first respondent was obliged to follow the guidelines of the Housing Code to ensure funding from the North-West Province"*[101].

103. In Fedsure Life Assurance Limited and Others v Greater Johannesburg Transitional Metropolitan Council and Others[102], this Court held that *"a local government may only act within the powers lawfully conferred upon it. There is nothing startling in this proposition – it is a fundamental principle of the rule of law, recognised widely, that the exercise of public power is only legitimate where lawful. The rule of law – to the extent at least that it expresses this principle of legality – is understood to be a fundamental principle of constitutional law."*

104. However, as we demonstrate below, in its actions, the municipality did not follow the principles, guidelines or standards prescribed by the Code. It actions were unreasonable, and its conduct constituted a breach of the right to housing as well as the principle of legality.

105. Chapter 10 of the Code specifically provides for the redevelopment of public Sector Hostels through applications to a Provincial Housing Development Board ("*PHDB*") in four stages. Certain principles are

---

[101] Record, Vol. 1, p.72, para 19.18.
[102] 1999 (1) SA 377 (CC) at para 56.

listed in Chapter 10[103] as applicable to such re-development. Those relevant to this matter are:

105.1 Participative process: The planning and design of such a redevelopment has to be done in a participative and inclusive manner. An important aspect of such participation is the formation of the Local Negotiating Group (*"LNG*") so that *"Municipalities and Hostel Residents will thus participate at the highest level of intensity"*[104].

105.2 Eligibility[105]: All hostel residents are ordinarily eligible for accommodation under a redevelopment scheme - a register of all hostel residents eligible for accommodation under the redevelopment scheme has to be drawn up as soon as the redevelopment scheme is identified in order to prevent non-eligible people moving in when the scheme is announced.

105.3 Affordability and community needs[106]: In order to ensure that the planning and design of the scheme take into account the needs of and affordability for the hostel residents, a socio-economic survey of hostel residents is to be undertaken as a <u>precondition</u> for an application in terms of Chapter 10. A

103 Record: Vol. 2, p.120; para 10.3 of Chapter 10.
104 Record: Vol. 2, p.121, para 10.3(b).
105 Record: Vol. 2, p.121, para 10.3(c).
106 Record: Vol. 2, p.121, para 10.3(d).

guideline for such a survey, including contents and methodology is attached to Chapter 10 as Annexure A.

105.4 Displacement[107]: Redevelopment applications would only be considered if alternative accommodation was secured as well as the acceptance of such accommodation by displacees. The LNG has a pivotal role in reaching such agreement. The Code further provides that the *"principle of equity is paramount in the displacement issue and the alternative accommodation proposed must be in line with that to be provided within the hostel and that available to residents within the broader community, via other State funded projects".*

106. It is clear that the municipality did not adhere to these underlying principles. More specifically:

106.1 the municipality refers to a *"protracted public participation process since 2005"*,[108] but such a process is not evident from its papers, which refer to a total of only four meetings held between 2005 and 2009 regarding the Thlabane Hostel redevelopment;

---

[107] Record: Vol. 2, p.121, para 10.3(e).
[108] Record: Vol. 1, p.56, para 9.

106.2 the pivotal role of the LNG and its participation at the *"highest level"* as envisaged by the Code, is not evident and there is no mention of the LNG and its specific functioning prescribed by the Code, following its establishment at the meeting held on 5 May 2005; [109]

106.3 there is no mention of a register of residents eligible for accommodation;

106.4 the municipality did not undertake a socio-economic survey as prescribed - the only mention of a survey relates to one completed in March 2009[110], years after the commencement of the proposed redevelopment scheme, and after the application was instituted; and

106.5 there is no indication that the municipality secured the acceptance of alternative accommodation from the hostel dwellers, or of the LNG's role in securing such acceptance, as required.

107. Insofar as the enquiry into eligibility is concerned, the compilation of such a register would have required the municipality to investigate the applicants' claims in respect of their Certificates of Occupation, their

---

[109] Record: Vol. 1, p.70, para 19.10. The minutes of the meetings are attached as "AA7" (Record: Vol. 2, p.116). There is no further mention of any meetings of the LNG. Attendance records of further meetings attached (as Annexures "AA12" and "AA14", Record: Vol. 2, p. 135 and 141) indicate general community attendance.

[110] Record: Vol.1, p.59, para 15.3.

insecure tenure by virtue of unfairly discriminatory land allocations under apartheid and to the upgrade of such insecure tenure. This investigation would also ultimately require consideration whether, in light of such claims, a hostel redevelopment was appropriate or whether the applicants would instead qualify for the Enhanced Extended Discount Benefit Scheme (*"EEDBS"*) under Part 3 of the Housing Code. The fundamental principle underlying the EEDBS is the securing of individual ownership *"to ensure that occupants of public housing stock are provided with the opportunity to secure individual ownership of their housing units"*[111]. The Applicants are 'qualifying occupants' for purposes of the EEDBS,[112] which further requires a consultative process between authorities and occupants.[113]

108. In addition, applications in terms of Chapter 10 can be made for three forms redevelopment: A rental development scheme; an ownership redevelopment scheme; or an alternative use redevelopment scheme. In order for an application for a rental development scheme to be considered it is required, amongst others, that *"such development proposal is approved by the LNG"*. [114] Again, there is no evidence of the LNG's participation in the municipality's proposed rental development scheme and indeed that such a scheme was approved by

[111] EEDBS, p.11, para 2.2.1.
[112] In terms of para's 2.3.1 and para 2.3.2 of the EEDBS, p 12.
[113] EEDBS, p.11, para 2.2.2.
[114] Record: Vol. 2, p.123, para 10.4(a).

the LNG. Also, there is no indication that a rental development scheme, as opposed to other options, was specifically mentioned before the third meeting, held on 11 February 2009.[115]

109. Provision is made in the Code for emergency funding grants[116], as the first phase of a re-development initiative, where hostel residents are living in conditions that seriously affect their health and safety. The municipality attached a Health Report and a Building Regulations Report, dated 25 June 2009[117], to their papers in support of its case but it is not clear how these reports fit into the procedure prescribed by the Code. The municipality did not allege that these reports were relevant to an application for emergency funding grants.

110. Paragraph 10.6 of the Code[118] describes the application procedure for redevelopment funding from the PHDB in four distinct stages or applications:

110.1 During the Notification stage details are provided to the PHDB of the hostel as well as the LNG (where established).

110.2 The second application involving consultants and preliminary planning follows the approval of the first notification application and the establishment of the LNG (where it has not been

---

115 Record: Vol.1, p.77, para 19.42.3.
116 Record: Vol. 2, p.125, para 10.5.1.5.
117 Annexures "AA3" and "AA4", Record: Vol.1, p.93 and 94.
118 Record: Vol. 2, p.128.

established at the Notification stage). It allows for the LNG to call for proposals from consultants to form a professional team to assist the LNG in preparing an application for funds for preliminary planning.

110.3 The LNG will then proceed with an application for re-development funding and permission to proceed with detailed designs.

110.4 Once such permission is granted, the project must then submit detailed design and tender documentation in an application for approval to call for tenders.

111. On its own version, the municipality did not follow this four staged application procedure. More specifically:

111.1 no documents were attached as evidence of the four applications required;

111.2 there is no mention of the participation of the LNG's, consultants or a professional team during the two middle stages concerning the planning and design of the project; and

111.3 the redevelopment of the Thlabane hostel was put to tender from 2005 to 2007[119] (after the redevelopment proposals were accepted by the municipal council in August 2004[120]) and a Service Level Agreement (that included a penalty clause) was concluded with Second Respondent on 20 February 2008[121], which clearly does not accord with the Code's procedure that envisages the tender process as the fourth and final stage following the completion of three earlier participative stages.[122]

112. Although the Code contemplates recourse to the Provincial Housing Development Board *("PHDC")* in circumstances where exhaustive attempts to facilitate inclusivity and consensus have been unsuccessful, there is no evidence that such an application was submitted to the PHDC.[123]

F. NON-COMPLIANCE WITH SECTION 26(3) OF THE CONSTITUTION

113. Section 26(3) of the Constitution provides as follows:

> *"(3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all*

---

119 Record: Vol.1, p.74, para 19.30.

120 Record: Vol.1, p.69, para 19.19.

121 Record: Vol.1, p.61, para 16.1 and p.75, para 19.36.

122 It appears from the Record, p.75, para 19.34, that Second Respondent attended the second public meeting held on 13 February 2008 and therefore became involved in the project without any community participation as prescribed by the Code. In fact, on the municipality's own version, only one meeting (held on 5 May 2005) preceded Second Respondent's involvement.

123 Record: Vol 2, p. 121, para b.

the relevant circumstances. No legislation may permit arbitrary evictions."

114. In its Judgment, the High Court did not make an explicit finding that the municipality is entitled to evict the applicants, or grant an eviction order. However, it is implicit in its order that the requirements of section 26(3) were satisfied on the facts of the case, as the effect of the order is that it permitted the demolition of the applicants' homes. This is further apparent in that the order is granted subject to alternative accommodation being tendered by the municipality.

115. Section 26(3) has two requirements:

115.1 firstly, that a court order is obtained prior to an eviction or demolition; and

115.2 secondly, that the court order is made after an enquiry into all the relevant circumstances, prior to an eviction order being granted.

116. In this case, neither of these requirements were satisfied:

116.1 the first requirement was not met by the municipality prior to its commencing the redevelopment project, as the threatened

demolition of the applicants homes was not authorised by a court order;

116.2 the second requirement was not met as there was no enquiry by the court into the relevant circumstances (including the personal circumstances of the applicants) and whether an eviction would be just and equitable in the circumstances.

117. The appropriate response of the High Court ought to have been to grant the applicants' relief and to order the municipality to comply with the provisions of the Housing Code, alternatively obtain an eviction order prior to attempting to demolish the buildings.

118. The reason the municipality gave for the upgrading project is that the properties are unsafe, dilapidated and further that they require densification. However, it is clear that the properties, although in a poor condition, are in a similar condition to many of the other properties in Thlabane township.

119. The statutory framework governing unsafe buildings and the circumstances in which they can be vacated, and their occupants evicted by local government, are addressed in the trilogy of the Rand

Property cases, including by this Court in Olivia Road,[124] in which it was confirmed that the vacation of such buildings would require a court order.

120. In Pheko and Others v Ekurhuleni Metropolitan Municipality [125], this Court recognised an eviction to be a permanent deprivation of occupation or possession, and confirmed that it requires a Court order, even where authorised by legislation. [126]

121. Plainly, if the conditions of the Thlabane hostels provide a basis for the municipality to take the applicants' homes from them, without compliance with the Housing Code, or an eviction order – section 26(3) of the Constitution is rendered nugatory, as well as the fundamental principle of legality.

122. Although the municipality disavowed any suggestion that it was seeking to evict the applicants, the fact demonstrate that the removal of the applicants and other residents was intended to be permanent, in order to make way for the demolition of the property, and consequently the municipality required a court order permitting the applicants' eviction.

---

[124] See: City of Johannesburg v Rand Properties (Pty) Ltd and Others 2007 (1) SA 78 (W); City of Johannesburg v Rand Properties (Pty) Ltd 2007 (6) SA 417 (SCA); Occupiers of Olivia Road, BereaTownship 197 Main Street, Johannesburg v City of Johannesburg and Others 2008 (3) SA 208 (CC), page 225, para 49.

[125] 2012 (2) SA 598 (CC).

[126] at para 45, See also: Occupiers of 51 Olivia Road Berea Township and 197 Main Street, Johannesburg v City of Johannesburg 2008 (3) 208 (CC) at para 49.

123. Although the municipality makes much of the fact that it tendered to provide alternative accommodation to the applicants, and that tender was made part of the Court order, that does not relieve it of complying with the provisions of section 26(3) and the applicable statutory scheme of the Prevention Of Illegal Eviction From And Unlawful Occupation Of Land Act 19 of 1998 *("the PIE Act").*

G. THE REQUIREMENTS FOR A FINAL INTERDICT

124. The requirements for a final interdict are well established: a clear right, an injury actually committed or reasonably apprehended, and no other satisfactory remedy, that is, an absence of similar protection by any means other than an ordinary remedy: Setlogelo v Setlogelo 1914 AD 221 at 227.

125. The applicants have a clear right to the protection accorded by Chapter 10 of the Housing Code, and section 26(3) of the Constitution, which prohibits evictions and demolitions without a court order (as given effect to in the PIE Act). The cumulative effect of such protections is that either the municipality has to obtain the applicants' consent to the development through the mandatory processes of the Housing Code, and thereby, their voluntary relocation or to launch eviction proceedings under PIE. The summary deprivation of the applicants' properties in the manner contemplated by the municipality is untenable, and ought not to

have had judicial sanction from the High Court.

126. We submit that the commencement of construction, absent the municipality's compliance with the Housing Code, and without obtaining an eviction order, without more, meets the requirements of an injury reasonably apprehended.[127]

127. Such unlawful action, in contravention of a legislative provision, is an injury of the rights of the applicants and undermines the constitutional and statutory scheme protecting the right to housing.

128. We submit that there is not any effective, alternative remedy which is available to the applicants. In particular, a review of the municipal resolution of 2004 will not avail the applicants, some eight years later, as it is not the resolution (which on the face of it appeared to be taken for the benefit of the applicants) but its implementation by the municipality, absent compliance with the Housing Code, and its constitutional obligations, that gave rise to the applicants' predicament.

H. THE COUNTER APPLICATION

[127] See City of Tshwane Metropolitan Municipality v Mamelodi Hostel Residents Association and others [2012] JOL 28434 (SCA).

129. The municipality indicated that it waived its counter application during the hearing in the High Court.[128] It now, somewhat opportunistically, persists with the relief sought in the counter application, rather than seeking to abandon the order therein. It does so in circumstances where it acknowledges that it waived the relief in the Court *a quo* and the waiver of the counter application was accepted by the applicants, and as a consequence not addressed during the hearing – as no relief was sought therein.

130. The municipality's approach demonstrates a plain misreading of the law in respect of Rule 41, which requires <u>either</u> the consent of the other party <u>or</u> the court for the withdrawal of proceedings after a matter has been set down, not both. Ordinarily a court will not force an applicant to proceed with a matter against which it seeks to abandon.[129] We submit that in such circumstances, the court *a quo* did not have a discretion to proceed to determine the counter application, as is now contended by the municipality.[130]

131. If this Court is nevertheless inclined to consider and determine the counter application, we submit that it ought nevertheless to be dismissed, on the basis of the applicants' version, and having regard to

---

128 Record: Vol. 3, p. 285, para 19; Vol. 4, p. 412, para 49.2.

129 Levy v Levy 1991(3) SA 614 A at 620B

130 Record: Vol. 4, p. 412, para 49.2

the municipality's manifest failure to comply with the Housing Code prior to commencing with the upgrade of the Thlabane hostels, as evidenced in the replying affidavit, which was delivered in answer to the counter application.

I. THE ORDER SOUGHT IN THIS CASE

132. The applicants seek an order, the effect of which would be that the municipality has to comply with the provisions of the Housing Code, and either obtain the applicants' consent to the redevelopment and their voluntary removal alternatively apply to court for an order authorising their eviction.

133. If this Court is inclined to grant the order, the applicants submit that the order should also include an order requiring the municipality to pay the applicants costs on the scale as between attorney and client, in light of the municipality's opportunistic failure to abandon the judgment in respect of the counter application.

J. CONCLUSION

134. Accordingly, in the event that the applicants' application for leave to appeal is granted, an order is requested in the following terms:

"1. The application for leave to appeal is granted;

2. The appeal is upheld;

3. The order of the High Court is set aside and substituted as follows:

> *"1. It is declared that the First Respondent's implementation of the Thlabane female hostel renewal project is unlawful insofar as it involves the disturbance of the peaceful possession by the applicants of their properties at Thlabane and/or the destruction of the applicants' homes in Thlabane;*
>
> *2. The First and Second Respondents are interdicted from implementing the Thlabane female hostel renewal project, more specifically to refrain from digging trenches in the applicants' properties or to destroy the applicants' homes, without the permission of the applicants or a court order authorising them to do so;*
>
> *3. First Respondent is ordered to pay the applicants' costs, including the costs of two counsel in this Court, as well as the costs in the High Court on the scale as between attorney and client."*

N J VAN NIEWENHUIZEN (SC)
M O'SULLIVAN
Counsel for the Applicants
Chambers
PRETORIA and CAPE TOWN
25 September 2012

APPLICANTS' LIST OF AUTHORITIES

1. Khoete Churchill Khoete v Judith Nomathemba Dimbaza, Free State High Court Appeal Number A448/07; *

2. DVB Behuising v North West Provincial Government 2001 (1) SA 500 (CC);*

3. Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A);

4. Da Mata v Otto NO 1972 (3) SA 858 (A);

5. Pretoria Portland Cement Co Ltd and Another v Competition Commission and Others 2003 (2) SA 385 (SCA);

6. Thint (Pty) Ltd v National Director of Public Prosecutions and Others; Zuma and Another v National Director of Public Prosecutions and Others 2009 (1) SA 1 (CC);

7. Occupiers of 51 Olivia Road and 197 Main Street, Johannesburg v City of Johannesburg 2008 (3) SA 208 (CC);*

8. Abahlali Basemjondolo Movement SA v Premier of the Province of KZN 2010 (2) BCLR 99 (CC);*

9. City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another 2012 (2) SA 104 (CC);*

10. Fedsure Life Assurance Limited and Others v Greater Johannesburg Transitional Metropolitan Council and Others 1999(1) SA 377 (CC);

11. City of Johannesburg v Rand Properties (Pty) Ltd and Others 2007 (1) SA 78 (W);

12. City of Johannesburg v Rand Properties (Pty) Ltd 2007 (6) SA 417 (SCA);

13. Occupiers of Olivia Road, BereaTownship 197 Main Street, Johannesburg v City of Johannesburg and Others 2008 (3) SA 208 (CC);*

14. Pheko and Others v Ekurhuleni Metropolitan Municipality 2012 (2) SA 598 (CC);*

15. Setlogelo v Setlogelo 1914 AD 221;

16. City of Tshwane Metropolitan Municipality v Mamelodi Hostel Residents Association and others [2012] JOL 28434 (SCA).*