

**IN THE HIGH COURT OF SOUTH AFRICA  
WESTERN CAPE DIVISION, CAPE TOWN**

Case Number: **13946/15**  
**13947/15**  
**13951/15**  
**13952/15**

In the matter between:

<b>CHARNELL COMMANDO</b>	First Applicant
<b>GERALDINE STHEPHANIE CUPIDO</b>	Second Applicant
<b>NORMAN ANDREW CUPIDO</b>	Third Applicant
<b>GICILLE VANNESSA COMMANDO</b>	Fourth Applicant
<b>WILLEM NEL</b>	Fifth Applicant
<b>MEESHADÉ JACOBA NEL</b>	Sixth Applicant
<b>DAPHNE NEL</b>	Seventh Applicant
<b>PRISCILLA NEL</b>	Eighth Applicant
<b>DYLAN NEL</b>	Ninth Applicant
<b>MA AIDA ABELS</b>	Tenth Applicant
<b>SULAIMAN GOLIATH</b>	Eleventh Applicant
<b>FAIZA FISHER</b>	Twelfth Applicant
<b>GEORGE FARIA RODRIGUES</b>	Thirteenth Applicant
<b>NASHIET ABELS</b>	Fourteenth Applicant
<b>CHRASHANNA SMITH</b>	Fifteenth Applicant
<b>DELIA SMITH</b>	Sixteenth Applicant
<b>BRENDA SARAH SMITH</b>	Seventeenth Applicant
<b>MACHAL SMITH</b>	Eighteenth Applicant
<b>MEGAN SMITH</b>	Nineteenth Applicant
<b>ROSELINE SMITH</b>	Twentieth Applicant
<b>CHESLYN SMITH</b>	Twenty-First Applicant

<b>RASHIEDA SMITH</b>	Twenty-Second Applicant
<b>MARK NEIL SMITH</b>	Twenty-Third Applicant
<b>MOGAMAT TAURIQ SMITH</b>	Twenty-Fourth Applicant
<b>GRAHAM BEUKES</b>	Twenty-Fifth Applicant
<b>SOFIE MASILO</b>	Twenty-Sixth Applicant
and	
<b>WOODSTOCK HUB (PTY) LTD</b>	First Respondent
<b>CITY OF CAPE TOWN</b>	Second Respondent

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## HEADS OF ARGUMENT ON BEHALF OF SECOND RESPONDENT

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## INTRODUCTION

1. The following is common cause in this matter:
  - 1.1. The property that is the subject of this application is Erf No 10626, Bromwell Street, Salt River ("**the property**").
  - 1.2. The erf size of the property is approximately 806m<sup>2</sup> in extent (and consists of five different units (122, 124, 126 and 130 (including 130A))).
  - 1.3. The property is owned by the First Respondent and was acquired pursuant to a Deed of Sale with the previous owners of the property concluded on 30 October 2013.<sup>1</sup>
  - 1.4. The First Respondent ("**the Woodstock Hub**") took transfer of the property on 4 March 2015 and subsequent to having done so it brought various applications for the eviction of the Applicants ("**the Residents**"). The City played no role in the sale or acquisition of the property.<sup>2</sup>
  - 1.5. Orders for the eviction of the Residents were granted on 17 March 2016 and 19 August 2016. Both Orders were granted by agreement between the parties.<sup>3</sup>
  - 1.6. In terms of the Court Order of 17 March 2016, the Residents were directed to vacate their homes by 31 July 2016.<sup>4</sup> The Residents thereafter requested their attorney at the time to obtain an extension of time to

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<sup>1</sup> FA; page 14; par 18.

<sup>2</sup> FA; page 14; par 18.

<sup>3</sup> FA; page 13; par 15.

<sup>4</sup> FA; page 17; par 26; CC2; page 97.

vacate the property.<sup>5</sup> To that end, an application to vary the Court Order of 17 March 2016 was brought on 4 August 2016 (by extending the vacation date to 30 November 2016). The variation application was dismissed on 5 August 2016.<sup>6</sup>

1.7. A key motivating factor in support of the variation application was that the effect of the eviction would be that the Residents would be rendered homeless.<sup>7</sup>

1.8. The Residents' endeavours to appeal against the eviction application has come to nought and the Residents have withdrawn their notices of appeal.<sup>8</sup>

2. The Woodstock Hub instituted this application on 20 September 2016. In terms of an Order granted pursuant to the relief sought under Part A of the Notice of Motion, the execution of the eviction order has been suspended pending the final determination of the relief sought under Part B.

3. This application pertains to the relief sought under Part B, in which the Residents seek inter alia the following substantive relief<sup>9</sup>:

3.1. A declaratory order that the City is under a constitutional duty to provide the Applicants and their dependants with temporary emergency accommodation "in a location as near as possible to the property

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<sup>5</sup> FA; page 17; par 27.

<sup>6</sup> FA; page 18; par 31, 32 and 33 read with CC5; page 123.

<sup>7</sup> FA; page 18; par 32.

<sup>8</sup> FA; page 19; par 36 and 37.

<sup>9</sup> NM; page 4; par 2 and 3.

where the Applicants currently reside at erf 10626, Bromwell Street, Cape Town".

- 3.2. A mandamus directing the City to make available the temporary emergency accommodation (pursuant to the declaratory order) within three months of the date of this Order.
4. Before addressing the substantive issues that the application presents, it warrants emphasising what this application is not about:
  - 4.1. It does not concern the question of whether an eviction ought to be granted or not. An eviction order has been granted and there is no appeal against that Order; it accordingly stands.
  - 4.2. It does not concern a debate about whether the City is obliged to provide emergency accommodation to the Residents. This is because the City has offered alternative emergency accommodation to every household that has not obtained alternative housing; it has done so irrespective of their income levels and other personal circumstances.
  - 4.3. For the above reason too, it does not concern a question of whether any household will be rendered homeless on account of the eviction. This is because every household facing eviction has: (a) been offered and taken up / is in the process of taking up alternative social housing; or (b) has been offered social housing but has rejected the offer and arranged their own alternative accommodation; or (c) has been offered emergency accommodation.

- 4.4. It does not concern an enquiry of whether the City has meaningfully engaged with the Residents; the affidavits filed by both the Residents and the City clearly show that the City has gone to great lengths to engage with the Residents.
- 4.5. It does not concern a challenge to the reasonableness or otherwise of the City's housing programme. No relief has been sought to that end and nor has a case for such relief been made out by the Residents.
5. As is apparent from the Notice of Motion, the relief sought is limited to the City providing emergency accommodation "in a location as near as possible to the property". The City's offer of emergency accommodation is at a development in Wolwerivier which is some 28.2 kms away from Bromwell Street; this, the City contends is "as near as possible" to the Bromwell property.
6. The City has provided, what we submit are compelling reasons, as to why the Residents cannot be provided with emergency accommodation any closer than Wolwerivier. Simply put, the City does not have any emergency housing developments available within the City Centre, it has not embarked on any such developments due to the scarcity of land, the exorbitant costs of such developments in the City Centre and that it has prioritised permanent social housing (as opposed to temporary, emergency housing) for development in the immediate proximity of the City within the context of these constraints.
7. The City is also of the view that there ought to be parity and fairness in its provision of housing assistance. On the Residents' approach, the thousands of persons living in conditions of abject poverty in informal settlements will have to patiently

wait their turn for permanent housing which, when they do receive will consist of a permanent housing structure of limited size in an area where subsidized housing is being provided (which, save for social housing, is not in the City Centre) whereas these Residents, on account of their historical place of residence being Woodstock (effectively contend) that they ought to be given a preferential right to relocate to a location as near as possible to Bromwell Street despite the fact that: (a) some of them did not even apply for permanent housing until recently; (b) purely by virtue of proximity to the City Centre the assistance that they will receive, will in the context of emergency housing, be greatly superior to that of permanent housing. Simply put, a beneficiary of permanent housing will be constrained to housing to the value of the State subsidy (currently nothing in excess of R 200 000.00) whereas these Residents, if their arguments were to find favour with this Court, would be relocated to very valuable State owned land in the vicinity of Bromwell Street. The City cannot and does not sanction such an unfair, haphazard and potentially discriminatory approach.

8. In the remainder of these Heads of Argument we address the following issues in turn:
  - 8.1. First, we properly identify the Residents' complaint and the case as made out in the founding affidavit.
  - 8.2. Second, we address the personal circumstances of the Residents.
  - 8.3. Third, we address the location of the emergency accommodation both in relation to the applicable legal principles and the facts.

- 8.4. Fourth, we address the issue of transport from Wolwerivier.
- 8.5. Fifth, we address the reasonableness of the emergency accommodation at Wolwerivier.
- 8.6. Sixth, we address the complaints relating to non-compliance with certain conditions of the EIA.
- 8.7. Finally, we make submissions in respect of the question of remedy.

## THE COMPLAINT

9. It must be emphasised at the outset that this matter commenced with an underlying concern by the Residents that if they were evicted, they would be rendered homeless. This much is apparent from the founding affidavit, where the following averment is made<sup>10</sup>:

“16. As I explain below, we have continued to reside at the property because we have nowhere else to go. We have tried our best to obtain alternative accommodation which is affordable given our circumstances and have attempted to engage with the City regarding the provision of temporary emergency accommodation. All these attempts have been unsuccessful and we now face the prospect of being evicted from the property and being left homeless on the streets, with literally no roof over our heads.”

10. Elsewhere the Residents complain that although the City was cited as a respondent in the consolidated eviction application, no relief was sought directing it to provide the Residents with temporary emergency accommodation in the event of their eviction from the property. According to the Residents: “Such relief was not sought notwithstanding that the Woodstock

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<sup>10</sup> FA: page 13; par 16.

Hub was aware, or reasonably ought to have been aware, that our circumstances were such that we would be at risk of homelessness if evicted from the property without any alternative accommodation being available to us.”<sup>11</sup>

11. In spite of its ongoing endeavours to assist the Residents, they are unduly critical of the City in their founding affidavit. According to the Residents, the City has adopted “an unreasonable, inflexible” attitude to them and their circumstances and the City has failed to adequately and proactively plan for and procure the land and/or buildings necessary to provide temporary shelter to them or similarly situated residents facing homelessness resulting from evictions.<sup>12</sup>
12. That initial complaint of the Residents has subsequently morphed into a complaint about the location of the City’s alternative accommodation and its proximity to the property. Differently put, given that the City has agreed to provide the Residents with emergency accommodation at one of its developments set up precisely for this purpose; the Residents now take issue with the location of the emergency accommodation that has been offered to them.
13. In the most recent Heads of Argument, the Residents introduce yet a further basis of challenge, viz, that the City bears a duty to address spatial injustice.<sup>13</sup>

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<sup>11</sup> FA; page 16; par 24.

<sup>12</sup> FA; page 32; par 75.

<sup>13</sup> HOA; page 26; par 74 and page 33.

## THE PERSONAL CIRCUMSTANCES OF THE RESIDENTS

14. In their Supplementary Founding Affidavit, the Residents provide further detail as to their personal circumstances. In summary, the following warrants reference:

14.1. Family Unit 1:

14.1.1. The household monthly income is R 3190.<sup>14</sup>

14.1.2. In a previous affidavit, it was alleged that the one member of the household works in Observatory and her sister attends a primary school in Salt River.<sup>15</sup> It was further alleged that the First Applicant's mother "is informally employed on a part time basis as a char".<sup>16</sup> In their Heads of Argument, it is alleged that the First Applicant is now unemployed but that her mother (the Fourth Applicant) is employed as a char worker in Salt River.<sup>17</sup>

14.1.3. Her mother receives treatment from the Woodstock Clinic.<sup>18</sup>

14.1.4. Despite raising certain complaints about living "far away", the family has searched for alternative accommodation in

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<sup>14</sup> SFA; page 405; par 8.

<sup>15</sup> SFA; page 405; par 7 and 10.

<sup>16</sup> SFA; page 405; par 7 and 10.

<sup>17</sup> HOA; page 8; par 16.

<sup>18</sup> SFA; page 406; par 15

“various areas”<sup>19</sup>, including Salt River, Woodstock, Maitland<sup>20</sup>, Mannenberg<sup>21</sup> and Mitchells Plain<sup>22</sup>.

14.1.5. Their concerns in respect of the location of Wolwerivier relates to travel costs to and from work and travel costs to school, which it is alleged would “negatively affect” their employment and schooling.<sup>23</sup>

14.1.6. It warrants emphasis that now that the First Applicant has become unemployed, the only impact on employment is in respect of one person, whose alleged employment details are, at best scant. No explanation is provided as to why learners cannot attend schools in the Wolwerivier area.

#### 14.2. Family Unit 3<sup>24</sup>:

14.2.1. The household (which consists of a 19 year old son and mother) has no income; both members are unemployed.<sup>25</sup> In their Heads of Argument, it is alleged that Dylan Nel “is a casual worker at Ashraf Upholstery in Salt River”.<sup>26</sup> In the affidavit filed, it is alleged that Dylan is unemployed.<sup>27</sup>

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<sup>19</sup> SFA; page 406; par 12.

<sup>20</sup> According to Google Maps, the distance from Bromwell Street is 4.5 km.

<sup>21</sup> According to Google Maps, the distance from Bromwell Street is 14.1 km.

<sup>22</sup> According to Google Maps, the distance from Bromwell Street is 24.6 km.

<sup>23</sup> SFA; page 406; par 14.

<sup>24</sup> SFA; SA2; page 417.

<sup>25</sup> SFA; SA2; page 419; par 4.

<sup>26</sup> HOA; page 9; par 17.

<sup>27</sup> SFA; SA2; page 419; par 4.

14.2.2. They have “recently” applied to the City for subsidised housing.<sup>28</sup>

14.2.3. Ms Nel alleges that she receives her medication from Woodstock Clinic and contends that if they were forced to move from the area, it would “negatively affect” access to her medication and healthcare.<sup>29</sup>

14.2.4. Again, the employment details of the one person who is allegedly employed is at best scant.

14.3. Family Unit 5<sup>30</sup>:

14.3.1. Mr Goliath is self-employed and earns approximately R 4000 per month.<sup>31</sup> No indication is provided in respect of Mr Goliath's place of employment.<sup>32</sup>

14.3.2. His children attend school in Salt River.<sup>33</sup>

14.3.3. It is further alleged that the Tenth Applicant is unemployed “but earns some money as a street vendor on occasion”.<sup>34</sup>

14.3.4. Despite raising certain complaints about living far away, the family has searched for alternative accommodation in

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<sup>28</sup> SFA; SA2; page 419; par 7.

<sup>29</sup> SFA; SA1; page 420; par 8 and 9.

<sup>30</sup> SFA; SA4; page 427.

<sup>31</sup> SFA; SA4; page 429; par 4.

<sup>32</sup> HOA; page 9; par 19.

<sup>33</sup> SFA; SA4; page 429; par 6.

<sup>34</sup> SFA; SA4; page 429; par 4.

“various areas”<sup>35</sup>, including Salt River, Woodstock, Maitland<sup>36</sup>, Brookland<sup>37</sup>, Kensington<sup>38</sup>, Goodwood<sup>39</sup> and Athlone<sup>40</sup>.

14.3.5. This family unit has made a verbal offer to purchase a property (at a location not disclosed) but are awaiting a response from the seller.<sup>41</sup>

14.3.6. He has also “recently” applied to the City for subsidised housing.<sup>42</sup>

14.3.7. His son has to attend at Red Cross Hospital every second month and his daughter attends on the Spencer Road Clinic once a month.<sup>43</sup>

14.3.8. They contend that this family unit will be rendered homeless if the eviction proceeds.<sup>44</sup>

#### 14.4. Family Unit 7<sup>45</sup>:

14.4.1. According to the Supplementary Founding Affidavit, Mr Smith is employed by the City and earns approximately R 5000 per month and his wife is also employed and earns approximately

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<sup>35</sup> SFA; SA 4; page 430; par 8.

<sup>36</sup> According to Google Maps is 4.5 km.

<sup>37</sup> According to Google Maps is 4.1. km.

<sup>38</sup> According to Google Maps is 6.2. km.

<sup>39</sup> According to Google Maps is 9.1. km.

<sup>40</sup> According to Google Maps is 9 km.

<sup>41</sup> Record: page 1935; par 9.

<sup>42</sup> SFA; SA 4; page 430; par 9.

<sup>43</sup> SFA; SA 4; page 430; par 11.

<sup>44</sup> SFA; SA 4; page 431; par 13.

<sup>45</sup> SFA; SA8; page 447.

R 3000 per month.<sup>46</sup> Elsewhere, Mr Smith alleges that his household earns a combined family income of R 10 780.20<sup>47</sup> and accordingly potentially qualifies for a home loan in the amount of R 324 048.00.<sup>48</sup>

14.4.2. His minor children attend a primary school in Woodstock.<sup>49</sup>

14.4.3. They have tried to move in with his wife's parents on the Cape Flats but the house is "too full" and they are concerned about their children's safety; significantly their concern about living on the Cape Flats is not expressed as being the distance from Bromwell Street despite the Cape Flats being about 20.3 km (according to Google Maps) from Bromwell Street.<sup>50</sup>

14.4.4. They have been on the City's waiting list for subsidised housing since 2014.<sup>51</sup>

14.5. Family Units 8A and 8B<sup>52</sup>:

14.5.1. There is a combined household income of approximately R 5300 per month.<sup>53</sup>

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<sup>46</sup> SFA; SA8; page 448; par 4.

<sup>47</sup> Record; page 1357.

<sup>48</sup> Record; page 1936; par 11.

<sup>49</sup> SFA; SA8; page 448; par 6.

<sup>50</sup> SFA; SA8; page 449; par 8.

<sup>51</sup> SFA; SA8; page 449; par 10.

<sup>52</sup> SFA; SA9; page 451.

<sup>53</sup> SFA; SA9; page 453; par 5.

14.5.2. They are concerned about travel costs to work; this despite the fact that between both these households there is one person who works as a part time char and whose income is undisclosed.<sup>54</sup> The frequency of her work is also not addressed.

14.5.3. They have "recently" applied to the City for subsidised housing.<sup>55</sup>

14.5.4. Should they be forced to move far away, the one family member (Michelle) who does part time char work for an undisclosed income, will not be able to afford travel costs to work and school.<sup>56</sup>

14.6. Individual Household 1<sup>57</sup>:

14.6.1. He used to be employed in Parow (which according to Google maps is 19.1 km away from Bromwell Street), earning a salary of R 4000 per month.<sup>58</sup>

14.6.2. He has been unemployed since 30 September 2016.<sup>59</sup> In their Heads of Argument, it is alleged that Mr Rodrigues is a casual worker at Fruit and Veg.<sup>60</sup>

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<sup>54</sup> SFA; SA9; page 453; par 5.

<sup>55</sup> SFA; SA9; page 453; par 9.

<sup>56</sup> SFA; SA9; page 454; par 10.

<sup>57</sup> SFA; SA5; page 432.

<sup>58</sup> SFA; SA5; page 434; par 4.

<sup>59</sup> SFA; SA5; page 434; par 4.

<sup>60</sup> HOA; page 12; par 26.

14.6.3. He has searched for accommodation as far afield as “the Northern Suburbs”.<sup>61</sup>

14.7. Individual Household 2<sup>62</sup>:

14.7.1. She moved in with Mr Goliath and his family when she was struggling and had nowhere to live.<sup>63</sup>

14.7.2. She is unemployed but receives “some support” (the amount of which is undisclosed), from the Eleventh and Thirteenth Applicants and her children who do not live with her.<sup>64</sup>

14.7.3. She has searched for accommodation but has no money for rental.<sup>65</sup>

14.7.4. She has been on the waiting list for subsidised housing since 2016.<sup>66</sup>

15. In summary, the position is as follows:

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<sup>61</sup> SFA; SA 5; page 435; par 7.

<sup>62</sup> SFA; SA6; page 437.

<sup>63</sup> SFA; SA6; page 439; par 3.

<sup>64</sup> SFA; SA6; page 439; par 4.

<sup>65</sup> SFA; SA6; page 439; par 6.

<sup>66</sup> SFA; SA6; page 439; par 8.

ITEM NO	FAMILY UNIT	RELEVANT PERSONAL CIRCUMSTANCES	ALTERNATIVE HOUSING
1.	Family Unit 1: Charnell and Vanessa Commando with minor daughter( Willem Nel is currently incarcerated)	<p>The household monthly income is R 3190.<sup>67</sup></p> <p>The one member of the household who previously worked in Observatory is presently unemployed and her sister attends a primary school in Salt River.<sup>68</sup></p> <p>Her mother receives treatment from the Woodstock Clinic.<sup>69</sup></p> <p>Despite raising certain complaints about living "far away", the family has searched for alternative accommodation in "various areas"<sup>70</sup>, including Salt River, Woodstock, Maitland<sup>71</sup>, Mannenberg<sup>72</sup> and Mitchells Plain<sup>73</sup>.</p>	<p>Status:</p> <p>The City has offered <b>emergency accommodation</b>.<sup>74</sup></p>
2.	Family Unit 2: Meeshade Nel and minor son	The household monthly income is R 2600. <sup>75</sup>	<b>Relocated</b> to social housing. <sup>82</sup>

<sup>67</sup> SFA; page 405; par 8.

<sup>68</sup> SFA; page 405; par 7 and 10.

<sup>69</sup> SFA; page 406; par 15

<sup>70</sup> SFA; page 406; par 12.

<sup>71</sup> According to Google Maps, the distance from Bromwell Street is 4.5 km.

<sup>72</sup> According to Google Maps, the distance from Bromwell Street is 14.1 km.

<sup>73</sup> According to Google Maps, the distance from Bromwell Street is 24.6 km.

<sup>74</sup> Record: page 1933; par 5.3.

<sup>75</sup> SFA; SA1; page 414; par 4.

<sup>82</sup> Record: page 1933; par 6.1.

		<p>The one member of the household works in Observatory and her child attends a primary school in Woodstock.<sup>76</sup></p> <p>Despite raising certain complaints about living “far away”, the family has searched for alternative accommodation in “various areas”<sup>77</sup>, including Salt River, Woodstock, Maitland<sup>78</sup>, Brookland<sup>79</sup>, Goodwood<sup>80</sup> and Athlone<sup>81</sup>.</p>	
3.	Family Unit 3: Priscilla Nel and adult son Dylan Nel.	<p>The household (which consists of a 19 year old son and mother) has no income; both members are unemployed.<sup>83</sup></p> <p>They have “recently” applied to the City for subsidised housing.<sup>84</sup></p> <p>Ms Nel alleges that she receives her medication from Woodstock Clinic and contends that if they were forced to move from the area, it would “negatively affect” access to her</p>	<p>Status:</p> <p>Has no income and requires <b>emergency accommodation</b>, which the City has offered.</p>

<sup>76</sup> SFA; SA1; page 414; par 6.

<sup>77</sup> SFA; page 406; par 12.

<sup>78</sup> According to Google Maps the distance from Bromwell Street is 4.5 km.

<sup>79</sup> According to Google Maps the distance from Bromwell Street is 4.1. km.

<sup>80</sup> According to Google Maps the distance from Bromwell Street is 9.1. km.

<sup>81</sup> According to Google Maps the distance from Bromwell Street is 9 km.

<sup>83</sup> SFA; SA2; page 419; par 4.

<sup>84</sup> SFA; SA2; page 419; par 7.

		medication and healthcare. <sup>85</sup>	
4.	Family Unit 4: Daphne Nel and minor son	N/A	Status: <b>Relocated</b> to Communicare Social Housing. <sup>86</sup>
5.	Family Unit 5: Sulaiman Golaith, Ma Aida Abels and Nashiet Abels and 3 minors.	<p>Mr Goliath is self-employed at an undisclosed location and earns approximately R 4000 per month.<sup>87</sup></p> <p>His children attend school in Salt River.<sup>88</sup></p> <p>Despite raising certain complaints about living far away, he explains that the family has searched for alternative accommodation in “various areas”<sup>89</sup>, including Salt River, Woodstock, Maitland<sup>90</sup>, Brookland<sup>91</sup>, Kensington<sup>92</sup>, Goodwood<sup>93</sup> and Athlone<sup>94</sup>.</p> <p>This family unit has made a verbal offer to purchase a property</p>	<p>Status:</p> <p>Despite the family income, the City has <b>offered emergency accommodation.</b></p>

<sup>85</sup> SFA; SA1; page 420; par 8 and 9.

<sup>86</sup> Record: page 1934; par 8.

<sup>87</sup> SFA; SA4; page 429; par 4.

<sup>88</sup> SFA; SA4; page 429; par 6.

<sup>89</sup> SFA; SA 4; page 430; par 8.

<sup>90</sup> According to Google Maps is 4.5 km.

<sup>91</sup> According to Google Maps is 4.1. km.

<sup>92</sup> According to Google Maps is 6.2. km.

<sup>93</sup> According to Google Maps is 9.1. km.

<sup>94</sup> According to Google Maps is 9 km.

		<p>(at a location not disclosed) but are awaiting a response from the seller.<sup>95</sup></p> <p>It has also “recently” applied to the City for subsidised housing.<sup>96</sup></p> <p>His son has to attend at Red Cross Hospital every second month and his daughter attends on the Spencer Road Clinic once a month.<sup>97</sup></p> <p>They contend that this family unit will be rendered homeless if the eviction proceeds.<sup>98</sup></p>	
6.	Household 6: Delia Smith and Chrashanna Smith and minor child.	N/A	<p>Status:</p> <p>Were offered a social housing unit and have <b>vacated</b> the property.<sup>99</sup></p>
7.	Household 7: Mark and Rashieda Smith, Mogamat (adult son), and 3 minor children	According to the Supplementary Founding Affidavit, Mr Smith is employed by the City and earns approximately R 5000 per month and his wife is also employed and	<p>Status:</p> <p>Despite the household income being <b>R 10 780.20</b><sup>106</sup> the City has <b>offered</b></p>

<sup>95</sup> Record: page 1935; par 9.

<sup>96</sup> SFA; SA 4; page 430; par 9.

<sup>97</sup> SFA; SA 4; page 430; par 11.

<sup>98</sup> SFA; SA 4; page 431; par 13.

<sup>99</sup> Record: page 1935.

<sup>106</sup> Record: page 1357.

		<p>earns approximately R 3000 per month.<sup>100</sup> Elsewhere, Mr Smith alleges that his household earns a combined family income of R 10 780.20<sup>101</sup> and accordingly potentially qualifies for a home loan in the amount of R 324 048.00.<sup>102</sup></p> <p>His minor children attend a primary school in Woodstock.<sup>103</sup></p> <p>They have tried to move in with his wife's parents on the Cape Flats but the house is "too full" and they are concerned about their children's safety; significantly their concern about living on the Cape Flats is not expressed as being the distance from Bromwell despite the Cape Flats being about 20.3 km from Bromwell Street.<sup>104</sup></p> <p>They have been on the City's waiting list for subsidised housing since 2014.<sup>105</sup></p>	<b>emergency accommodation.</b>
8A	Family Unit 8A: Brenda Smith,	Concerned about travel costs to work;	Status:

<sup>100</sup> SFA; SA8; page 448; par 4.

<sup>101</sup> Record: page 1357.

<sup>102</sup> Record: page 1936; par 11.

<sup>103</sup> SFA; SA8; page 448; par 6.

<sup>104</sup> SFA; SA8; page 449; par 8.

<sup>105</sup> SFA; SA8; page 449; par 10.

	Roseline and their major daughters Cheslyn and Megan and 4 minor children	this despite the fact that no one works in this household. It is alleged in the Heads of Argument that the Twentieth Applicant "sometimes earns some income from looking after some family member's children".	Mrs Smith has enquired about an offer of housing previously made to her. The City has offered the entire household <b>emergency accommodation.</b>
8B	Family Unit 8B: Michelle Smith and children	Concerned about travel costs to work; this despite the fact that there is one person who works as a part time char and whose income is undisclosed. They have "recently" applied to the City for subsidised housing. Should they be forced to move far away, the one family member (Michelle) who does part time char work for an undisclosed income, will not be able to afford travel costs to work and school.	Status:  The City has offered <b>emergency accommodation.</b>
9.	Graham Beukes, Sofie Masilo and 3 minors	N/A	Has found alternative accommodation and have <b>relocated.</b> <sup>107</sup>
10.	Individual Household 1:	Used to be employed in Parow (which	The City has offered

<sup>107</sup> Record: page 1938

	George Rodriques	<p>according to Google maps is 19.1 km away from Bromwell Street), earning an salary of R 4000 per month.<sup>108</sup></p> <p>Has been unemployed since 30 September 2016.<sup>109</sup> According to the Heads of Argument, is employed as a casual worker at Fruit and Veg (at par 26).</p> <p>Has searched for accommodation as far afield as “the Northern Suburbs”.<sup>110</sup></p>	<b>emergency accommodation.</b>
11.	Individual Household 2: Faiza Fischer	<p>Moved in with Mr Goliath and his family when she was struggling and had nowhere to live.<sup>111</sup></p> <p>Is unemployed but receives “some support” (the amount of which is undisclosed), from the Eleventh and Thirteenth Applicants and her children who do not live with her.<sup>112</sup></p> <p>Has searched for accommodation but has no money for rental.<sup>113</sup></p>	The City has offered <b>emergency accommodation</b> (to be shared with individual household 1).

<sup>108</sup> SFA; SA5; page 434; par 4.

<sup>109</sup> SFA; SA5; page 434; par 4.

<sup>110</sup> SFA; SA 5; page 435; par 7.

<sup>111</sup> SFA; SA6; page 439; par 3.

<sup>112</sup> SFA; SA6; page 439; par 4.

<sup>113</sup> SFA; SA6; page 439; par 6.

		Has been on the waiting list for subsidised housing since 2016. <sup>114</sup>	
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16. According to the Applicants' summary the following family units require emergency housing<sup>115</sup>:

16.1. Family Unit 1;

16.2. Family Unit 3;

16.3. Family Unit 5;

16.4. Family Unit 7;

16.5. Family Unit 8A;

16.6. Family Unit 8B;

16.7. Individual Households 1 and 2.

17. All of these family units (6 in total) and individual households (2 in total who have been offered one structure) have been offered emergency accommodation by the City. None of them have to date accepted the offer.

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<sup>114</sup> SFA; SA6; page 439; par 8.

<sup>115</sup> Record; page 1940; par 17.3.

18. As regards the families who have been offered emergency accommodation, the following falls to be emphasised:

18.1. Two of the family units which have been offered emergency accommodation by the City, have employed persons with: (a) Family Unit 5 having an income of R 3500; and (b) Family Unit 7 having a combined income of R 10 780.20<sup>116</sup> and accordingly potentially qualifying for a homeloan in the amount of R 324 048.00.<sup>117</sup> Indeed, given their income levels some of these households would not even qualify for subsidised state housing which is limited to persons who earn less than R 3500 per month.

18.2. Save for the aforementioned households, none of the other individuals are working, except for certain individuals whose work appears to be ad hoc for an undisclosed income, an at undisclosed employer and of undisclosed frequency.

18.3. Many of these households have themselves sought alternative accommodation some distance from Bromwell Street; indeed, in some instances as far afield as the Northern Suburbs or the Cape Flats.

19. All of the remaining family units have either vacated or are in the process of vacating to alternative accommodation.

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<sup>116</sup> Record: page 1357.

<sup>117</sup> Record: page 1936; par 11.

## THE OBLIGATION TO PROVIDE EMERGENCY ACCOMMODATION: THE LAW

20. We respectfully submit that the point of departure in the adjudication of this matter is section 26 of the Constitution which provides as follows:

- “(1) Everyone has the right to have access to adequate housing.
- (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of this right.
- (3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.”

21. There is no challenge as to the reasonableness of the City's delivery of housing, including its delivery of emergency housing; it must accordingly be accepted as such.

22. In **Government of the Republic of South Africa and Others v Grootboom and Others** 2001 (1) SA 46 (CC), the Constitutional Court held that:

22.1. That the framework for housing development as well as the general principles underpinning it do not contemplate the provision of housing that falls short of the definition of housing development in the Housing Act. In other words, “there is no express provision to facilitate access to temporary relief for people who have no access to land, no roof over their heads, for people who are living in intolerable conditions and for people who are in crisis because of natural disasters such as floods and fires, or because their homes are under threat of demolition. These are people in desperate need. Their immediate need can be met by relief short of housing which fulfils the requisite standards of durability,

habitability and stability encompassed by the definition of housing development in the Act."<sup>118</sup>

22.2. That in assessing the reasonableness of the housing programme, "one must consider whether the absence of a component catering for those in desperate need is reasonable in the circumstances".<sup>119</sup>

22.3. That:

"[64] .... The housing development policy as set out in the Act is in itself laudable. It has medium and long-term objectives that cannot be criticised. But the question is whether a housing program that leaves out of account the immediate amelioration of the circumstances of those in crisis can meet the test of reasonableness established by the section.

[65] The absence of this component may have been acceptable if the nationwide housing program would result in affordable houses for most people within a reasonably short time. However, the scale of the problem is such that this simply cannot happen. Each individual housing project could be expected to take years and the provision of houses for all in the area of the municipality and in the Cape Metro is likely to take a long time indeed. The desperate will be consigned to their fate for the foreseeable future unless some temporary measures exist as an integral part of the nationwide housing program. Housing authorities are understandably unable to say when housing will become available to these desperate people. The result is that people in desperate need are left without any form of assistance with no end in sight. Not only are the immediate crises not met. The consequent pressure on existing settlements inevitably results in land invasions by the desperate thereby frustrating the attainment of the medium and long-term objectives of the nationwide housing program. That is one of the main reasons why the Cape Metro land program was adopted."

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<sup>118</sup> At par 52.

<sup>119</sup> At par 63.

23. Pursuant to the dictum of the Constitutional Court in **Grootboom**, National Government has enacted Part 3 of the Housing Code to cater for emergency housing; this section of the Code is known as “the Emergency Housing Programme”.
24. Part 2.3 of the NHC, 8 under the “Definition of Emergency Housing Circumstances” provides that:

“This Programme will apply to emergency situations of exceptional housing need, such situations being referred to as “Emergencies”, as defined below:

An emergency exists when the MEC, on application by a municipality and or the PD, agrees that persons affected owing to situations beyond their control:

Having become homeless as a result of a declared state of disaster, where assistance is required, including cases where initial remedial measures have been taken in terms of the Disaster Management Act, 2002 (Act No 57 of 2002) by government, to alleviate the immediate crisis situation;

Have become homeless as a result of a situation which is not declared as a disaster, but destitution is caused by extraordinary occurrences such as floods, strong winds, severe rainstorms and/or hail, snow, devastating fires, earthquakes and/or sinkholes or large disastrous industrial incidents;

Live in dangerous conditions such as on land being prone to dangerous flooding, or land which is dolomitic, undermined at shallow depth, or prone to sinkholes and who require emergency assistance;

Live in the way of engineering services or proposed services such as those for water, sewerage, power, roads or railways, or in reserves established for any such purposes and who require emergency assistance; . . . .”

25. In addition part 2.4 9 in the first paragraph thereof provides that:

“The Programme will benefit all affected persons who are not in a position to address their housing emergency from their own resources or from other sources such as the proceeds of superstructure insurance policies and the following households will qualify for assistance under this Programme: . . . .”

26. It warrants emphasising that the Emergency Housing Programme applies to “emergency situations of exceptional housing need”. It applies to various categories of persons including persons who are evicted or threatened with imminent eviction from land or from unsafe buildings, or situations where proactive steps ought to be taken to forestall such consequences. The Programme is intended to benefit all affected persons who are not in a position to address their housing emergency from their own resources or from other sources.
27. It is therefore of particular importance that emergency housing (given the breadth of its beneficiary base) not be conflated with the provision for long-term adequate housing. To do so, we respectfully submit will result in the arbitrary, haphazard provision of housing in that persons facing an emergency will be provided with comparable housing to those who are patiently awaiting their turn on the housing waiting list. Furthermore, there are stringent criteria including income levels which apply to the provision of permanent subsidised housing, all of which do not apply to emergency housing.
28. Indeed, the cogency of this proposition has already been recognised by the Courts.

29. Binns-Ward J in **City of Cape Town v Hoosain NO and Others**, unreported WCC case No 10334/2011, delivered on 21 October 2011: [2011] ZAWCHC 391 at par 9 and 14 said the following in this regard<sup>120</sup>:

“9. Turning then to the substantive issue. The matter of the provision of alternative accommodation in this case arises not out of the state's obligation to promote the access by everyone to *adequate* housing by taking reasonable measures, within its available resources, to achieve the progressive realisation of the right as understood by the concept of 'housing development' as defined in s 1 of the Housing Act 107 of 1997<sup>3</sup>, but rather out of the related and incidental obligation within any state housing programme to provide for the needs of people for basic shelter occurring in situations of crisis because of natural or manmade emergency or because their homes are under threat of demolition as in the current case. Thus the state's obligation in the current context can be met by 'relief short of housing which fulfils the requisite standards of durability, habitability and stability encompassed by the definition of housing development in the [2000] ZACC 19; Act' (see *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) (2000 (11) BCLR 1169) at para 52). How far short of the requisite standards of permanent housing the relief offered by the state can be allowed to fall is a question not easily answered. The answer has to be informed in the main by the striking of a reasonable balance between available resources and the extent, in the given context, of the overall demands on those resources, not just by the persons immediately under consideration, but the population in general. In the consideration of available resources account has to be taken of the need for a proportionate allocation of resources so as to avoid the demands of the provision of emergency shelter becoming an undue impediment to the state's ability in the ordinary course to progressively provide permanent housing to those in need.

....

14. Once it is recognised that emergency accommodation by its very nature will invariably fall short of the standards reasonably expected of permanent housing accommodation, it follows that those who need to occupy such accommodation must accept less than what would ordinarily be acceptable. The apparent harshness of an acceptance of this recognition has to be seen against the realities imposed by the vast scale of the housing

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<sup>120</sup> Endorsed by the SCA in *City of Johannesburg v Dladla and Others* 2016 (6) SA 377 (SCA) at par 20.

backlogs which the State, in general, and the City, in particular, are having to engage."

30. In **City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another** 2012 (2) SA 104 (CC), the Constitutional Court, reaffirmed the differentiation between emergency housing and other housing which it previously recognised in **Grootboom**:

"[95] As a result, I find that whereas differentiation between emergency housing needs and housing needs that do not constitute an emergency might well be reasonable, the differentiation the City's policy makes is not. To the extent that eviction may result in homelessness, it is of little relevance whether removal from one's home is at the instance of the City or a private property owner. The policy follows from the City's incorrect understanding of its obligations under Ch 12 and its claim that it lacks resources. The City's housing policy is unconstitutional to the extent that it excludes the Occupiers and others similarly evicted from consideration for temporary accommodation. The exclusion is unreasonable."

31. In **City of Johannesburg v Dladla and Others** 2016 (6) SA 377 (SCA) at par 22, the SCA held as follows:

"[22] The thrust of the argument by the amicus was that housing must have special regard to the needs of the vulnerable and, in particular, women and children. In this connection, we were referred to South African, foreign and international law. About this aspect of policy there can be no confusion: South African law in this field is, by now, trite. It is abreast of the best in the world and, in the submission of Mr Loxton, who appeared for the City, goes further to protect the socially disadvantaged than any other country. The evaluation of any municipal, regional or national government's housing policy — whether by an electorate, the courts, or experts in areas as diverse as urban and regional planning, social work, economics, architecture and building, construction and engineering — will have regard to a multiplicity of factors, including, but not limited to, safety, protection from the elements, access to utilities such as electricity and clean water, refuse collection, public transport, schools, clinics, parks and other centres of sport and recreation, regulation, aesthetics, interdigitation and general spatial design. An evaluation of broad, long-term political policy takes place on a different

footing from a judgment dealing with the facts in a temporary situation created by an emergency. With this proposition, counsel for both the amicus and the City agreed. It is self-evidently correct. The best must not become the enemy of the good."

32. Chapter 12 of the Housing Code, in regulating the provision of emergency housing, imposes no obligation as to the location of such housing.

33. By contrast, because the Constitution provides for a right of access to "adequate" housing, there is a significantly higher threshold that must be met in that context.

34. For instance, with regard to permanent housing, section 9(1)(a)(ii) of the Housing Act provides that:

"(1) Every municipality must, as part of the municipality's process of integrated development planning, take all reasonable and necessary steps within the framework of national and provincial housing legislation policy to —

(a) ensure that —

(i) the inhabitants of its area of jurisdiction have access to adequate housing on a progressive basis;

(ii) conditions not conducive to the health and safety of the inhabitants of its area of jurisdiction are prevented or removed;

(iii) services in respect of water, sanitation, electricity, roads, stormwater drainage and transport are provided in a manner which is economically efficient."

35. Section 1 of the Housing Act defines "housing development" in very broad terms to mean:

“(T)he establishment and maintenance of habitable, stable and sustainable public and private residential environments to ensure viable households and communities in areas allowing convenient access to economic opportunities, and to health, educational and social amenities in which all citizens and permanent residents of the Republic will, on a progressive basis, have access to —

- (a) permanent residential structures with secure tenure, ensuring internal and external privacy and providing adequate protection against the elements; and
- (b) potable water, adequate sanitary facilities and domestic energy supply; . . . .”

36. As regards the question of the location of alternative accommodation, according to Justice Ngcobo (as he then was) in **Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others (Centre on Housing Rights and Evictions and Another, Amici Curiae)** 2010 (3) SA 454 (CC):

“[222] Well before August 2006 the residents were requested to move in order to allow for the further implementation of the project. In this regard Mr Sopaqa states that 'in about August 2006' Thubelisha 'became more aggressive in their attempts to persuade all Joe Slovo residents to move to Delft'. Indeed, a considerable number of residents relocated to Delft voluntarily as a result. The applicants apparently opposed the relocation to Delft because they 'had heard many reports from Joe Slovo residents who had voluntarily relocated, about the poor conditions at Delft, ranging from lack of access to transport, to poor employment prospects and high crime levels'. The residents have therefore known for some time prior to the eviction proceedings that they had to relocate to Delft. While the concerns of the applicants' relocation to Delft may be understandable, the fact of the matter is that they must relocate to give way to the development aimed at benefiting them and thousands of others in their situation. They have known for some time that they had to vacate the land and they were told to vacate some time ago.

.....

[254] Some of the reasons advanced by the residents for refusing to relocate to the TRUs in Delft are a lack of schools and other amenities and a lack of employment. What must be stressed here is that relocation is necessary to develop Joe Slovo so that decent housing can be built there. This will benefit the residents. Moreover, the Constitution does not guarantee a person a right to housing at government expense at the locality of his or her choice. Locality is determined by a number of factors, including the availability of land. However, in deciding on the locality, the government must have regard to the relationship between the location of residents and their places of employment.

[255] As indicated above, Delft is some 15 km away from Joe Slovo. However, the government has offered free transport to take children to schools in Kwa-Langa. In addition, it has committed itself to building more schools and clinics in Delft and pensioners have a choice of getting their pension either in Delft or in Kwa-Langa. In short, the government has taken some steps in order to ameliorate the hardships that may be caused by relocation."

(Own Emphasis)

37. In **City of Johannesburg v Changing Tides 74 (Pty) Ltd and Others** 2012 (6) SA 294

(SCA), the SCA held as follows:

"[56] Accordingly it is appropriate to require the City on receipt of the list of occupiers requiring temporary emergency accommodation from the LRC, to report to the court, within one month of receipt of the list, setting out the accommodation that it will make available to all of those occupiers and when such accommodation will be available. That accommodation must be in a location as near as feasibly possible to the area where Tikwelo House is situated. The report must be supported by an affidavit from an appropriate official in the employ of the City verifying its contents and contain an undertaking that the City will provide the occupiers with accommodation in accordance therewith. It must deal specifically with the issue of proximity and explain why the particular location or locations of the accommodation have been selected. It must also set out the steps taken during the two months before it needs to be filed to engage with the occupiers through the LRC or any other means that may appear appropriate."

38. Accordingly, while the SCA referred to a report being provided in **Changing Tides** and to accommodation being provided in a location as near as feasibly possible to the property from which they were being evicted, it made no pronouncement that there is an unqualified right to emergency accommodation in the immediate vicinity from where persons are being evicted. Indeed, the judgment does not address the question of proximity to the area from which persons are being evicted or specific State obligations in that regard.
39. While in **City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another** 2012 (2) SA 104 (CC) the Court ordered that the Municipality must provide those Occupiers whose names appear in the document entitled 'Survey of Occupiers of 7 Saratoga Avenue, Johannesburg' filed on 30 April 2008 with temporary accommodation in a location as near as possible to the area where the property is situated on or before 1 April 2012, provided that they are still resident at the property and have not voluntarily vacated it, it did not make any findings in relation to this issue which does not appear to have arisen on the papers.
40. Most recently in **Baron and others v Claytile (Pty) Limited and Another (CCT241/16) [2017] ZACC 24 (13 July 2017)** the Constitutional Court decisively pronounced on the question of alternative accommodation in the context of an eviction under ESTA. In that matter, the City had offered, *albeit* shortly before the hearing of the matter before the Constitutional Court to make alternative accommodation available to the Occupiers at Wolwerivier.<sup>121</sup> That offer was

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<sup>121</sup> At par 30.

rejected by the Occupiers on the basis of the distance from Wolwerivier to their places of employment and the children's school; and further that the housing units at Wolwerivier were inadequate structures as the units had been constructed with corrugated cladding.<sup>122</sup> The Constitutional Court rejected the concerns raised by the Occupiers and concluded as follows:

“[32] The applicants urged this Court to make a value judgment as to what is just and equitable, which includes consideration of the distance from the applicants' places of employment and the distance from social amenities, such as schools, clinics and shopping centres. The applicants failed to deal with the objection that Wolwerivier was far from their places of employment, but relied on a bald allegation, without setting out any particulars as to where they were employed and the distance from Wolwerivier. They did not deal with any hardship they would suffer should they move to Wolwerivier.

....

[50] The applicants' concerns about what made the initial accommodation ill-suited have been addressed by the City to the best of its abilities. Cognisant that the duty is one of progressive realisation, I accept that the housing units at Wolwerivier qualify as suitable alternative accommodation which is provided by the City within “its available resources”. The applicants cannot delay their eviction each time by stating that they find the alternative accommodation offered by the City unsuitable. Specifically, their remaining concerns regarding the schooling of the children have also been addressed by the offer of transport by the first respondent.”

41. We respectfully submit that the judgment of the Constitutional Court in **Baron** dispositively dealt with Wolwerivier as suitable alternative accommodation. The Residents however, seek to distinguish it on two bases<sup>123</sup>:

41.1. First, that the residents in that matter failed to set out their particulars as to where they were employed, the distance from Wolwerivier and what

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<sup>122</sup> At par 31.

<sup>123</sup> HOA; page 42; par 113.

hardship they would suffer should they move to Wolwerivier.<sup>124</sup> Far from this being a distinguishing factor, we submit that in the present instance too the Residents have provided information in the vaguest terms as to these issues. In the first instance, subject to a few exceptions most of the individuals are unemployed. In the second instance, where it is alleged that individuals are doing casual or part time work, no indication is provided as to the frequency of such employment. In the third instance, no indication is provided as to exactly where and for whom individuals work, including precise addresses etc., thereby making it very difficult to assess the degree of potential hardship.

41.2. Second, that this case has its genesis in PIE and not ESTA.<sup>125</sup> While it is correct that **Baron** was an eviction under ESTA, whereas PIE applies in the present instance, what is significant is that ESTA defines “suitable alternative accommodation” in expansive terms and despite this definition, Wolwerivier was found to be reasonable in the context of an eviction under ESTA. According to ESTA, suitable alternative accommodation is defined as follows:

“alternative accommodation which is safe and overall not less favourable than the occupiers' previous situation, having regard to the residential accommodation and land for agricultural use available to them prior to eviction, and suitable having regard to-

- (a) the reasonable needs and requirements of all of the occupiers in the household in question for residential accommodation, land for agricultural use, and services;
- (b) their joint earning abilities; and

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<sup>124</sup> HOA; page 42; par 113.

<sup>125</sup> HOA; page 43; par 114.

- (c) the need to reside in proximity to opportunities for employment or other economic activities if they intend to be economically active."

42. Accordingly, we submit that the following legal principles find application in respect of the City's offer of emergency accommodation:

42.1. First, emergency accommodation is distinct from permanent subsidised accommodation. Indeed, the definition of housing development in the Housing Act does not find application in respect of emergency housing. In addition, the Constitutional Court has recognised that the State's obligation in the current context can be met by "relief short of housing which fulfils the requisite standards of durability, habitability and stability encompassed by the definition of housing development" in the Housing Act. There are compelling reasons as to why emergency housing ought not to be conflated with other permanent forms of housing. Key to these reasons is the fact that emergency housing is provided pending the acquisition of alternative permanent housing.

42.2. Second, the Housing Code and chapter 12 in particular does not impose location as being a necessary prerequisite in respect of the provision of emergency accommodation.

42.3. Third, the Constitutional Court has already recognised that the Constitution does not guarantee a person a right to housing at government expense at the locality of his or her choice and further that locality is determined by a number of factors, including the availability of land.

42.4. Fourth, the Constitutional Court has already ruled that Wolwerivier constitutes suitable alternative accommodation that is with the City's available resources.

42.5. Finally and in any event, at best for the Residents, the emergency housing must be as near as is feasibly possible to their current place of residence. We submit on the facts, the City has shown that Wolwerivier has met this criterion. It is this factual enquiry that we now turn to.

### **THE PROVISION OF EMERGENCY ACCOMMODATION: THE FACTS**

43. As regards its approach to Emergency Housing, the City has explained<sup>126</sup>:

"In order to determine whether a household qualifies for emergency housing, the first determination is whether the household in question is able to address their housing needs through their own resources or from other sources, such as from other housing programmes.

It is for this reason that applicants for emergency housing are required to place their names on the housing database. Once this is done, they are assessed as to whether they can be accommodated under any other housing programme. In this particular instance, there are two housing programmes that bear particular relevance, viz, the Social Housing Programme and GAP Housing. In the event that households qualify for either of these programmes and can be moved to such housing, it would follow that they would not be in need of Emergency Housing. On the other hand, in the event that they do so qualify, they will be eligible for Emergency Housing."

44. The City has explained its approach to the determination of the location for its housing programmes. It has stated<sup>127</sup>:

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<sup>126</sup> City AA; page 542; par 47 and 48.

<sup>127</sup> City AA; page 551; par 66.

- 44.1. The City has a spread of different housing options available across its jurisdiction.
- 44.2. As regards emergency housing, it is correct that there are no developments in the immediate City centre and surrounds.
- 44.3. The reasons for this are complex but include: (a) the excessively high costs of developing an emergency housing settlement in the City. The costs in this regard are at least three-fold what they would be in areas further afield; (b) the very high rates on properties in the City centre; (c) the scarcity of land in the immediate surrounds of the City and the competing demands on such land.
- 44.4. There are however other housing programmes in which the immediate surrounds of the City is being targeted. These are aimed at creating affordable inner city housing and temporary housing projects. These are all in planning stages but at varying levels of planning and preparation. Various examples in this regard have been provided which include:
- 44.4.1. Inner City Housing in Woodstock: there are six separate sites that are being targeted for different housing projects.
- 44.4.2. A transitional housing development and a social housing development in Salt River.
- 44.4.3. The Cape Town Foreshore Freeways Project: the City's Transport for Cape Town directorate has put out a Request for Proposals (RFP) for prospective investors and developers to consider and

present a comprehensive proposal that effectively harnesses world-leading design and development, thereby enabling the full potential of this immensely valuable city asset to be unlocked. Proposals should present a comprehensive development solution for the Foreshore Freeway Precinct as a mixed land use development, including transportation, housing, social and economic opportunities, supported by ancillary uses, such as open space. It is recognised that opening up some of this space for multiple-income housing, including affordable housing, could bring lower-income people closer to work opportunities.

44.4.4. Maiden's Cove: the City is taking an innovative approach to the Maiden's Cove development, by leveraging City-owned land and encouraging investment in projects that unlock transit-oriented development. It is vital that partnerships with various sector bodies and the private sector are formed if Cape Town is to truly realise a revitalised, integrated city. It is for this reason that the project has gone out for proposal call. 10% of the financial offer for Maiden's Cove will be allocated to near-inner City housing projects, which would amount to R150 million planned budget spend on affordable housing.

44.4.5. Two Rivers Urban Park ("**TRUP**"): the City of Cape Town and Western Cape Government have embarked on a joint project that is primarily aimed at overcoming the legacy of apartheid spatial planning. TRUP is an all-inclusive development designed to bring people closer to work opportunities and living within a

green, compact environment that is serviced by multiple transport networks. The site is strategically located along the M5 and between Voortrekker Road and the N2, and is bordered by two rivers, the Liesbeek and the Black River. It is informed by the Table Bay District Spatial Plan. TRUP aims to release 120 ha of land within the area for the creation of a mixed-use, fully inclusive development.

45. The Residents identified 45 parcels of vacant state owned land within 5 kilometres from the property which they submit are suitable for development or at the very least temporary emergency accommodation.<sup>128</sup>
46. In response the City has explained: (a) its approach to identifying land for housing development; and (b) why none of the land parcels referred to can be used by the City for emergency accommodation to the Residents.
47. As regards the question of identifying land, the City has explained that a land disposal committee which meets twice a year, or more often if required, has on its agenda as a standing item the transfer of land that is surplus to the core business of the national department it is assigned to. Should any national land holdings be usable for low income housing provision in Cape Town a request to transfer that property to the municipality, by way either of donation or purchase, is made. The legal process is thus followed to action the transfer. A few transfers have taken place but many large parcels are as yet not released.<sup>129</sup>

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<sup>128</sup>FA; page 33; par 76.

<sup>129</sup> City AA; page 566; par 124.

48. The City has further explained why none of the land parcels identified by the Residents (and in respect of which the City is alleged to be the owner) can be used as emergency accommodation for them.<sup>130</sup> The City has provided the following comprehensive explanation in this regard<sup>131</sup>:

48.1. As regards Erf 25760 [74 Scott Road, Rosebank / Newlands; recorded by the Applicants as being 1130m<sup>2</sup> and depicted on Annexure "**AA12.1**"]: as is apparent from the attached City map viewer, it is enclosed by other residential properties and is therefore not accessible and not suitable for a housing development.

48.2. As regards Erf 1873 [81A Dorp Street, Schotschekloof recorded by the Applicants as being **942** and depicted on Annexure "**AA12.2**"]: it is a very small tract of land which would not be suitable for a human settlement.

48.3. As regards Erf 960 (1805m<sup>2</sup>) and Erf 967 (1893m<sup>2</sup>) [9 and 10 Rael Street, Tamboerskloof]: is a portion of a well-used public park; recorded by the Applicants as being 1805m<sup>2</sup> and depicted on Annexure "**AA12.3**".

48.4. As regards Erf 12161 (366 m<sup>2</sup>) [51 Pine Road, Woodstock]: Depicted as No 20 and 34 on CC21 (with different owners being PGWC and the City) has been reserved for Social Housing.

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<sup>130</sup> City AA; page 569; par 125.

<sup>131</sup> City AA; page 569; par 125.

- 48.5. As regards Erf 12358 [35 Coventry Road, Woodstock; recorded by the Applicants as being **144m<sup>2</sup>** and depicted on Annexure "**AA12.4**"]: is too small for a viable human settlements project.
- 48.6. As regards Erf 12504 [5 Chester Road, Woodstock; recorded by the Applicants as being 931m<sup>2</sup> and depicted on Annexure "**AA12.5**"]: Was developed as a parking lot in anticipation of the BRT lane on Chester Road because parking on the street is no longer available.
- 48.7. As regards Erf 114825 [79 Upper Coventry Road, Woodstock; recorded by the Applicants as being **271m<sup>2</sup>** and depicted on Annexure "**AA12.6**"]: is too small and not viable for a housing development.
- 48.8. As regards Erf 10619 (1141m<sup>2</sup>): Part of the Social Housing Project.
- 48.9. As regards Erf 20014 [7 Justin Street, Brookland; recorded by the Applicants as being 496m<sup>2</sup> and depicted on Annexure "**AA12.7**"]: Has a house with an Occupant on the property and is in any event a thin strip of land not suitable for a human settlements development.
- 48.10. As regards Erf 20140 [91 Kings Road, Brooklyn recorded by the Applicants as being 416m<sup>2</sup> and depicted on Annexure "**AA12.8**"]: Is public open space.
- 48.11. As regards Erf 20141 [89 Kings Road, Brookland recorded by the Applicants as being **228m<sup>2</sup>** and also depicted on Annexure "**AA12.8**"]: Is too small for a viable housing project.

48.12. As regards Erf 20154 [27 Vasco Street, Brookland recorded by the Applicants as being **612m<sup>2</sup>** and also depicted on Annexure "**AA12.8**"]: Is too small for a viable housing project.

48.13. As regards Erf 20349 [91 Kings Road, Brookland recorded by the Applicants as being 7495m<sup>2</sup> and also depicted on Annexure "**AA12.9**"]: the site is fully developed and occupied as is apparent from AA12.9.

48.14. As regards Erf 148883 [6 Protea Crescent Rugby recorded by the Applicants as being 468m<sup>2</sup> and also depicted on Annexure "**AA12.10**"]: Public Open Space in an area where houses have very little garden space.

49. The City has also explained<sup>132</sup>:

"126. As is apparent from what I have stated above, many of these land parcels are too small for a housing development. The City is not in a position to provide individual tracts of land to beneficiaries; to do so is simply unaffordable (the costs of individual provision by far exceeding the costs of a development). It would also create a great unfairness amongst different beneficiaries of State assisted housing. Simply put, a beneficiary in Khayelitsha would receive a structure to a value of under R 200 000.00, whereas as a beneficiary of an individual land parcel in the City could receive property to a value of perhaps ten-fold that figure. Such a result is neither sustainable nor fair."

50. Importantly, in the Residents' Replying affidavit, none of these allegations are placed in dispute. Instead, the Residents make the following (incorrect) averment in response<sup>133</sup>:

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<sup>132</sup> City AA; page 569; par 126.

<sup>133</sup> RA; page 782; par 75.

“75. I wish to highlight that the City has not stated why these parcels of land could not be used to provide emergency accommodation but merely that they are too small for a viable housing project.”

51. For all of these reasons, we submit that it is not reasonably possible to relocate the Residents who require emergency accommodation to areas in the proximity of Bromwell Street. Key amongst these reasons are the following:

51.1. First, the City proactively, but also on an ad hoc basis, identifies suitably located sites where it can accommodate households in terms of the provisions of the National Housing Programme for Housing Assistance in Emergency Housing Circumstances. The City has conceptualised a process and product that is quicker to deliver and is premised on being permanent, albeit incremental – hence the name incremental development areas (IDAs). A number of possible IDA locations have been identified such as Sir Lowry's Pass and Busasa. These will be planned and developed in the coming three years, and more such sites will be identified across the City.<sup>134</sup> The City has explained that a combination of urbanisation, population growth and climate change impacts has meant that demand for this type of accommodation is increasing. Consequently, the City has embarked on various initiatives to establish more of these temporary housing opportunities.<sup>135</sup>

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<sup>134</sup> City AA; page 578; par 146.2.2.

<sup>135</sup> City AA; page 581; par 147.

- 51.2. Second, due to land shortages and the high costs of development, the City does not have emergency housing developments available in the City Centre.
- 51.3. Third, the City is not in a position to provide individual tracts of land to beneficiaries because it considers it to be unaffordable (the costs of individual provision by far exceeding the costs of a development). The City has also pointed to the disparity that such an approach would create between the subject Residents and other persons in need of housing.
- 51.4. Fourth, the City has further explained that it has limited options available in the vicinity of Bromwell Street but has stated that in the event that these households move into social housing, they will be at liberty to apply for occupation of the social housing units that are scheduled to be constructed in Salt River and Woodstock (in the next eighteen months).<sup>136</sup>
- 51.5. Finally, the City accepts that if possible, relocations should be in areas in the vicinity from where people are evicted. However, as explained by the City, this is a complex issue; in the case of the City, there are many issues that have not rendered this possible, including access to land and the high costs of development. Despite these challenges, as stated

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<sup>136</sup> City AA; page 574; par 143.

there are measures afoot for social housing in Woodstock and Salt River.<sup>137</sup>

52. For all of these reasons, we submit that it is not reasonably feasible to relocate the Residents to an area in close proximity to Bromwell Street.

53. Finally and in any event, we submit that the emergency housing at Wolwerivier which the City has offered to the Residents meets the threshold for emergency housing. As regards the structures at Wolwerivier, the City has explained<sup>138</sup>:

53.1. Plumbing installation, the bulk water installation and the electricity infrastructure has been completed.

53.2. Internal gravel roads have been provided to the site, whilst the entrance to the development has been constructed to black top standard. The property is serviced by the ME215 Morningstar Road.

53.3. Beneficiaries will be provided with a 26.5 m<sup>2</sup> emergency housing structure, which consists of a prefabricated light gauge steel structure with corrugated cladding. Each structure will be fitted with an internal toilet and wash basin.

53.4. The entire development will be fenced with a concrete palisade fence.

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<sup>137</sup> City AA; page 593; par 190.

<sup>138</sup> City AA; page 550; par 65.

53.5. Space has been reserved within the development for the establishment of a crèche or pre-primary education facilities. Space for a community facility is also being provided for in the layout.

54. We emphasise that the Constitutional Court has already found in **Baron** that the housing units at Wolwerivier qualify as suitable alternative accommodation which is provided by the City within its available resources.

### **TRANSPORT AND ACCESSIBILITY FROM WOLWERIVIER**

55. At the instance of the Court, the parties were directed to engage further on the issue of transport from Wolwerivier and in particular: (a) precisely what the transport requirements of the Bromwell Residents was; and (b) what measures (if any) the City and Woodstock Hub could put in place in order to ameliorate the challenges raised in respect of transport by the Applicants.

56. There can be no dispute that the parties have engaged at length on the issue of transport. We emphasise the following in this regard:

56.1. The City has provided an assessment of the persons that require assistance with transport.<sup>139</sup>

56.2. The City has placed in issue the fact that the Applicants have not explained why the learners amongst them as well as those accessing

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<sup>139</sup> Record: Vol 6; page 2149; par 8.3.

health care facilities cannot attend in areas closer to Wolwerivier.<sup>140</sup> The City had referred to the various alternative options in this regard.

56.3. The City has provided an estimated monthly cost in order to meet the transport requirements in an amount of R 7 615.40.<sup>141</sup>

56.4. It is apparent that Woodstock Hub has tendered payment of those costs since 3 March 2017 until 30 June 2017 (four months).<sup>142</sup>

56.5. We respectfully submit that the Applicants have failed to engage in any meaningful way with the genuine endeavours on the part of both the City and Woodstock Hub in order to ameliorate their plight.<sup>143</sup> Instead, the Applicants:

56.5.1. Make clear their steadfast resistance to any settlement and the fact that they do not agree to being relocated to Wolwerivier.<sup>144</sup>

56.5.2. Make clear that they have made no attempts to enquire about schooling and health care options closer to Wolwerivier; they accordingly approach this matter on the basis that they irrespective of where they move to, they will continue attending schools and health care facilities in the Bromwell Street area (seemingly for no apparent reason) and in respect of which they

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<sup>140</sup> Record: Vol 6; page 2149; par 8.3.

<sup>141</sup> Record: Vol 6; page 2149; par 8.4.

<sup>142</sup> Record: Vol 6; page 2150; par 8.5.

<sup>143</sup> Record: Vol 6; page 2150; par 8.6.

<sup>144</sup> Record: Vol 6; page 2150; par 8.6.1.

cannot afford transport costs, which they seek to have the City fund for an indefinite period of time.<sup>145</sup>

56.5.3. Take the approach that because the City will not provide subsidised transport, there is no further purpose of engagement. Indeed, they do not address or impugn the City's reasons in this regard.<sup>146</sup>

56.5.4. Do not engage in any meaningful way with the tender made by Woodstock Hub.<sup>147</sup>

57. The stance of the Applicants (as taken in the affidavits) is that the Applicants seek emergency accommodation "in a location as close as possible" to where they currently reside. Clearly, they are not prepared to relocate to Wolwerivier or indeed to engage in any measures that could ameliorate their plight should they so relocate. This is made patently clear in the final three paragraphs of the Applicants' previous Heads of Argument on Transport in which they stated:

"21. As matters presently stand, it is apparent from the correspondence filed after the meeting held with the Presiding Judge on 9 February 2017, that the parties have not been able to reach a mutually acceptable solution to the dispute before the court or the transport issue in respect of which the Presiding Judge required further information. We emphasise in this regard that the dispute before the court is not a dispute relating to the terms and conditions upon which the applicants would be prepared to relocate to Wolwerivier. It is a dispute regarding whether the City is constitutionally and statutorily obliged to provide the applicants with temporary emergency accommodation in a location as close as possible to where the applicants currently reside.

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<sup>145</sup> Record: Vol 6; page 2150; par 8.6.2.

<sup>146</sup> Record: Vol 6; page 2151; par 8.6.3.

<sup>147</sup> Record: Vol 6; page 2151; par 8.6.4.

22. We respectfully submit that there are furthermore a number of practical problems in the way of the Court assessing the quantum of transport costs for the residents and granting some kind of 'transport assistance' order based on a hypothetical scenario and in circumstances where the residents themselves have emphasised the practice difficulties of assessing unknown variables relating to these transport costs.
23. As we have emphasised earlier, the residents have not agreed to engage in settlement discussions or meaningful engagement on the terms on which they would relocate to Wolwerivier and provided information relating to their transport needs after having been requested to do so by the Presiding Judge. The residents accordingly stand by the issues formulated in the affidavits which they have filed in these proceedings and persist with seeking the relief set out in their notice of motion."

58. We submit that in these circumstances it ill-behoves the Applicants to criticise the City for not acting reasonably.

#### **THE EIA AND THE APPLICANTS' COMPLAINTS**

59. After the hearing of this matter before the previous Judge, the Residents sought to belatedly introduce further evidence in respect of non-compliance with an EIA in respect of Wolwerivier.<sup>148</sup> This evidence, the Residents contend is "relevant and material" to their relocation to Wolwerivier.<sup>149</sup> We do not agree.

60. In any event, the City has filed a comprehensive affidavit in response to this complaint.<sup>150</sup> To the extent that it may be contended that non-compliance with certain conditions of an EIA approval render Wolwerivier unsuitable for emergency accommodation, we submit that there is no merit to the argument for at least the following reasons:

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<sup>148</sup> Further Affidavit; page 2184.

<sup>149</sup> Further Affidavit; page 2186; par 7.

<sup>150</sup> City's Further Affidavit; page 2377.

60.1. First, an EIA is not for the purposes of ensuring that a housing development meets the requirements of suitability or reasonableness; it concerns questions of environmental impact and measures to mitigate adverse impact.<sup>151</sup>

60.2. Second, the City has explained at some length in its further affidavit what measures are underway in respect of applying for an amendment to the conditions of the EIA and addressing certain outstanding issues.

61. In the circumstances, we submit that this issue has no bearing of the present application.

## REMEDY

62. The declaratory relief sought by the Residents in this matter is framed in the following terms:

"2. It is declared that the Second Respondent is under a constitutional duty to provide the Applicants and their dependents residing with them with temporary emergency accommodation in a location as near as possible to the property where the Applicants currently resident at erf 10626, Bromwell Street, Cape Town."

63. For reasons addressed, the City contends that alternative accommodation at Wolwerrivier is "as near as possible" to the Bromwell Street property.

64. It must be emphasised, the relief sought in this application does not concern broader issues of the City's approach to identifying land for housing development or indeed the nature of the developments that have been

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<sup>151</sup> City's Further Affidavit; page 2383; par 15.

targeted for the City and surrounds. Instead, it concerns a factual determination as to whether there is, as a matter of fact, a location for emergency housing that is closer to Bromwell Street than Wolwerivier is. The City has contended that there is no such alternative.

65. The City accordingly asks that the application be dismissed with costs; alternatively that this Court finds that the emergency accommodation on offer from the City is "as near as possible" to Bromwell Street.

**KARRISHA PILLAY**

Counsel for the Second Respondent

7 September 2017

Chambers

Cape Town