IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case Number: **13946/2015**

13947/2015

13951/2015

13952/2015

In the matter between:

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

ROSELINE SMITH	Twentieth Applicant
CHESLYN SMITH	Twenty-First Applicant
RASHIEDA SMITH	Twenty-Second Applicant
MARK NEIL SMITH	Twenty-Third Applicant
MOGAMAT TAURIQ SMITH	Twenty-Fourth Applicant
GRAHAM BEUKES	Twenty-Fifth Applicant
SOFIE MASILO	Twenty-Sixth Applicant

and

WOODSTOCK HUB (PTY) LTD	First Respondent
CITY OF CAPE TOWN	Second Respondent

APPLICANT'S HEADS OF ARGUMENT

I INTRODUCTION

1. This matter concerns the unlawful and unconstitutional exclusion of emergency housing from housing delivery programmes implemented by the City of Cape Town in the inner City and its surrounds and in particular, the areas of Woodstock and Salt River.

2. The City is obliged under section 26(2) of the Constitution to take reasonable legislative and other measures to achieve the progressive realization of the right of access to adequate housing. This includes the duty to plan for and act pro-actively in response to the emergency housing needs of persons who have been evicted from their homes and who face homelessness. The Bromwell Residents fall into this category.

3. The Bromwell Residents also fall into another category of persons who are in a situation of crisis and whose emergency housing needs require a reasonable and rational response from the City: working class tenants who are being displaced and evicted due to gentrification, rapid development and rising property prices in the Woodstock, Salt River and inner City precinct. The City does not dispute the negative effects of gentrification on this vulnerable category of persons. Quite the opposite. Its own policy documents confirm this to be the case and refer repeatedly to the City's obligations to reverse the legacy of spatial apartheid.

4. But mere policies, programmes and references to mitigating the negative effects of gentrification and spatial apartheid on inner City residents such as the Bromwell Residents, are not enough. The City is required to act to achieve the intended results of its housing programmes. It is required to do so reasonably and rationally. This the City has not done. By excluding emergency housing from its responses to housing needs in the inner City and focusing that response instead exclusively on social housing, the City has excluded the housing needs of a vulnerable group whose needs are most urgent and who

do not qualify for the social housing programmes implemented by the City in the inner City and its surrounds.

5. If the Bromwell Residents had been living in an informal settlement on the site of a planned inner city social housing project, this case would have been moot. The Bromwell Residents would by now in all likelihood be accommodated in transitional housing in that or another inner city social housing project.

6. That is precisely the approach that the City has adopted in relation to the persons occupying the site identified for the Pine Road social housing development. Those occupiers in that case were relocated not to rudimentary emergency housing sites offered in Wolwerivier, Maitland or Kampies, but to a 42-room transitional housing site in Pickwick Street, Woodstock, built by the City especially for this purpose. The City's reasoning for treating groups of such similarly situated persons, both facing displacement from their homes, the one by a private developer and the other by the City, is unavailing. The root cause of their displacement and its consequences are the same. There is no reasonable basis for the City to differentiate between people relocated by the City in order to facilitate social housing in the inner city and those evicted from inner City areas by private land-owners but whose needs for emergency housing in the inner city are the same. But this is precisely what the City has done: it includes the first group in transitional housing projects in the inner City but excludes the second. This differentiation is inflexible, unlawful and unconstitutional.

7. The declaratory orders and structural interdict sought by the Bromwell

Residents in this matter seeks to remedy this unconstitutional exclusion and implementation of the City's housing programmes as follows:

7.1 It is declared that the housing programme of the Second Respondent and its implementation in terms of the City of Cape Town Integrated Human Settlements: Five Year Plan is inconsistent with the Second Respondent's constitutional and statutory obligations to the extent that:

7.1.1 it fails to provide the Applicants and people living in Woodstock and Salt River who are at risk of homelessness and in a crisis situation due to eviction from their homes with access to transitional housing or temporary emergency accommodation in the immediate City centre and surrounds.

7.2 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 or transitional housing:

7.2.1 in the Woodstock, Salt River and inner city precinct as identified in the Prospectus for Affordable Housing in the Woodstock and Salt River Precinct issued by the Second Respondent on 28 September 2017; and

7.2.2 in a location as near as possible to the property where the Applicants currently reside at erf 10626, Bromwell Street, Cape Town ("the property")."

7.3 The Second Respondent is directed to make available temporary emergency accommodation or transitional housing referred to in paragraph 7.2.1 above to the Applicants within 12 (twelve) months of the date of this order;

7.3 The Second Respondent is ordered to comply with its constitutional obligations as declared in this order.

7.4 The Second Respondent is directed to deliver a report to this Court within 3 (three) months of the date of this order, confirmed on affidavit, detailing the emergency accommodation or transitional housing that it will make available to the Applicants in the Woodstock, Salt River and inner city precinct, when such accommodation will be available, the proximity of such accommodation and explaining why the particular location and form of accommodation has been selected. The report must also set out the steps taken by the Second Respondent during the three months before the report is filed to meaningfully engage with the Applicants and/or the Applicants' attorneys regarding the provision of temporary emergency accommodation or transitional housing to the Applicants."

7.5 The Applicants may within 2 (two) weeks of the filing of the Second Respondent's report, deliver any affidavits dealing with the contents of the Second Respondent's report;

7.6 Thereafter the matter may be re-enrolled on a date to be determined by

the Registrar in consultation with the presiding Judge for such further relief as may be appropriate;

7.7 The Second Respondent and any respondent opposing this application is directed to pay the costs of this application; and

7.8 Further and/or alternative relief.

II THE CONTEXT

8. The City's answering affidavit deals at length with the broader context of housing delivery and the City's capacity constraints.[1] It is however not just the capacity constraints of the institution responsible for housing delivery which is relevant, but the broader social, economic context in which the problem arises.[2] An assessment of context is therefore at the centre of the enquiry into whether a government programme delivering socio-economic rights is reasonable.[3]

9. The Applicants' expert witness, Ms Lauren Royston, has provided important historical and socio-economic context and explained the effect of rising property prices and gentrification on working class tenants in the Woodstock and Salt River area.[4]

[1] Record: p 2772 – p 2776
[2] Government of the Republic of SA & Others vs Grootboom & Others 2001 (1) SA 46 (CC) at 43
[3] Mazibuko and Others v City of Johannesburg and Others 2010 (4) SA 1 (CC) at para 49
[4] Record: p 463 – p 511

Historical context

10. With regard to the historical context, Ms Royston notes at the outset of her report that while all South African cities struggle with the legacy of spatial apartheid, "….*Cape Town faces unique challenges in that it is both one the most historically spatially divided cities in the country and is also In the midst of one of the worst housing affordability crises in the world*."[5]

11. Ms Royston points out that the Woodstock and Salt River area was one of the few inner-city neighbourhoods in which Coloured households managed to survive forced evictions such as those in District Six, which saw 60 000 residents ejected from the inner-city. African people were also forcefully removed and displaced from Woodstock and Salt River.[6] This historical background is confirmed by the City's Affordable Housing Prospectus for the Woodstock, Salt River and Inner City Precinct, which notes that "..*the declaration of Woodstock's neighbour, District Six, as a white-only area, and its subsequent demolition in the 1970s, has become a seminal moment in the history of the city. In contrast and despite the best efforts of the apartheid state, Woodstock and Salt River, were never successfully segregated. Although parts of them were declared white areas, they remained home to a diverse community of Capetonians, many of whom lived as neighbours for generations, in defiance of the government's attempt at socially engineering these areas*."[7]

[5] Record: p 470: para 12
[6] Record: p 474: para 24
[7] Record: p 2551

12. Academic work by Laura Wenz on creative industries and local urban development pointed out how residential demographics began to shift gradually following the end of apartheid. This was prompted by both reduced household income as the textile industry began to falter, and the onset of gentrification as the area began to attract individuals from the arts and creative sector wanting to live in a more affordable, urban and vibrant part of Cape Town. Wentz noted that in contrast to the first wave of gentrification in the area, Woodstock's current gentrification and creative industry led urban regeneration "…*has been initiated and driven by private property developers that wanted to reap profits from the 'Rebirth of Woodstock' by means of specifically attracting 'creative industry' tenants*." These developers were aided by the area falling under Cape Town's Urban Development Zone, a National Treasury-led intervention to incentivize redevelopment in inner city areas.[8]

13. According to Ms Royston, Woodstock and Salt River began to be viewed more widely as an investment destination, corporate hub, and a space for retail and entertainment. Research on the exclusivity of these new developments shows how many of the new creative developments catered for middle to high income people, have controlled access, private security and are experienced as alienating by poor Coloured residents.[9]

[8] Record: p 475 – 476: para 25 - 27
[9] Record: p 477: para 30

Socio-economic context

14. Ms Royston's expert affidavit makes a number of important observations and conclusions regarding the socio-economic context of rental housing in the Woodstock and Salt River area and the impacts of rising property prices and affordability of rentals in the area for working class tenants. These conclusions have not been disputed by the City nor placed in issue by countervailing expert evidence.

15. Ms Royston points out that year on year average property price growth in Cape Town (the third highest in the world after Shanghai and Vancouver) has rendered it increasingly difficult for poor, working and middle class households to afford well-located and quality homes in or close to the city.[10] To afford an average house, an average Cape Town resident must earn three times the average household income resulting in a major shift towards rental accommodation.[11]

16. Rapidly rising home prices in desirable areas have forced many residents into the rental market. The Housing Development Agency notes in a 2013 report that based on 2011 Census data, there has been "*a noticeable shift toward rental accommodation*" in the Western Cape. This shift to rental is mirrored by 2011 Census data on Cape Town. This has been accompanied by a rise in rental rates. According to PayProp Research, average rental rates in the Western Cape increased by 28.76% between 2012 and 2015. The average

[10] Record: p 470, para 13.
[11] Record: p 472, para 16 – 19

rental in the province was calculated at R7161.00 per month – this is higher than the national average and the Gauteng average. Limited data exists at the City level, where average rental increases are likely to be higher.[12]

17. According to the 2011 census, approximately 42% of households in Woodstock earned R6,400 per month or less. Using the affordability measure, of 30% of household income, these households could afford rent of R1 920 or less. The majority of households in Woodstock earned R12 800 or less per month, using the affordability measure of 30% of household income, the majority of households could only afford rent of R3 840 or less per month TPN Credit Bureau rental reports for the area indicate that the average rental price for all properties over the past two years in Woodstock has been R5275.This contrasts to rental in 2003, which, according to the Woodstock-Salt River Revitalisation Framework, were between R1 000 and R2 000 per month.[13]

18. The framework further notes that the purchase price for property in the area ranged between R100 000 to R300 000 in 2003. Data collated on sales prices by Property24 indicates that the average sale price of house and apartments in Woodstock in 2015 was R1.6 million.[14]

19. Based on affordability being measured as 30% of household income, a household in Woodstock would have to earn at least R17,583 per month today to be able afford the current average rental. Based on the demographic profile

[12] Record: p 471: para 17
[13] Record: p 477: para 30
[14] Record: p 478: para 30

of the area, this is out of reach for many, if not the majority, of the area's households. Increasingly high sales prices also prompt landlords to sell, refurbish or develop properties rather than continue leasing to their tenants of many years.[15]

The human impact of rising property prices and gentrification in the Woodstock and Salt River area

20. The City in its initial affidavit sought to dispute the relationship drawn by Ms Royston between rising property prices, unaffordable rents and gentrification in the area and evictions and displacement of working class residents in the area, referring to this as a "*bald statement*" and one "*too vague to provide any meaningful answer to*."[16]

21. What is now clear and which we submit is central to the issues arising in this case, is that the City accepts, albeit belatedly, that there is indeed a direct link between displacement of Woodstock & Salt River residents and the unaffordability of rising property prices and rentals. In a speech delivered by the City's erstwhile Councillor Brett Herron on 18 July 2017, he stated that *"..the City must also mitigate against the displacement of residents, especially tenants in rental properties, who have lived their entire lives in suburbs like Woodstock and Salt River where high-end developments are rising at a rapid pace because of the proximity to the Cape Town central business district*

[15] Record: p 477, para 30 - 32
[16] Record: p 591: para 81

(CBD)."[17] The City's Woodstock, Salt River and Inner City Precinct Prospectus records that "…*as property prices continue to rise many of the working class tenants that have been an established part of life in Woodstock and Salt River since its foundation in the colonial era are being displaced*."[18]

III THE BACKGROUND FACTS

The Bromwell Residents

22. The Bromwell Residents consist of six families and two individuals.

23. The details of the families and individuals set out below were those current when the matter was last argued on 12 September 2017. There have been some changes since then and leave will be sought at the hearing of this application for leave to file a further affidavit in which updated personal circumstances of the Applicants are more fully set out.

24. Family Unit 1: consists of Charnell Commando (First Applicant), a 29 year old now unemployed woman, who lives in Unit 124 Bromwell Street with her mother Gicille Vanessa Commando (Fourth Applicant) and her minor sister Lekeesha (aged 12), who attends school in Salt River. Fourth Applicant is employed as a char worker in Salt River. The combined monthly income of the household is approximately R2000.00. The First and Fourth Applicants have lived on the property their entire lives. They have been on the state housing waiting list since 2005 and 2009 respectively.[19]

[17] Record: p 2477
[18] Record: p 2553
[19] Record: p 405 – 406; para 7 – 17.

25. Family Unit 3: consists of Priscilla Nel (Eighth Applicant), who is 45 years old and is unemployed and lives in Unit 124 Bromwell Street with her son Dylan Nel (Ninth Applicant) aged 19. Dylan Nel is a casual worker at Ashraf Upholstery in Salt River earning R2000.00 per month. They are supported by their family, Meeshade Jacoba Nel (Sixth Applicant), Daphne Nel (Seventh Applicant), Sofie Masilo (Twenty-Sixth Applicant) and Graham Beukes (Twenty-Fifth Applicant). Priscilla Nel is diabetic and suffers from hypertension and high cholesterol, for which she receives treatment at the Woodstock Clinic. The Eighth Applicant and Ninth Applicant have lived on the property for their entire lives and have been on the state housing waiting list since 2016.

26. Family Unit 5: consists of Sulaiman Goliath (Eleventh applicant) who is a 51 year old taxi sliding-door operator and lives with his partner Ma Aida Abels (Tenth Applicant) aged 40 and their children Mogamat Dawood Abels (aged 10), Naashifah Abels (aged 8) and Nabeelah Abels (aged 4) at 126 Bromwell Street. The household has a gross income of approximately R7000.00.Tenth Applicant is unemployed, but earns some money as a street vendor on occasion. The two minor children attend school in Salt River, while the youngest is not of a school going age. Mogamat Dawood Abels is a heart patient at Red Cross Children's hospital. Naashifah Abels has a chest problem and has to go the Spencer Road Clinic once a month. The family has lived in the Salt River/Woodstock area all their lives and Tenth and Eleventh Applicant have been on the state housing waiting list since 2016.[20]

[20] Record: p 429 – 430; para 1 – 11.

27. Family Unit 7: consists of Mark Neil Smith (Twenty-Third Applicant) who is a 45 year old labourer and lives with his wife Rashieda Simth (Twenty-Second Applicant) and their children, Mogamat Tauriq Smith (Twenty-Fourth Applicant); Toufeeq Agmat Smith (aged 13); Tashriq Ismail Smith (aged 11); and Azraa Smith (aged 5) at 128 Bromwell Street. Twenty-Third Applicant is employed by the City and Twenty- Second Applicant is employed by Bags of Bites CC in Observatory. The minor children attend school in Woodstock. The combined monthly household income of the family is approximately R10 430.00. They have always lived in the Salt River/Woodstock area and have been on the state housing waiting list since 2014.[21]

28. Family Unit 8A: consists of Brenda Sarah Smith (Seventeenth Applicant) who is a 76 year old pensioner and lives with her daughter Roseline Smith (Twentieth Applicant), aged 50 and her grandson Cheslyn Smith (Twenty-First Applicant) aged 21 at 128 Bromwell Street. Seventeenth Applicant receives a monthly pension of approximately R1500.00. Twentieth Applicant is unemployed but receives a disability grant of approximately R1500.00. She sometimes earns some income from looking after some family member's children. Twenty-First Applicant is unemployed. Their combined gross monthly household income (including grants) is approximately R3930.00. Seventeenth Applicant suffers from arthritis and high blood pressure and attends at the Woodstock Clinic to receive her medication. The family has always lived on the property and has been on the state housing waiting list since 2016.[22]

[21] Record: p448 – 449; para 1 – 10
[22] Record: p 452 – 455; para 1 -11

29. Family Unit 8B: consists of Machal (Michelle) Smith (Eighteenth Applicant), who is a 41 year old char worker in Salt River and lives with her daughter Megan Smith (Nineteenth Applicant) aged 21, her minor children; Tyreece Pearce (aged 16), Mikyle Pearce (aged13) and Tougiedah Smith (aged 4), and her grandson Jaden Smith (aged 4). Two of the minor children attend school in Salt River and the other two minor children are not a school going age. Eighteenth Applicant is not permanently employed full time but does regular part time char work. She also receives a children's grant and some maintenance from her ex-husband. Nineteenth Applicant is unemployed. Their gross monthly income is approximately R4080.00. They have lived their entire lives on the property and Eighteenth Applicant has been on the state housing waiting list since 2016.[23]

30. There are two individual households on the property. The first is George Faria Rodrigues (Thirteenth Applicant) who is 40 years old. He works as a casual worker at Fruit and Veg and earns about R2000.00 per month. He lives at 126 Bromwell Street with Family Unit 5. He has lived most of his life in the Salt River/Woodstock area and has been on the state housing waiting list since 2016.[24] The second individual household is that of Faiza Fisher (Twelfth Applicant), who is 46 years old and unemployed. She lives at 126 Bromwell Street with Family Unit 5. She suffers from arthritis and lung disease. She recently re-applied for a disability grant and continues to receive R1500.00 per

[23] Record: p 452 – 455; para 1 -11
[24] Record: p 432 – 435; para 1 – 9

month on a temporary basis. She has been on the state housing waiting list since 2016.[25]

Occupation history

31. The Applicants, a number of whom are family members related to each other, previously occupied the property by virtue of lease agreements with the previous owners of the property, Reza and Erefaan Syms. The First Applicant, Third Applicant, Sixth Applicant, Eleventh Applicant, Seventeenth Applicant and Twenty-Fifth Applicant were parties to the lease agreements.[26] The rental for each housing unit ranged from R300.00 to R2000.00 per month with the lease agreements being inter-generational in nature, the tenancies of the Applicants being linked to previous lease agreements between their parents and grandparents and various owners of the property.[27]

32. The Syms brothers were co-owners of the property. Reza Syms was responsible for the collection of rent from the lessees.[28]

33. On 30 October 2013, Reza Syms entered into a sale agreement with Woodstock Hub. Transfer only took place on 4 March 2015.[29] The Applicants only became aware of the sale agreement, through a press statement released by the Woodstock Hub on 26 August 2016.[30]

[25] Record: p 438 -439; para 1 – 8.
[26] Record: p 768
[27] The history of each family's occupation of the property is set out in detail at p 206 of the record
[28] Record: p 209
[29] Record: p 14, para 18
[30] Record: p 767 & p 995

34. The Applicants continued to occupy the property after it was sold. Reza Syms collected rent on a monthly basis until early 2014.[31] During 2014, Reza Syms stopped collecting rent from the Applicants. Attempts by the Applicants to contact him telephonically were unsuccessful. The Applicants thereafter approached the Rental Housing Tribunal ("Tribunal") for guidance on the payment of rent. The Tribunal did not assist.[32]

35. During June 2014, the Applicants received letters of cancellation of their leases from attorneys acting on behalf of Woodstock Hub who were managing the property even though transfer of ownership had not yet occurred. The letters required the Applicants to vacate the property.[33] The Applicants again approached the Tribunal for assistance but did not receive any feedback on its investigation.[34]

IV THE LITIGATION HISTORY

36. The litigation history in this matter now spans a period of some five years and not all the developments in the litigation remain relevant for the purposes of this application. Reference will therefore be made to the key aspects of the litigation history which remain of relevance to the issues to be determined in the current application following the amendment of the relief sought by the Applicants. The chronology below will be expanded on in more detail in the sections of these heads dealing with the City's offers of emergency

[31] Record: p 767: para 13
[32] Record: p 767 para 13
[33] Record: p 768 para 18
[34] Record: p 767 para 13

accommodation.

The eviction proceedings

37. The Woodstock Hub instituted eviction proceedings against the Applicants during July 2015. The applications were brought in terms of the provisions of the Prevention of Illegal Eviction and Unlawful Occupation of Land Act 19 of 1998 ("PIE"). The application papers themselves contained a number of inaccuracies in relation to the citation of the Applicants.[35] The City was cited as respondent in each eviction application. No relief was sought against it.

38. The eviction applications were initially set down for hearing on 6 September 2015. The hearing was postponed to 22 September 2015 in order for the Applicants to obtain legal representation and file answering affidavits. The Applicants obtained the services of an attorney who filed notices of intention to oppose on their behalf on 18 September 2015.

39. On 10 December 2015 Hlophe JP granted an order by agreement consolidating the eviction applications for hearing on 9 February 2016, providing for the filing of a schedule containing the details of the occupiers of the property and setting out a time-table for the delivery of further affidavits.[36]

40. On 17 March 2016 Hlophe JP granted a further order allegedly by agreement,

[35] Record: p 16, para 22.
[36] Record: p 8.

in terms of which the Applicants were directed to vacate the property by 31 July 2016.[37] According to the Applicants, this order was taken by agreement pursuant to legal advice given to the Applicants by their former attorney that the Applicants had no legal defence to the eviction application. In the light of this legal advice, the Applicants had requested their attorney to obtain an extension of time in order to vacate the property.[38] The Applicants however, only became aware of the order and the specific date to vacate through a social media post during May 2016, and immediately sought assistance from their attorney.

41. On 4 August 2016 the Applicants brought an application seeking to vary the dates in the 17 March 2016 order by extending the deadline for them to vacate the property to 30 November 2016. The variation application was dismissed by Weinkove AJ on 5 August 2016.[39] The Applicants then obtained the assistance of one John Adams and brought a further application to set aside a warrant of ejectment issued pursuant to the 17 March 2016 order. That application was struck off the roll by Yekiso J on 8 August 2016.

42. The Applicants, again assisted by John Adams, filed notices of appeal against the 17 March 2016 order.

43. The notices of appeal were subsequently withdrawn in terms a settlement

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[37] Record: p 97. On the duty of a court to satisfy itself that an eviction order is just and equitable notwithstanding that the eviction order is purportedly being sought by consent, see Occupiers of Erven 87 and 88 Berea v De Wet N.O. and Another (CCT108/16) [2017] ZACC 18; 2017 (8) BCLR 1015 (CC) (8 June 2017)

[38] Record: p 17, para 27 – 28

[39] Record: p 18, para 33.

agreement concluded between the Applicants, as assisted by John Adams, and the first respondent on 19 August 2016, which provided inter-alia for the respondents to vacate the property by 9 September 2016.[40]

44. During 3 September 2016 to 19 September 2016, a series of discussions took place between the Applicants, their present attorneys, various City officials and the Executive Mayor concerning the availability of alternative accommodation for the Applicants.[41]

45. These discussions commenced on 3 September 2016 with a letter directed to the City by the applicant's present attorneys which *inter-alia* alerted the City to the imminent eviction, set out the Applicants personal circumstances and sought the assistance of the City with regard to temporary emergency accommodation.[42] The City responded on 5 September 2016 stating inter-alia that the eviction was a "*private eviction*" which was "*just and equitable*" without emergency accommodation being provided to the Applicants. The letter stated that the City did not have emergency accommodation available for the applicant, but was willing to place the Applicants on the waiting list for such emergency housing provided they apply and meet the criteria.[43]

46. On 7 September 2016, the then Executive Mayor De Lille, the local councilor and the Mayor's spokesperson met with the Applicants at the property. The Mayor agreed to look into possible solutions "*including whether land could be*

[40] Record: p 19, para 37
[41] Record: p 21 – p 30
[42] Record: p 181
[43] Record: p 184

made available for the relocation of the Applicants."[44] On 8 September 2016 the Applicants' attorneys responded to the Mayor's request that she be provided with information regarding the matter. The response from the Applicants' attorney provided the Mayor with detailed information relating to the details and circumstances of the Applicants, background information relating to their occupation of the property and information confirming that a number of the Applicants were on the City housing waiting list.[45]

47. The Applicants were informed by City officials that same day that the First Respondent had agreed with the City not to proceed with the execution of the eviction order until 26 September 2016. The City officials proposed that the City would assist the Applicants to apply for social housing and that the Applicants would have "*first option*" to apply for units in the upcoming social housing developments in the Woodstock and Salt River areas once these had been developed in approximately 18 months.[46]

48. The Applicants' attorneys sought further information regarding these proposals in letters sent to the City on 8 September 2016, to which there was no response.[47] What then followed was a telephone call to the Applicants' community representatives requesting the Applicants to attend a meeting "*to apply for housing*" and a meeting held at the City's housing office on 12

[44] Record: p 558, para 90
[45] Record: p 189 – p 245
[46] Record: p 25, para 49
[47] Record: p 25, para 52

September 2016 where the Applicants' details were updated and registered on the housing database.[48]

49. On 12 September 2016 the Mayor issued a statement *inter-alia* recording that the City had been investigating the circumstances of "*each of the five tenants in order to ascertain whether they qualify for the basket of services that the City is allowed to offer in terms of policy and law*". The statement recorded that four families qualified for social housing opportunities and that the Bromwell families would be encouraged to apply for allocation in two new social housing developments to be built in the next 18 months.[49]

50. Further correspondence was directed to the City by the Applicants' attorneys on 15 and 16 September 2016. The latter correspondence placed the City on terms to provide by 19 September 2016 details of when it would provide temporary emergency accommodation to the Applicants failing which this court would be approached for relief.[50] The City failed to respond to this letter save for a statement from its legal advisor that she would take instructions. This application (for the relief as initially framed) was launched on 20 September 2016 after no further response from the City.

51. On 23 September 2016 an order was granted by agreement postponing the application for hearing on 4 November 2016, setting time frames for the filing

[48] Record: p 26, para 58
[49] Record: p 277
[50] Record: p 291

of further papers and heads of argument and suspending the 17 March 2016 and 19 August 2016 orders until 4 November 2016. The parties later agreed to the application being heard on 9 November 2016.[51]

52. On 7 November 2016 the Applicants launched an application for the postponement of the hearing scheduled on 9 November 2016. The purpose of the postponement was to allow for further time for applications for social housing submitted by the Applicants to be processed and a decision communicated to the Applicants. At the hearing of the application on 9 November 2016, the parties agreed to an order postponing the application to 31 January 2016, an order providing for the Applicants to apply for all social housing, GAP and FLISP subsidy housing opportunities within the City by 30 November 2016, the filing of reports and affidavits regarding the outcome of these applications and a time-table regulating the further conduct of the matter.[52]

53. The application was argued before Weinkove AJ on 31 January 2017 and 1 February 2017. Subsequent to the hearing and on 9 February 2017, Weinkove AJ requested the parties to provide further information on the issue of the transportation needs of the Applicants.[53]

54. On 23 March 2017 the Applicants instituted a substantive application for the recusal of Weinkove AJ on the grounds that his conduct during the hearing on

[51] Record: p 373-378
[52] Record: p 1123-1126
[53] The correspondence and information relating to the transportation issue is set out at p 1995 to 2173 of the record.

31 January 2017 gave rise to an apprehension of bias against the Applicants. On 18 May 2017 an order was granted by agreement postponing the hearing of the recusal application and a further hearing on the transportation needs issue to 3 and 4 August 2017. Provision was made in the order for the filing of further papers and heads of argument addressing issues relating to the recusal application and the environmental authorisation for Wolwerivier.[54]

55. Weinkove AJ subsequently stepped down from further involvement in the matter on 14 June 2017. On 20 July 2017 an order was granted enrolling the application for hearing *de novo* before Sher AJ (as he then was) from 12 – 14 September 2017 and setting time-lines for the delivery of further papers and heads of argument.[55]

Litigation history and developments post September 2017 to date

56. In the course of the hearing on 13 September 2017, the Court raised certain questions regarding the use of erf 13814, Salt River for the purposes of a City owned transitional housing project. The Applicant's attorney filed an affidavit setting out background information and City documents relating to the use of erf 13814 for transitional housing.[56]

57. That same day, Mayor De Lille issued a media statement regarding the City's inner-City social housing initiative and the City's then Mayoral Committee Member for Transport and Urban Development, Councillor Brett Herron, made

[54] Record: p 2177 - 2178
[55] Record: p 2373.1 – 2373.3
[56] Record: p 2464 – p 2475

media statement on affordable housing on well-located City-owned land in the Woodstock and Salt River area.[57]

58. On 28 September 2017 the City issued its City Prospectus for Affordable Housing in Woodstock, Salt River and the Inner-City precinct.[58]

59. On 4 December 2017 the Applicants filed an application for leave to amend their notice of motion in the light of the City's recent statements regarding the development of social housing and transitional housing in the Woodstock and Salt River area. The City and the Woodstock Hub opposed the application and filed answering affidavits. The amendments sought were granted following an order by this Court on 13 August 2018.[59]

60. On 20 December 2018 the City advised the Applicants' attorneys that it had identified possible emergency accommodation for the Applicants in Maitland and requested the Applicants to indicate when they could view the accommodation.[60] Further information regarding the offer was sought on 17 January 2019 when the Applicants' attorney returned from leave.[61]

61. The City responded to the request for further information on 19 February 2019, a month later.[62] On 26 February 2019 the Applicants' attorney sought further information from the City regarding the Maitland offer and provided dates when

[57] Record: p 2604 - 2611
[58] Record: p 2545 – p 2583
[59] Record: p 2749 - 2751
[60] Record: p 2974 para 60
[61] Record: p 2974: para 61
[62] Record: p 2974: para 61

the Applicants were available to visit the site.[63] There was no response to this letter until 29 May 2019 when the City advised that they were "*in the process of engaging with the receiving community and ward Councillor in the area*" and that they were also *"in process of determining and finalizing the type of structure they would offer*."[64]

62. Two and a half months later, the City advised on 16 August 2019 that the offer of emergency accommodation in Maitland was no longer available as the receiving community had objected to the relocation of the Applicants to the Maitland site.[65] In the same letter, the City advised that emergency accommodation could be made available to the Applicants at a site called Kampies.

63. On 27 August 2019 the Applicants attorneys requested further information from the City concerning the offer of emergency accommodation at Kampies.[66] There was no response from the City to this letter until 12 February 2020, eight months later, when the City indicated that arrangements could be made for a site visit to Kampies.[67]

64. The site visit to Kampies took place on 29 February 2020 and subsequent thereto the Applicants' attorney requested further information regarding the proposed relocation of the Applicants' to the Kampies site.[68] The City

[63] Record: p 2974: para 62
[64] Record: p 2975: para 64
[65] Record: p 3002 – 3003
[66] Record: p 3015 - 3018
[67] Record: p 2978: para 75
[68] Record: p 2979: para 76

responded to the requests for information on 4 March 2020 and requested the Applicants to indicate their acceptance or rejection of the Kampies offer by 7 April 2020.[69]

65. On 6 April 2020 the Applicants directed a letter to the City's attorneys providing detailed reasons for their rejection of the City's offer of emergency accommodation at Kampies.[70]

V THE TARGET OF THE CONSTITUTIONAL CHALLENGE

66. Before outlining and then elaborating on the grounds underpinning the Applicants' constitutional challenge, it is in the first place necessary to identify the target of the challenge itself. The City alleges in this regard that the Applicants "…*seek to challenge a single housing instrument*", however, the delivery of housing by the City "…*is guided and informed by a range of legislation, policies, plans and programmes*."[71]

67. The City is mistaken in its understanding of the Applicants' constitutional challenge. The constitutional challenge relates to both the City's housing programme and its implementation in terms of the Five-Year Plan.

68. Paragraph 1 of the Applicants amended notice of motion seeks a declaratory order. For ease of reference it will be referred to in these heads as "*the housing delivery programme declarator*".

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[69] Record: p 3047 – p 3063
[70] Record: p 3094 – p 3096
[71] Record: p 2777: para 21

69. The housing delivery programme declarator seeks an order declaring that "..*It is declared that the housing programme of the Second Respondent and its implementation in terms of the City of Cape Town Integrated Human Settlements: Five Year Plan is inconsistent with the Second Respondent's constitutional and statutory obligations to the extent that…it fails to provide the Applicants and people living in Woodstock and Salt River who are at risk of homelessness and in a crisis situation due to eviction from their homes with access to transitional housing or temporary emergency accommodation in the immediate City centre and surrounds.*"

70. It is evident from the formulation of the housing delivery programme declarator that it is directed at two targets. The first is the housing programme of the City of Cape Town. The second is the implementation of the housing programme in terms of the City of Cape Town Integrated Human Settlements: Five Year Plan.

71. The City's housing delivery programme, generally speaking, would have to logically include and does in fact comprise of a number of different policies, guidelines and sub-programmes. According to the City's answering affidavits, these include:

70.1 the Integrated Human Settlements Framework ("IHSF") which is "*…aimed at improving the delivery of housing opportunities in the City and identifies how housing delivery needs are going to be met until the*

year 2030"[72];

70.2 the Integrated Human Settlements: Five Year Plan, ("the Five Year Plan"), which the City stated was reviewed annually "…*to ensure that it considers and responds to any significant changes in the micro and macro environments that may impact on delivery*."[73]

70.3 the City's Integrated Development Plan ("IDP");[74]

70.4 the Woodstock and Salt River Revitalization Framework aimed at "…*encouraging re-development in Woodstock and Salt River.*";[75]

70.5 the Table Bay District Spatial Plan;[76]

70.6 Transport Orientated Development[77];

70.7 the Built Environment Performance Plan[78];

70.8 the Catalytic Land Development Programme;[79]

[72] Record: p 537: para 31
[73] Record: p 539: para 37
[74] Record: p 574 – p 581
[75] Record: p 585 - 587
[76] Record: p 597: para 206
[77] Record: p 2781 – p 2783: para 27 - 28
[78] Record: pp 2783 – 2784: para 30 - 32
[79] Record: pp 2784 – 2786: para 33 - 36

70.9 the Emergency Housing Plan through the development of Temporary Relocation Areas ("TRAs") and Incremental Development Areas ("IDAs");[80]

70.10 the Affordable Housing Prospectus for Woodstock, Salt River and the Inner City Precinct.[81]

72. In addition to the above, the City executes and implements various housing programmes as identified in the Housing Code.[82] The Five Year Plan records that the City aims to deliver a range of housing types over the full range of housing types supported by the National Department of Human Settlements' funding programmes. These include UISP phases 1 to 3, yielding fully serviced sites; UISP phase 4,delivering top structures on sites already serviced; IRDP, which makes it possible for the City to install services in developments; PHP, which supports groups of beneficiaries who already hold title to land, to construct top structures; the CRU programme, facilitating the funding of high-density rental accommodation on well- located land; social housing, which is a rental option for households within the higher income bracket of R1 500 to R7 500 per month; national housing programme for farm residents, including the facilitation of on-site or off-site housing for farmworkers and a national housing programme for proven military veterans.[83] The City has a level 2 accreditation for all provincial and national housing programmes and thus has

[80] Record: p 2788 para 30: p 2790: para 42
[81] Record: p 2545 – p 2583
[82] Record: p 2774: para 11.5
[83] Record: p 664

increased responsibility and control of housing delivery.[84]

73. What is apparent from the above is that the City has an overall housing delivery programme which consists of a number of inter-related constituent elements, each aimed at a different housing typology. It is not a single housing programme recorded in a single document and the City confirms that to be the case.[85] The City's overall housing programme may more accurately be described as a programme for 'housing development' as contemplated in the Housing Act 107 of 1997 ('the Housing Act').[86]

74. But however the City's housing programme is described and whether it consists of a single instrument or a range of different policy instruments and programmes with particular parts directed at providing or setting out frameworks for the planning and delivery of various types of housing, it is subject to the requirement of reasonableness if it is a measure aimed at achieving the progressive realization of the right of access to adequate housing in section 26(1) of the Constitution.

75. Reasonableness is required both in regard to the formulation of the City's housing programme and in its implementation.[87] Every step by the City, as an organ of state in the local arm of government., in the implementation of its

[84] Record: p 2961: para 12
[85] Record: p 2777: para 21
[86] Section 1 of the Housing Act defines the term 'housing development' as "*the 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*."
[87] Grootboom: para 42

overall housing delivery programme must therefore be consistent with the constitutional obligation to take reasonable measures to provide adequate housing.[88]

76. To summarise then: the target of the Applicant's constitutional challenge is the City's housing programme as stated in the Applicant's amended notice of motion. It is a challenge to the City's overall housing programme both in the formulation of its response (or lack thereof) to the emergency housing needs of the Applicants and people living in Woodstock and Salt River who are at risk of homelessness and in a crisis situation due to eviction from their homes, and to its implementation in terms of the Five Year Plan. The Applicant's case is not a challenge, as the City would have it, to a single document or programme 'hived off' in isolation from the context of the City's other housing programmes

The relevance of the Five-Year Plan

77. The City contends that the amended relief sought by the Applicant' is "*misconceived and incompetent*" because the Five-Year Plan "…*had a limited lifespan until 2017 and has no relevance beyond 2017*."[89]

78. The Five-Year Plan was first referred to by the City in its first answering affidavit. The City stated *"….the City has adopted the Integrated Human Settlements: Five Year Plan, ("the Five Year Plan"), which it reviews annually to ensure that it considers and responds to any significant changes in the micro*

[88] Grootboom: para 82
[89] Record: p 2793: para 47.1

and macro environments that may impact on delivery."[90] The City furthermore stated:

> "*In developing its Five Year Plan, the City ensures alignment with many of the other plans currently implemented by the City and national government, including: (a) the National Development Plan; (b) the City of Cape Town Integrated Development Plan; (c) the State of Cape Town Report, 201 0; (d) the Spatial Development Framework; and (e) the Integrated Human Settlements* Framework."[91]
>
> "*The various housing programmes that the City implements are summarised at page 90 of the Five Year Plan. At page 82 of the Five Year Plan reference is made to the various settlements that are: (a) possible/ future projects; (b) projects in the planning stage; (c) projects under construction.*"[92]

79. It is clear from the Five-Year Plan that the plan was a mechanism adopted by the City to implement its housing programme. The Five-Year Plan records that:

79.1 "*This plan is closely aligned with, and contributes to, the City of Cape Town's overarching five-year Integrated Development Plan and has been developed to enable the realisation of the City's five key strategic pillars or focus areas*."[93]

79.2 "*This Integrated Human Settlements Five-Year Plan takes account of these challenges, along with the continued shortage of trained and skilled staff, to realistically inform the Directorate's efforts to enhance existing living environments, explore new housing possibilities and effectively address the challenges of urbanisation – all in pursuit of*

[90] Record: p 539: para 38
[91] Record: p 539: para 38
[92] Record: p 539: para 39 - 40
[93] Record: p 641

sustainable housing opportunities for every resident of Cape Town."[94]

80. The Five-Year Plan refers to three megaproject/catalytic projects, the profiles of which were identified by the City and submitted to the national Department of Human Settlements. In identifying these projects, the Five Year Plan confirms that the City considered various criteria determined by the national department of Human Settlements and the Housing Development Agency, one of which was to "…*affect and integrate the spatial environment as envisaged by the City of Cape Town spatial plan*."[95]

81. One of the catalytic projects identified by the City and recorded in the Five-Year Plan is Catalytic project 3: the Voortrekker Road corridor integration zone ("VRCIZ"). The Five -Year Plan states the following in this regard:

> *"The total number of social housing sites identified extend beyond just the Voortrekker Road corridor integration zone (VRCIZ). Two of the sites, Pine Road and Dillon Lane, are located in Woodstock, which is in the metro south-east corridor integration zone (MSEIZ) within 3 km of central Cape Town. The sites in the VRCIZ itself are Salt River Market to the east and Belhar, Glenhaven, to the west. This area also falls within the City's social housing restructuring zones.*
>
> *These social housing projects offer an affordable type of rental that serves specific income groups, which will help improve Cape Town's residential stock and create viable communities.*
>
> *The VRCIZ has been identified as a regeneration corridor that directly links the Bellville and Cape Town central business districts. Key spatial elements of the VRCIZ include an efficient, multi-modal public transport network (including road, rail, taxi, bus, etc.), the highest number of tertiary institutions in relation to the rest of the city, abundant social facilities, and opportunities for taking up latent land use rights, which will in many instances reduce the turnaround times for development proposals.*
>
> *In addition, a significant portion of the City's urban development zone falls*

[94] Record: p 652
[95] Record: p 654

within the VRCIZ.

The initiative aims to redirect investment back to the corridor in order to address market failures, urban management issues and ineffective land use management strategies. These factors have contributed to the flight and migration of corporate industries to the northern parts of the city, including Tygervalley and Century City.

The VRCIZ hosts a diverse range of land uses: Residential, commercial and social amenities (including a tertiary educational precinct) are all present. It provides significant potential and opportunity to explore renewal and rebuilding initiatives that can transform Cape Town's spatial form and function. The aim is to utilise existing infrastructure networks and to leverage both existing and planned public transport networks to achieve transitoriented development and integrated settlements, putting communities in close proximity to public transport, employment and social amenities.

A key part of this regeneration drive is social housing where rental accommodation is managed in perpetuity for lower income households."[96]

82. The Five-Year Plan states that "…*this review of the Integrated Human Settlements Five-Year Plan informs and is an integral part of the strategic focus area of human settlements and services in the City's IDP. The IDP is the City's key tool for dealing with the real issues of households and communities in a strategic, developmental and delivery-oriented way*."[97]

83. The Five-Year Plan records that it "…*will contribute to the City's achievement of some of the goals set in the National Development Plan, by transforming previous spatial inequalities in the location and design of major future housing developments as well as providing communities with a greater choice in housing solutions*."[98] The Five Year Plan is also stated to be supportive of Strategic Objective 6 of the provincial Department of Human Settlements,

[96] Insert ref
[97] Record: p 676
[98] Record: p 676

which focuses on accelerating housing delivery through prioritizing in situ upgrades of informal settlements. [99]

84. By "informing" and being an "integral part" of the human settlements strategic focus area in the City's IDP, the Five-Year Plan gives effect to the statutory duties of the City to implement integrated development planning. In terms of section 25 (1) of the Municipal Systems Act 32 of 2000 ("theSystems Act"), each municipal council is required to adopt a single, inclusive and strategic plan for the development of the municipality.[100]

85. Section 35 of the Systems Act provides for the integrated development plan adopted by the council of a municipality to be its principal strategic planning instrument which guides and informs all planning and development, and all decisions with regard to planning, management and development, in the municipality and binding on the municipality in the exercise of its executive authority. In terms of section 36(1), a municipality must give effect to its integrated development plan and conduct its affairs in a manner which is consistent with its integrated development plan.

86. The Five-Year Plan does not only serve to give effect to the City's obligations in terms of chapter 5 of the Systems Act. It is apparent from the plan that its

[99] Record: p 676

[100] Section 25(1) of the Systems Act: "*(1) Each municipal council must, within a prescribed period after the start of its elected term, adopt a single, inclusive and strategic plan for the development of the municipality which- (a) links, integrates and co-ordinates plans and takes into account proposals for the development of the municipality; (b) aligns the resources and capacity of the municipality with the implementation of the plan; (c) forms the policy framework and general basis on which annual budgets must be based; (d) complies with the provisions of this Chapter; and (e) is compatible with national and provincial development plans and planning requirements binding on the municipality in terms of legislation."*

purpose was inter-alia to inform the City's efforts in exploring new housing possibilities, to record the role of projects such as the VRCIZ and importantly, to support national planning tools such as the National Development Plan and provincial strategic objectives of the provincial Department of Human Settlements. It is plainly a mechanism in terms of which the City's broader housing delivery programme was implemented. The City's contention that the Five-Year Plan is no longer relevant because it had "*no lifespan beyond 2017*" therefore has no merit.

VI GROUNDS FOR THE CONSTITUTIONAL CHALLENGE

87. The Applicants submit that the formulation and implementation of the City's Housing Programme is deficient and inconsistent with the positive duties imposed on the City by section 26(2) of the Constitution, in the following respects:

87.1 the City's housing programme does not provide for access to emergency or transitional accommodation in the immediate inner City centre and surrounds in order to meet the urgent emergency housing needs of the Applicants and people living in Woodstock and Salt River who are at risk of homelessness and in a crisis situation due to eviction from their homes;

87.2 in the provision of transitional housing in the immediate inner City centre and surrounds, the City irrationally and inflexibly differentiates between persons relocated by the City in order to facilitate social

housing in the inner City and persons such as the Applicants who have been evicted from their homes in the Woodstock / Salt River area and face imminent homelessness;

87.3 the implementation of the City's housing programme in the immediate inner City and surrounds is unreasonable and inconsistent with the objectives of the programme and the City's own public statements;

87.4 the implementation of the City's housing programme in relation to emergency accommodation needs is unreasonable and inconsistent with the City's duty to mitigate the effects of spatial apartheid.

Failure of the City's housing programme to plan for and provide access to emergency accommodation in the immediate inner City area and surrounds

88. It is clear from the papers that the City's approach to housing in the immediate inner City area and surrounds is exclusively focused on the provision of social housing and not emergency housing.

89. The City's answering affidavit states that "*The City has targeted social housing development for the inner City and surrounds*"[101] and that "…*the developments referred to in Woodstock and Salt River would best serve the imperatives of social housing as opposed to general emergency housing*."[102] The City confirmed this to be the case in its first answering affidavit, in which it stated that "…*sites in the Woodstock and Salt River areas have indeed for allocated*

[101] Record: p 2772: para 11.2
[102] Record: p 2795: para 47.4

or reserved for social housing."[103] The VRCIZ which had been identified by the City and put forward by the City to the national Department of Human Settlements as a catalytic project, is inter-alia focused on the provision of social housing at the Pine Road and Dillon Lane sites which are in the metro south-east corridor integration zone and the Salt River Market site, which falls within the City's social housing restructuring zones.

90. The City confirmed in its answering affidavit that there are no emergency housing developments in the immediate City centre and surrounds.[104] The delivery of emergency accommodation by the City takes place through temporary relocation areas ("TRAs") which are also known as incremental development areas ("IDAs"). IDAs are parcels of land that have been developed for families in need of emergency housing.[105]

91. According to the City, "…*Relocation can only occur to an established Incremental Development Area and not on an ad hoc basis to individual parcels of City land. Costs, planning, the regulatory framework as well as the prescripts of fairness do not allow for this to be done*."[106]

92. It is common cause that there is no IDA available in close proximity to the City centre.[107] The IDAs developed by the City are listed in the Five Year Plan. The examples listed in the Five Year Plan are Masonwabe flats in Gugulethu, Sir Lowrys Pass Village and Skandaalkamp and Rooidakkies which are located

[103] Record: p 587: para 163
[104] Record: p 551: para 66.2
[105] Record: p 657
[106] Record: p 1275
[107] Record: p 594: para 193

at the Vissershok landfill site.[108] The only other IDAs developed by the City and listed in the Five Year Plan are those located in Khayelitsha, Phillipi and Blaauwberg (Wolverivier).[109] In its answering affidavit dated 2 March 2020, the City refers to additional emergency housing sites within existing settlements and which are currently in the planning or construction phase. None of these sites are located in close proximity to the Woodstock / Salt River and inner City area.[110]

93. Notably, the City's latest Built Environment Performance Plan 2019/2020 ("BEPP"), which is stated to be an "*integral part of the municipal package of strategic and corporate plans*" records that "…*the City will continue developing Temporary Relocation Areas (TRAs), as well as Incremental Development Areas (IDAs) for families in need of emergency housing. Where possible this incremental approach to housing developments provides for one-on-one services.*"[111]

94. It is apparent from the City's various policy and planning documents which inform its overall housing delivering programme, that no provision is made in these instruments for the provision of emergency housing in the inner City area to persons such as the Applicants who are facing imminent homelessness due to eviction from their homes in the Woodstock / Salt River area.

95. The City's Integrated Human Settlements Framework ("IHSF") is aimed

[108] Record: p 658
[109] Record: p 682
[110] Record: p 2790: para 42
[111] Record: p 2847

identifying how housing delivery needs are going to be met until the year 2030, a period in which, according to the City, housing demand is expected to rise significantly.[112] The IHSF sets out the City's principles for integrated human settlements. None of these include the provision of emergency housing in the inner City area to persons facing eviction and displacement from their homes in the inner City.[113]

96. The Five Year Plan, whose ostensible purpose to "*ensure that it considers and responds to any significant changes in the micro and macro environments that may impact on delivery*", makes no provision or planning for emergency housing in the inner City area. The Five Year Plan, insofar as it does refer to emergency housing developments through IDAs or TRAs, both in respect of projects which are being constructed or at the planning stage, makes no provision for the establishment of emergency housing initiatives in the inner city area.[114]

97. The City's IDP notes that "..*one of the City's challenges is to transform its spatial and social legacy into a more integrated and compact city*".[115] Objective 3.2 of the IDP, while dealing with land for housing in emergency circumstances, focuses on the provision of emergency housing through IDAs and records that "…more such sites will be identified across the City."[116] The City referred again to the IDP for 2017 to 2022 in its answering affidavit but

[112] Record: p 594: para 30
[113] Record: p 2780: para 25
[114] Record: p 682
[115] Record: p 574: para 145.1
[116] Record: p 578: para 146.2.2

made no reference to the IDP having identified sites for emergency housing in close proximity or in the inner City area.[117]

98. The Woodstock and Salt River Revitalization Framework ('WSRF') was adopted by the City in order to encourage inclusive redevelopment in Woodstock and Salt River.[118] It is one of the district policies for the Table Bay District.[119]

99. Ms Royston notes that the WSRF provides for the possibility of under-utilised public buildings in the Woodstock and Salt River being used for social programmes and for public use including accommodation for vulnerable groups such as homeless people, and facilities for the elderly. The WSRF proposed rehabilitation subsidies to convert and maintain buildings, as well as subsidies to ensure access to affordable accommodation - including interest rate subsidies for low-income groups and rental subsidies to match affordability levels with the necessary rent levels. It proposes subsidies to encourage affordable rental and ownership housing in mixed income developments.[120]

100. The WSRF expressly refers to strategic social actions with regard to homelessness by providing for the re-use of old public buildings for accommodation of single mothers, children, refugees and the aged.[121] The

[117] Record: p 2780: para 25
[118] Record: p 479, para 36
[119] Record: p 479, para 37; p 585, para 159
[120] Record: p 480, para 38
[121] Record: p 586, para 161

WSRF further provides for horizontal subsidies which include rehabilitation subsidies to convert and maintain buildings to acceptable standards and vertical subsidies which include interest rate and rental subsidies for low income groups.[122]

101. According to the City, the rehabilitation subsidies provided for in the WSRF need to be "*contextualised*". The City explains that *"the incentive programme was aimed at encouraging the conversion of large vacant buildings on Albert Road to loft apartments and mixed use to accommodate the anticipated increase in demand for housing in the area as a result of the anticipated revitalization of the area*."[123] In her expert affidavit, Ms Royston observed that to the best of her knowledge, the City has only acted on the framework to improve aspects of the built environment and some public facilities and has not implemented the substantive housing solutions and social programmes provided for in the framework.[124]

102. The City admits that the WSRF has been used to improve aspects of the built environment and some public facilities, as stated by Royston.[125] Its contention is that "*it is not correct that housing solutions and social programmes have been excluded under the programme*."[126] There is no evidence however that the City's implementation of the WSRF has been directed at providing

[122] Record: p 586, para 160
[123] Record: p 586, para 160
[124] Record: p 480, para 38
[125] Record: p 587, para 162
[126] Record: p 587, para 162

emergency housing solutions in Woodstock and Salt River area for persons facing imminent homelessness due to eviction from their homes in the area.

The effect of the City's focus on social housing in the inner city

103. As pointed out earlier in these heads, the City has taken a policy decision to implement social housing not emergency housing in the inner-city area. City owned parcels of land in the Woodstock / Salt River area are reserved and allocated for social housing.

104. According to the City, its Social Housing Programme is "…*aimed at developing affordable rental in areas where bulk infrastructure (sanitation, water, transport) may be underutilised, therefore improving urban efficiency. It is high density subsidised housing that is implemented, managed and owned by independent, accredited social housing institutions in designated restructuring zones; it is for rental purposes. Income levels of between R 1500 and R 7500 (depending on the particular development) are required in order to qualify*."[127]

105. Social housing units within the City include Steenberg; Brooklyn; Bothasig; Scottsdene and a further development at Belhar which was stated to become available in March 2017. The Belhar development required a gross income ranging from R2800 to R7500 with rentals ranging from R720 to R2150.[128]

106. The Applicants applied for social housing to various social housing institutions

[127] Record: p 543: para 51
[128] Record: p 544: para 52

subsequent to an order granted on 9 November 2016. These include Madullammolo Housing Association, Communicare NPC and, SOHCO Property Investments NPC. The details and outcomes of the various applications are set out in a comprehensive schedule prepared by the Applicants' attorney.[129] The schedule records that the 6 Bromwell family units and the 2 individual households do not qualify for any social housing and that consequently 16 adults and 11 children would need emergency accommodation.[130] The City confirms that the Applicants "…do not qualify for any of the permanent housing assistance measures, for example, social housing solutions."[131]

107. With regard to the sites allocated to social housing institutions and identified in the Prospectus, the City confirms that except for one of the Applicants (Mr Smith), none of the Applicants fall within the income bracket qualifying them for the allocation of social housing at the Pine Road development either.[132] It is furthermore unlikely that the Applicants would in future qualify for allocation of social housing at the sites identified in the Prospectus. The definition of "affordable housing" in the Prospectus refers to household incomes of R3500 to R18000 per month.[133]

108. The effect, it is submitted, of the City's implementation of social housing as its exclusive and primary housing delivery mechanism in the Woodstock, Salt

[129] Record: pp 1138 - 1196
[130] Record: p 1195
[131] Record: p 2542: para 27
[132] Record: p 2803: para 52
[133] Record: p 2549

River and inner-city area, is to exclude the Bromwell Residents and similarly situated persons from access to public housing in the inner city area solely on the basis of their income. In contrast, the Emergency Housing Programme, which is aimed at providing assistance to persons who are evicted or threatened with imminent eviction from land or from unsafe buildings[134], applies to households that comply with the Housing Subsidy Scheme qualification criteria (household income of less than R3500 per month) as well as households with a monthly income exceeding this maximum income limit.[135]

Unreasonable and irrational differentiation

109. The City's housing programme does not only fail to make provision for the emergency housing needs of the Applicants and persons similarly situated in the Woodstock / Salt River area who are being displaced from their homes. The implementation of the programme by way of social housing in the area excludes persons such as the Bromwell Residents who do not meet the income qualification criteria for social housing.

110. There is a further deficiency in the manner in which the City implements its housing programme: it unreasonably and irrationally differentiates between different categories of persons with the same emergency housing needs.

111. On 16 January 2017 and in response to a letter from the Applicants attorneys which had outlined various parcels of City owned land which were vacant and

[134] Record: pp 36 - 37
[135] Section 2.4 of the Emergency Housing Programme

which the Applicants maintained were suitable for emergency housing, one of which was erf 13814 Woodstock, the City's attorneys advised that "…*This property was already allocated as a transition area for those who need to be relocated from a site to be developed for housing. It has therefore already been designated for a category of housing beneficiaries which do not include the Bromwell Residents and has no further capacity to accommodate any further occupiers*."[136]

112. On 18 July 2017 the City's then Councillor Herron issued a media statement recording that the City intended developing its first transitional housing project in Salt River and that "*more transitional housing projects were in the pipeline in Salt River as well as other areas of Cape Town*."[137]

113. The following week, on 25 July 2017, then Executive Mayor De Lille approved a recommendation from the City's Transport and Urban Development Portfolio Committee for the implementation of the proposed Salt River transitional housing project referred to in Councillor Herron's speech on 18 July 2017. The recommendation stated the following:

> "A *significant challenge in the precinct is how to deal with the low income households that are presently living in the area, usually in informal forms of housing e.g. Pine Road and Salt River Market Site. In these instances these households have Jived on these sites for many years. However, the existence of these informal housing settlements are delaying the development of formal affordable rental housing on these sites which could yield more than 2000 Affordable Housing Units as opposed to the current 50 Informal Settlements units. This situation is not only happening in this precinct but in other parts of the City's TOD Corridors where the intent is to encourage medium and high density*

[136] Record: p 1882
[137] Record: p 2469

affordable rental developments."

"It is therefore important to find solutions to this issue not only in the interest of the households in the Informal Housing Units but also to free up sites for new formal Affordable Rental Opportunities.

The proposed solution is to develop a *"Transitional Housing Scheme" on Erf 13814, Salt River to accommodate the households in the current informal settlements.*

There is already a *transitional housing scheme for "Street Boys" on this site. A detailed feasibility study for the proposed Transitional Housing has been conducted as part of the Communal Residential Units (CRU) programme to determine the form and viability of the project within the financial framework (Annexure 8).*

This proposal will provide transitional and semi-permanent housing and deal with relocation of households in the Salt River and Woodstock area in a *manner that respects their constitutional rights, while freeing up land and buildings for formal development for affordable rental."* [138]

114. On 28 September 2017 the City released the Prospectus. The Prospectus included a definition of the term "transitional housing", which was defined as "…*accommodation for individuals or families who have to be relocated as a result of eviction or temporarily moved as a result of the upgrading of sites on which they lived. This accommodation is an intermediate solution until such time as individuals or families can move into permanent accommodation*."[139] It should be noted in this regard that the Prospectus also identified the St James Transitional Housing site (to be used to relocate persons living in the Salt River Market settlement) which the Applicants had previously identified and had requested the City to consider for emergency housing, which request was denied.[140]

[138] Record: pp 2471 - 2472
[139] Record: p 2549
[140] Record: p 2592 - 2601

115. On 1 November 2017 Mr Pogiso Molapo deposed to an affidavit on behalf of the City. His affidavit dealt with the identified social housing sites in Woodstock / Salt River and the Prospectus issued by the City on 28 September 2017. There are number of aspects of his affidavit which are of importance.

116. Firstly, Mr Molapo confirmed that "*…as regards the occupiers of the 19 structures that require relocation from Pine Road, the City is presently engaged in a consultative exercise with these residents to ascertain whether they would qualify for other social housing units elsewhere, GAP housing, BNG, CRUs or other housing opportunities alternatively emergency housing at Wolwerivier*."[141]

117. Secondly, Thirdly, Mr Molapo stated "…*the remaining units [in the Pickwick Transitional Site] will be used for other emergency housing needs and for the transitional relocation of persons on the Salt River Market site because the St James Transitional Housing site, may take longer to develop*."[142]

118. The differentiation in the City's approach to the occupiers of the Pine Road site and the Bromwell Residents is striking. It is clear that while the City claims that it was engaged in a "consultative exercise" with these occupiers regarding other housing options, unlike the Bromwell Residents, the City was prepared to consider allocating the Pine Road occupiers transitional housing at the Pickwick site in the immediate vicinity of their homes.

[141] Record: p 2537: para 18
[142] Record: p 2536: para 17

119. As the City's answering affidavit makes clear, this is in fact exactly what happened. The 42 rooms constructed for the Pickwick Transitional site were all allocated to and are occupied by the residents of the informal settlement on Pine Road and the facility has no further capacity.[143]

120. It is submitted that the differential treatment afforded by the City to the Pine Road occupiers as opposed to the Bromwell Residents was unreasonable, irrational and bore no rational connection to the City's legitimate purpose of providing emergency transitional housing to those who are vulnerable and most in need. The Pine Road occupiers and the Bromwell Residents both had emergency housing needs but have been treated differently.

121. As Van Der Westhuizen J explained in *Blue Moonlight* in the context of differential treatment of persons evicted by a municipality as opposed to persons evicted by private landowners:

> *"By drawing a rigid line between persons relocated by the City and those evicted by private landowners, the City excludes from the assessment, whether emergency accommodation should be made available, the individual situations of the persons at risk and the reason for the eviction. Affected individuals may include children, elderly people, people with disability or women-headed households, for whom the need for housing is particularly great or for whom homelessness would result in particularly disastrous consequences.86 Individuals may have a range of incomes – some may be able to afford subsidised housing while others may be completely destitute. In the present case, the Occupiers have a myriad of personal circumstances to be taken into account in considering their eligibility for housing.*
>
> *Furthermore, it cannot necessarily be assumed that the City evicts or*

[143] Record: p 2804: para 54.2

relocates mainly for reasons of safety whilst private property owners do so only for commercial reasons. Once an emergency of looming homelessness is created, it in any event matters little to the evicted who the evictor is. The policy does not meaningfully and reasonably allow for the needs of those affected to be taken into account.

"s 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."[144]

Failure to mitigate effects of spatial apartheid

122. The City has a duty to address through its municipal planning and land use management decisions, patters of spatial injustice which result from apartheid spatial planning. This specific duty is imposed by the Spatial Planning and Land Use Management Act 16, of 2013 ("SPLUMA").

123. The legacy of apartheid spatial planning which SPLUMA is meant to address is set out in its preamble, which records that "*WHEREAS many people in South Africa continue to live and work in places defined and influenced by past spatial planning and land use laws and practices which were based on: racial inequality; segregation and unsustainable settlement patterns*."

124. Section 7 of SPLUMA sets out various principles which apply to spatial planning, land development and land use management. One of these is the principle of spatial justice. Section 7(a) of SPLUMA, in its relevant parts, states

[144] City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another (2012 (2) SA 104 (CC) at para 92 - 95

the following:

> *"7. The following principles apply to spatial planning, land development and land use management:*
>
> *(a) The principle of spatial justice, whereby—*
>
> *(i) past spatial and other development imbalances must be redressed through improved access to and use of land;*
>
> *(ii) spatial development frameworks and policies at all spheres of government must address the inclusion of persons and areas that were previously excluded, with an emphasis on informal settlements, former homeland areas and areas characterised by widespread poverty and deprivation;*
>
> *(iii) spatial planning mechanisms, including land use schemes, must incorporate provisions that enable redress in access to land by disadvantaged communities and persons;*
>
> *(iv) land use management systems must include all areas of a municipality and specifically include provisions that are flexible and appropriate for the management of disadvantaged areas, informal settlements and former homeland areas;*
>
> *(v) land development procedures must include provisions that accommodate access to secure tenure and the incremental upgrading of informal areas;"* (emphasis added)

125. In terms of section 6 of SPLUMA, the general principles set out in section 7 apply to all organs of state responsible for the implementation of legislation regulating the use and development of land. The principle of spatial justice applies to all aspects of spatial development planning, land development and land use management.[145]

126. The principle of spatial justice must therefore guide *inter-alia* "*the preparation,*

[145] SPLUMA: section 6(2)

adoption and implementation of any spatial development framework, policy or by-law concerning spatial planning and the development or use of land", "*the sustainable use and development of land*" and "*the performance of any function in terms of this Act or any other law regulating spatial planning and land use management.*"[146]

127. In *Adonisi*, Gamble J said the following regarding the duty of organs of state such as the City to address the negative effect of spatial apartheid:

> "*In summary then, it is fair to say that the statutory and policy framework which finds its origins in the Constitution and the legislation mandated thereunder, renders it necessary for both the Province and the City to redress the legacy of spatial apartheid as a matter of constitutional injunction. The constitutional and statutory obligations of these tiers of government to provide access to land and housing on a progressive basis, encompass the need to urgently address apartheid's shameful and divisive legacy of spatial injustice and manifest inequality*."[147]

128. Ms Royston's expert affidavit notes that according to the Western Cape Spatial Development Framework, there has been a pattern of public housing projects built on the urban periphery. Research by the Affordable Land and Housing Data Centre shows that government sponsored housing in the City of Cape Town is concentrated on the City edges, with a visible absence of subsidised housing close to the City centre.[148] Policy 35 of the City of Cape Town's Spatial Development Framework commits the City to redress existing imbalances in

[146] SPLUMA: section 6(1)(b), (c) and (e).
[147] Adonisi and Others v Minister for Transport and Public Works Western Cape and Others; Minister of Human Settlements and Others v Premier of the Western Cape Province and Others (7908/2017; 12327/2017) [2020] ZAWCHC 87 (31 August 2020) at para 94 (application for leave to appeal this judgment has been sought)
[148] Record: p 473: para 21

the distribution of different types of residential development, and avoid creating new imbalances by inter-alia "…*using publicly and SOE-owned Infill sites to help reconfigure the distribution of land* uses *and people; and increasing low-income earners'* access *to affordable housing that* Is *located close to the city's economic opportunities."*[149]

129. It is submitted that the conduct of the City in implementing its housing programme in a manner which irrationally and unreasonably differentiates between persons in the same situation of emergency housing need in the inner city area and its conduct in failing to plan for and implement emergency or transitional housing in the inner city, contributes to the furtherance of spatial apartheid in the City.

130. The current location of the City's IDAs cannot be said to be in close proximity to the inner city area. These IDAs are located in Gugulethu, Sir Lowrys Pass Village, the Vissershok landfill site, Khayelitsha, Phillipi and Blaauwberg (Wolverivier). The City's BEEP 2019/2020 confirms that the City will continue developing Temporary Relocation Areas (TRAs), as well as Incremental Development Areas (IDAs) as a housing response for families in need of emergency housing. In effect, the City by excluding emergency housing from the inner city area and continuing with its development of IDAs on the periphery of the City, continues to perpetuate the existence of spatial apartheid referred to by Ms Royston, "….*with poor Black African and Coloured families living on the outskirts of the City commuting long distances at great economic*

[149] Record: p 492: para 66

and personal expense, to employment and educational opportunities."[150]

131. The next section of these heads deals with the City's defences to the constitutional challenge advanced by the Applicants.

VI THE CITY'S MAIN DEFENCES

Non-joinder

132. The City contends that in the light of the "*far reaching*" amended relief sought by the Applicants, the joinder of the national and provincial Minister of Human Settlements was necessary.[151]

133. The subject of the Applicant's constitutional challenge relates to the deficiencies of the City's housing programme and its implementation. As was held in *Blue Moonlight*, "…[it is] *the obligations and conduct of the City that have to be considered*."[152] The City has failed to establish any credible factual basis to demonstrate what direct and substantial interest the national and provincial Minister would have in any order that this Court might make or how the orders sought by the Applicants will prejudice the national or provincial Minister if given effect to.

134. It is accordingly submitted that the City's non-joinder point is without merit.

[150] Record: p 474: para 22
[151] Record: p 2772: para 11.1
[152] Blue Moonlight at para 45

Reasonable formulation and implementation of housing programmes

135. In *Mazibuko*, O' Regan J said the following regarding the duty of an organ of state when dealing with a constitutional challenge to the reasonableness of a programme for the delivery of socio-economic rights:

> *"When challenged as to its policies relating to social and economic rights, the government agency must explain why the policy is reasonable. Government must disclose what it has done to formulate the policy: its investigation and research, the alternatives considered, and the reasons why the option underlying the policy was selected. The Constitution does not require government to be held to an impossible standard of perfection. Nor does it require courts to take over the tasks that in a democracy should properly be reserved for the democratic arms of government. Simply put, through the institution of the courts, government can be called upon to account to citizens for its decisions. This understanding of social and economic rights litigation accords with the founding values of our Constitution and in particular, the principles that government should be responsive, accountable and open.*
> *Not only must government show that the policy it has selected is reasonable, it must show that the policy is being reconsidered consistent with the obligation to "progressively realise" social and economic rights in mind. A policy that is set in stone and never revisited is unlikely to be a policy that will result in the progressive realisation of rights consistently with the obligations imposed by the social and economic rights in our Constitution."*[153]

136. In *Grootboom*, the Constitutional Court identified the following features of a reasonable programme to give effect to socio-economic rights:

136.1 it must be capable of facilitating the realization of the right;[154]

136.2 it must be comprehensive, coherent and co-ordinated;[155]

136.3 appropriate financial and human resources must be made available for

[153] Mazibuko and Others v City of Johannesburg and Others 2010 (3) BCLR 239 (CC) at para 61 – 62.
[154] Grootboom at para 41
[155] Grootboom, para 41

the programme;[156]

136.4 it must be balanced and flexible and make provision for short, medium and long term needs;[157]

136.5 it must be reasonably conceived and implemented;[158]

136.6 it must be transparent and its contents made known effectively to the public;[159] and

136.7 it must make short term provision for those whose needs are urgent and who are living in intolerable conditions.[160]

137. The mere existence of a housing programme or a policy which addresses or is planned to address medium to long term housing needs, is not sufficient to meet the test of reasonableness. The state is required to respond rationally and apply its policies policy to the actual situation of the persons concerned. As Sachs J explained in *Port Elizabeth Municipality* in the context of eviction proceedings*:*

> "*The availability of suitable alternative accommodation will vary from municipality to municipality and be affected by the number of people facing eviction in each case. The problem will always be to find something suitable for the unlawful occupiers without prejudicing the claims of lawful occupiers and those in line for formal housing. In this respect it is important that the actual situation of the persons concerned be taken account of. It is not enough to have a programme that works in theory. The Constitution requires that everyone must be treated with care and concern; if the measures though statistically successful, fail to*

[156] Grootboom, para 39
[157] Grootboom, para 43
[158] Grootboom, para 40 – 43
[159] Grootboom, para 43
[160] Grootboom, para 99

respond to the needs of those most desperate, they may not pass the test.

In a society founded on human dignity, equality and freedom it cannot be presupposed that the greatest good for the many can be achieved at the cost of intolerable hardship for the few, particularly if by a reasonable application of judicial and administrative statecraft such human distress could be avoided. Thus it would not be enough for the municipality merely to show that it has in place a programme that is designed to house the maximum number of homeless people over the shortest period of time in the most cost effective way. The existence of such a programme would go a long way towards establishing a context that would ensure that a proposed eviction would be just and equitable. It falls short, however, from being determinative of whether and under what conditions an actual eviction order should be made in a particular case."[161] (emphasis added).

138. A municipality may therefore not adopt a "one size fits all" approach when responding to the emergency housing needs of persons facing potential homelessness. We respectfully submit that this applies equally to the evaluation of the reasonableness of the location and proximity of housing provided by a municipality in response to such needs. As our courts have repeatedly held, every eviction case is different.[162] The duty to take reasonable measures requires the City to seek out and implement concrete case specific solutions:

*"Each case, accordingly, has to be decided not on generalities but in the light of its own particular circumstances. Every situation has its own history, its own dynamics, its own intractable elements that have to be lived with (at least, for the time being), and its own creative possibilities that have to be explored as far as reasonably possible. The proper application of PIE will therefore depend on the facts of each case, and each case may present different facts that call for the adoption of different approaches." (*emphasis added.)[163]

[161] Port Elizabeth Municipality v Various Occupiers 2005 (1) 217 at para 29
[162] Blue Moonlight Properties v Occupiers of Saratoga Avenue 2009 (1) SA 470 (W) at para 64
[163] Port Elizabeth Municipality at para 31

139. Lastly, it is necessary to set out the principles which apply to the powers of the court when faced with a constitutional challenge to the reasonableness of a programme delivering socio-economic rights. In *TAC*, Chaskalson J said the following in response to an argument that the principle of separation of powers precluded a court from granting orders which have the effect of requiring the executive to pursue a particular policy:

> *"This Court has made it clear on more than one occasion that although there are no bright lines that separate the roles of the legislature, the executive and the courts from one another, there are certain matters that are pre-eminently within the domain of one or other of the arms of government and not the others. All arms of government should be sensitive to and respect this separation.*
>
> *This does not mean, however, that courts cannot or should not make orders that have an impact on policy.*
>
> *The primary duty of courts is to the Constitution and the law, "which they must apply impartially and without fear, favour or prejudice". The Constitution requires the state to "respect, protect, promote, and fulfil the rights in the Bill of Rights". Where state policy is challenged as inconsistent with the Constitution, courts have to consider whether in formulating and implementing such policy the state has given effect to its constitutional obligations. If it should hold in any given case that the state has failed to do so, it is obliged by the Constitution to say so. In so far as that constitutes an intrusion into the domain of the executive, that is an intrusion mandated by the Constitution itself. There is also no merit in the argument advanced on behalf of government that a distinction should be drawn between declaratory and mandatory orders against government. Even simple declaratory orders against government or organs of state can affect their policy and may well have budgetary implications. Government is constitutionally bound to give effect to such orders whether or not they affect its policy and has to find the resources to do so.*
>
> *A dispute concerning socio-economic rights is thus likely to require a court to evaluate state policy and to give judgment on whether or not it is consistent with the Constitution. If it finds that policy is inconsistent with the Constitution it is obliged in terms of section 172(1)(a) to make a declaration to that effect."*[164]

[164] Minister of Health and Others v Treatment Action Campaign and Others (No 2) (2002 (10) BCLR 1033 at para 98 - 101

140. The City argues that the implementation of social housing as opposed to emergency housing in the inner city area is reasonable and that the reasons for the absence of emergency housing in the inner city and surrounds "*are complex*" and include "*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.*"[165]

141. In its second answering affidavit, the City states that "…*each of the developments are dependent on a range of factors including: (a) the availability of land; (b) the costs of the particular housing programme that is implemented; (c) where the City can obtain best value for money. Based on a consideration of all of these factors, the City adopted the view that the developments referred to in Woodstock and Salt River best serve the imperatives of social housing as opposed to general emergency housing*."[166]

142. In relation to costs, the City states that "…*the delivery of housing in the inner City is significantly more costly than housing delivery elsewhere. This is due to, inter alia, the cost of land in the inner City, the economies of scale in respect of building costs given the limited land availability in the inner City, and the high cost of rates and taxes in the inner City. What this means is that if housing*

[165] Record: p 551 para 66.3
[166] Record: p 2795: para 47.4

delivery as part of the state's Breaking New Ground housing policy (i.e. subsidised state housing) were to occur in the inner City, the subsidy provided by national government for the provision of such housing would be wholly inadequate."[167]

143. It is respectfully submitted that the references by the City to delivery of housing in the inner city being "significantly more costly", "economies of scale in respect of building costs", "high rates of rates and taxes" and "inadequacy" of national government subsidies, are exceedingly vague and unhelpful. The City does not explain or assist the court with information as to:

143.1. what these "significant costs" are compared to areas outside the inner city;

143.2. what are the factors impacting on or details of the economies of scale in respect of building costs;

143.3. what rates and taxes are applicable to City or state-owned land in the inner city;

143.4. what research or investigations were done to determine these costs;

143.5. what levels of subsidization are applicable to state subsidized housing in the inner city;

[167] Record: p 2798: para 49.2.2

143.6. the budgetary and fiscal details of funding available for the implementation of emergency housing;

144. This information it is submitted would be crucial in determining the reasonableness of the City's policy choices to implement social housing as opposed to emergency housing in the inner city. The City has therefore failed to place convincing evidence before the court demonstrating that it lacks the financial resources to implement emergency housing projects in the inner city area.

145. In any event, the City's contentions that emergency housing in the inner city is not viable due to resources constraints and its reliance on factors such as higher land and building costs in the inner city, are belied by the fact that the City's first transitional housing project in the inner city, the Pickwick development, was financed by CRU (Communal Residential Unit) funding and determined to be viable within the City's financial framework.[168] Furthermore, it is not open to the City to rely on resources constraints if it planned its housing programme and implemented it on the basis of an incorrect understanding of its constitutional obligations.[169]

146. A significant component of the City's defence to the constitutional challenge is based on the contention that the Applicants' have no right to be afforded emergency accommodation in "a location of their choice" and that to do so

[168] Record: p 2497
[169] Blue Moonlight: para 74

would amount to affording the Applicants undue and unfair preference in the allocation of housing. This point is also without merit.

147. Our courts have on a number of occasions recognised the importance of location as a component of the right to adequate housing.

148. In *Blue Moonlight*, the Constitutional Court directed the City of Johannesburg to provide the evicted residents in that application 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*."[170]

149. The importance of the location of temporary emergency accommodation was emphasised by the SCA in *Changing Tides*, which held that the temporary emergency accommodation to be provided:

> *"….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."*[171]

150. *Joe Slovo*[172] concerned an appeal against an eviction order granted in an application brought by various organs of state against 4386 households

[170] Blue Moonlight at para 104 (iv).
[171] Changing Tides at para 56.
[172] Residents of Joe Slovo Community, Western Cape v Thubelisha Homes 2010 (3) SA 454 (CC)

comprising of about 20 0000 people from the Joe Slovo settlement on the outskirts of Cape Town. The observation by the Court that the Constitution "*does not guarantee a constitutional right to state housing at a location of his or her choice*", must be considered in the context of the specific facts of the case and most importantly, the measures tendered by the state to ameliorate the consequences of the relocation of the Joe Slovo community.

151. In deciding that the eviction and relocation of the Applicants was just and equitable, Ngcobo J explained:

> *"Some of the reasons advanced by the Applicants 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 Applicants. 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*."[173]

152. The Court in *Joe Slovo* placed great emphasis on the ameliorative measures which the state had tendered to address the disruptive consequences of relocating the community to Delft, which was some 15kms away from Joe Slovo. The State had in that case offered to free transport to take children to schools, it had committed itself to building more schools and clinics in Delft and pensioners were given a choice of getting their pension either in Delft or in Kwa-Langa.[174] Yacoob J writing for the majority noted that "*there are circumstances in which there is no choice but to undergo traumatic*

[173] Joe Slovo at para 253
[174] Joe Slovo at para 254

experiences so that we can be better off later. Significantly, they are ameliorated by the state undertaking to provide transport and to ensure that schooling is available to children and that people moved to Delft can get to work."[175]

153. In *Baron and others v Claytile (Pty) Limited and Another* ('Baron')[176], the Constitutional Court dismissed an application for leave to appeal against a judgment and order of the Land Claims Court (LCC) which had ordered the eviction of the appellants from private land in terms of the provisions of the Extension of Security of Tenure Act 108 of 1997 ('ESTA').

154. During the course of the proceedings, the City had made the appellants an offer of alternative accommodation of five housing units at Wolwerivier.[177] The appellants refused the offer on the basis that accommodation at Wolwerivier was unacceptable inter-alia due to the distance from Wolwerivier to their places of employment and their children's schooling.[178] Pretorius AJ held that:

> "*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*."

[175] Joe Slovo at para 106
[176] Baron and others v Claytile (Pty) Limited and Another (CCT241/16) [2017] ZACC 24 (13 July 2017)
[177] Baron, para 30
[178] Baron, para 31

155. It is submitted that the judgment of the Constitutional Court in *Baron* is distinguishable from the facts of this case on two main grounds. Firstly, it is apparent from the judgement that central to the Court's finding was the bald allegations by the appellants in that case that Wolwerivier was far from their places of employment and their failure to set out any particulars as to where they were employed, the distance from Wolwerivier and what hardship they would suffer should they move to Wolwerivier.[179] In the present case, the Applicants have set out in detail the hardships and prejudice they will suffer if relocated to Wolverivier.[180] Secondly, unlike *Baron*, this case has its genesis in the provisions of the PIE Act not ESTA. As the Court pointed out in *Baron*:

> *"While the LCC cannot be faulted for turning to established jurisprudence to assist with its assessment of whether suitable alternative accommodation was a pre condition of eviction, and what it meant for determining the balance of equity, it should be pointed out that the statement in Port Elizabeth Municipality was about PIE, and not ESTA. This is significant. Not because what was said in Port Elizabeth Municipality regarding the "constitutional matrix" of evictions and the balancing of housing interests with property interests have no bearing on the ESTA context, but rather because it must be kept in mind that we are dealing with different pieces of legislation with different purposes. ESTA was enacted to strengthen the lawful occupation of persons residing on farms, as part of the land reform scheme envisaged in section 25 of the Constitution. It does not go without saying that legal principles developed with reference to PIE can apply to ESTA, or that the balance that must be struck will be struck in the same way*."[181]

Offers of alternative accommodation

156. The City argues that it has "gone out of its way" to accommodate the residents

[179] Baron, para 32
[180] See for example the affidavits at page 1838 to 1849 of the record
[181] Baron, para 20

concerns and points in its second answering affidavit to the most recent offer of alternative emergency accommodation at Kampies.[182]

157. There are two answers to this point. The first is that it is not relevant to the question of whether the City's housing programme and its implementation comply with the City's constitutional obligations. The second is that the Applicants have set out in detail in the papers the reasons for their non-acceptance of the various offers of emergency accommodation at Wolverivier and more recently, the Kampies site.[183]

VII REMEDY

158. For the reasons set out above, it is submitted that the City's housing programme and its implementation is unreasonable, and unconstitutional in that its inflexible formulation and implementation fails to respond to the short term emergency housing needs of the Applicants, in the inner city from which they have been evicted and face homelessness.

159. The appropriate relief must, therefore, entail a declaration that the City's housing programme and its implementation in terms of the Five-Year plan is constitutionally invalid and unlawful. This the Court must do so under section 172(1)(a) of the Constitution. As the Constitutional Court has repeatedly held, the Court has no discretion under section 172(1)(a), but must declare conduct

[182] Record: p 2807 - 2812
[183] Record: p 3043 - 3046

that is inconsistent with the Constitution invalid to the extent of the inconsistency.[184] The Constitutional Court described the Court's duty to grant appropriate and effective relief in *Fose* as follows:

> *"this Court has a particular duty to ensure that, within the bounds of the Constitution, effective relief be granted for the infringement of any of the rights entrenched in it … Particularly in a country where so few have the means to enforce their rights through the courts, it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated. The courts have a particular responsibility in this regard and are obliged to "forge new tools" and shape innovative remedies, if needs be, to achieve this goal."*[185]

160. In *Corruption Watch NPC and Others v President of the Republic of South Africa and Others*,[186] Madlanga J, writing for the majority, explained the breadth of the Court's power to vindicate the rule of law in formulating appropriate relief under section 172(1)(b) of the Constitution. Madlanga J stated:

> *"[68] In terms of section 172(1)(b) of the Constitution we may make <u>any</u> order that is just and equitable. The operative word "any" is as wide as it sounds. Wide though this jurisdiction may be, it is not unbridled. It is bounded by the very two factors stipulated in the section – justice and equity …*
>
> *[69] What must be paramount in the relief that a court grants is the vindication of the rule of law. The effect of that is the reversal of the consequences of constitutionally invalid conduct…."*

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[184] Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others 2011 (4) SA 113 (CC) paras 81-85; AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others 2014 (1) SA 604 (CC) para 25.

[185] Fose v Minister of Safety and Security [1997] ZACC 6; 1997 (3) SA 786 (CC) at para 69. See also at paras 18 and 19 on the meaning of appropriate relief.

[186] Corruption Watch NPC and Others v President of the Republic of South Africa and Others 2018 (1) BCLR 1179 (CC); 2018 (2) SACR 442 (CC) at paras 68-75.

161. Similarly, in *Electoral Commission v Mhlope*, Mogoeng CJ held (writing for the majority):

> *'[130] The rule of law is one of the cornerstones of our constitutional democracy. And it is crucial for the survival and vibrancy of our democracy that the observance of the rule of law be given the prominence it deserves in our constitutional design. To this end no court should be loathe to declare conduct that either has no legal basis or constitutes a disregard for the law, as inconsistent with legality and the foundational value of the rule of law. Courts are obliged to do so.…*
>
> *[132] Section 172(1)(b) clothes our courts with remedial powers so extensive that they ought to be able to craft an appropriate or just remedy even for exceptional, complex or apparently irresoluble situations. And the operative words in this section are "an order that is just and equitable". This means that whatever considerations of justice and equity point to as the appropriate solution for a particular problem, may justifiably be used to remedy that problem. If justice and equity would best be served or advanced by that remedy, then it ought to prevail as a constitutionally sanctioned order contemplated in section 172(1)(b).'*[187]

162. The Court is therefore empowered to formulate an effective remedy that is properly tailored to remedy the unlawfulness and constitutional deficiencies of the City's housing programme and its implementation. It is submitted that the relief sought in the Applicants notice of motion (as amended) is effective and just and equitable in the circumstances.

SHELDON MAGARDIE
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Chambers
Cape Town
4 November 2020

[187] Electoral Commission v Mhlope 2016 (5) SA 1 (CC) at paras 130-132.