IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

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

In the matter between:

CHARNELL COMMANDO	First Applicant
GERALDINE STHEPHANIE CUPIDO	Second Applicant
NORMAN ANDREW 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
MACHAL 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

HEADS OF ARGUMENT ON BEHALF OF THE RESIDENTS

TABLE OF CONTENTS

I INTRODUCTION

1. This case arises in the context of the continuing legacy of apartheid urban and spatial planning some two decades into South Africa's constitutional democracy. The Constitutional Court has described this legacy as follows:

> *"The apartheid city, although fragmented along racial lines, integrated an urban economic logic that systematically favoured white urban areas at the cost of black urban and peri-urban areas. The results are tragic and absurd: sprawling black townships with hardly a tree in sight, flanked by vanguards of informal settlements and guarded by towering floodlights, out of stonethrow reach. Even if only a short distance away, nestled amid trees and water and birds and tarred roads and paved sidewalks and streetlit suburbs and parks, and running water, and convenient electrical amenities . . . we find white suburbia. How did it happen? Quite simply: ". . . in reality the economic relationship between the white and black (African, coloured and Indian) halves of the city was similar to a colonial relationship of exploitation and unequal exchange."*[1]

2. The apartheid spatial form continues to dominate in Cape Town. Poor Black African and Coloured families live on the outskirts of the city and commute at great economic and personal expense to employment, educational opportunities, health care facilities and other high quality and well-resourced public services within or near the inner city.[2] Cape Town faces unique challenges, in that it is both one of the most historically spatially divided cities in the country and also in the midst of one of the worst housing affordability crises in the world.[3]

---

1 *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC) at para 122.

2 Affidavit of Lauren Royston: p 474, para 22.

3 Affidavit of Lauren Royston: p 470, para 12. This is not disputed by the City: Record: p 583, para 152.

3. This application was initially brought on behalf of 26 named low income and unemployed applicants (collectively referred to as “the applicants”) who, together with their families, formed a total group of 43 women and men and children living in housing units at erf 10626, Bromwell Street, Cape Town (“the property”). The applicants and their families have lived on the property for generations.

4. The property itself is located in the Woodstock and Salt River area of Cape Town. The Woodstock and Salt River area is one of the few inner city neighbourhoods in Cape Town which survived apartheid forced removals and in which, prior to the onset of the phenomenon of “gentrification”, residents were able to access relatively affordable housing opportunities.[4]

4A. Woodstock Hub (Pty) Ltd (“Woodstock Hub”), a property development company, bought the property during 2013. Its main business function and objective is to construct “middle income” rental units on the property, in the rental band of R5000.00 to R9000.00 per month.[5] Woodstock Hub brought eviction proceedings against the applicants. It was duly granted an eviction order. The order left the applicants facing eviction and the prospect of being left homeless with literally no roof over their heads.

5. On 20 September 2016 the applicants applied for an order suspending the eviction order pending the determination of an application for *inter-alia* relief relating to the obligations of the City to provide the applicants with temporary emergency accommodation. While Applicants engaged the City prior to the

---

4 Affidavit of Lauren Royston: p 470, para 12; p 477, para 31

5 Record: p 297, para 7

launch of the application, it was only subsequent to the application that the parties engaged in a process of meaningful engagement, the purpose of which was to facilitate the applicants' access to housing through various social housing programmes. Some of the applicants were able to obtain social housing or alternative accommodation and have vacated the property.

6. The First, Fourth, Eighth, Ninth, Tenth and Eleventh, Twelfth, Thirteenth, Seventeenth, Eighteenth, Nineteenth, Twentieth, Twenty-First, Twenty-Second, Twenty-Third and Twenty-Fourth Applicants (hereinafter referred to as "the residents") and their dependents have not been able to secure alternative housing. They are at risk of homelessness and require temporary emergency accommodation. The City has tendered to make emergency housing units available to the residents at its Wolwerivier incremental development area ("IDA") situated on the outskirts of Cape Town ("Wolweriver"). Wolwerivier is located 29km by private car from where the residents currently reside and a significant distance from their places of employment and their children's schools.

Outline of the residents submissions

8. The core submissions to be advanced by the residents are in essence the following:

    8.1 The City is under a constitutional duty to provide the residents and their dependents residing with them with temporary emergency housing in a locality as near as possible to the area in which they currently reside; and

8.2 The City has failed to grapple with the actual situations of the residents and has failed and/or refused to consider any alternative measures other than providing the residents with emergency housing units at Wolwerivier. The City's response to the emergency housing needs of the residents is inflexible, unreasonable and unconstitutional.

The structure of these heads

9. These heads of argument are structured as follows:

9.1 First, we explain the current position on the property and the circumstances of the applicants who pursue the relief set out in the notice of motion;

9.2 Second, we summarise the factual background and litigation history;

9.3 Third, we set out the historical, social and economic context to this application;

9.4 Fourth, we deal with the legal and policy frameworks;

9.5 Fifth, we set out the failure of the City to comply with its constitutional and statutory obligations to respect, protect and promote the residents' right of access to adequate housing; and

9.6 Finally, we address the issue of an appropriate remedy.

II THE CURRENT POSITION ON THE PROPERTY

Applicants who vacated or are in the process of vacating the property

11. The Fifteenth and Sixteenth Applicants have obtained alternative accommodation and have vacated the property. The Seventh Applicant and Fourteenth Applicant have obtained alternative accommodation and is in the process of vacating the property. These Applicants no longer pursue any relief in this application. The Twenty-Fifth and Twenty-Sixth Applicants are in the process of vacating the property and will not pursue the relief sought in the application. The Sixth Applicant has qualified for social housing and will in all likelihood not pursue any relief in this application.

III THE RESIDENTS PERSONAL CIRCUMSTANCES

12. A number of households / family units and individuals living on the property who have not qualified for alternative housing and pursue the relief sought in this application.[6] They are Family Unit 1 (First and Fourth Applicant but now excluding Fifth Applicant); Family Unit 3 (Eighth and Ninth Applicants); Family Unit 5 (Tenth and Eleventh Applicants); Family Unit 7 (Twenty-Second, Twenty-Third and Twenty-Fourth Applicants); Family Unit 8A (Seventeenth, Twentieth and Twenty-First Applicants); Family Unit 8B (Eighteenth and Nineteenth Applicants), the Thirteenth Applicant and the Twelfth Applicant.

---

6 See Affidavit of Disha Govender dated 26 January 2016.

13. The family units and individuals set out above consist of total of 27 individuals comprising of **16 adults** and **11 children.** Their personal circumstances are set out below.

Family Unit 1: Charnell Commando and Gicelle Commando

14. Charnell Commando (First Applicant) is a 29 year old kitchen assistant employed at Café Ganesh in Observatory. She lives in Unit 124 Bromwell Street with her mother Gicelle 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 R3190.00. 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.[7]

Family Unit 3: Priscilla Nel and Dylan Nel

15. Priscilla Nel (Eighth Applicant) is 44 years old and is unemployed. She lives in Unit 124 Bromwell Street with her son Dylan Nel (Ninth Applicant) aged 19. Dylan Nel is also unemployed. 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

[7] Record: p 405 – 406; para 7 – 17.

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.[8]

Family Unit 5: Sulaiman Goliath, Ma Aida Abels, Mogamat Dawood Abels, Naashifah Abels and Nabeelah Abels

17. Sulaiman Goliath (Eleventh applicant) is a 51 year old taxi sliding-door operator. He 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 3) at 126 Bromwell Street. Eleventh Applicant earns a monthly salary of approximately R4 000.00. 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. The family's combined monthly income is approximately R7000.00. 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.[9]

Family Unit 7: Mark Neil Smith, Rashieda Simth, Mogamat Tauriq Smith, Toufeeq Agmat Smith, Tashriq Ismail Smith and Azraa Smith

18. Mark Neil Smith (Twenty-Third Applicant) is a 44 year old labourer. He lives with his wife Rashieda Simth (Twenty-Second Applicant) and their children, Mogamat Tauriq Smith (Twenty-Fourth Applicant); Toufeeq Agmat Smith (aged 12);

---

8 Record: p 419- 420; para 1 – 8.

9 Record: p 429 – 430; para 1 – 11.

Tashriq Ismail Smith (aged 10); and Azraa Smith (aged 4) 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 nett monthly household income of the family is approximately R8 000.00. They have always lived in the Salt River/Woodstock area and have been on the state housing waiting list since 2014.[10]

Family Unit 8A: Brenda Sarah Smith, Roseline Smith and Cheslyn Smith

19. Brenda Sarah Smith (Seventeenth Applicant) is a 75 year old pensioner. She lives with her daughter Roseline Smith (Twentieth Applicant), aged 50 and her grandson Cheslyn Smith (Twenty-First Applicant) aged 20 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 sometime earns some income from looking after some family member's children. Twenty-First Applicant is unemployed. Their combined nett 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.[11]

Family Unit 8B: Machal Smith, Megan Smith, Mikyle Pearce, Tyreece Pearce, Tougidah Mohamed and Jaden Smith

---

10 Record: Volume 2 p448 – 449; para 1 – 10.
11 Record: p 452 – 455; para 1 -11.

20. Machal (Michelle) Smith (Eighteenth Applicant) is a 40 year old char worker in Salt River. She lives with her daughter Megan Smith (Nineteenth Applicant) aged 20, her minor children; Tyreece Pearce (aged 15), Mikyle Pearce (aged 12) and Tougiedah Smith (aged 3), and her grandson Jaden Smith (aged 3). 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. The combined nett monthly income (including grants) of the family 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.[12]

George Faria Rodrigues

21. George Faria Rodrigues (Thirteenth Applicant) is 39 years old. He was previously employed but is currently unemployed. 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.[13]

Faiza Fisher

22. Faiza Fisher (Twelfth Applicant) is 45 years old and is unemployed. She lives at 126 Bromwell Street with Family Unit 5. She suffers from arthritis and lung

12 Record: p 452 – 455; para 1 -11.
13 Record: p 432 – 435; para 1 – 9.

disease. She recently applied for a disability grant and is now receiving R1500.00 per month on a temporary basis. She has been on the state housing waiting list since 2016.[14]

IV FACTUAL BACKGROUND

23. 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, Seventh Applicant, Eleventh Applicant, Seventeenth Applicant and Twenty-Fifth Applicant were parties to the lease agreements.[15] 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.[16]

24. The Syms brothers were co-owners of the property. Reza Syms was responsible for the collection of rent from the lessees.[17]

25. On 30 October 2013, Reza Syms entered into a sale agreement with Woodstock Hub in terms of which the latter purchased the property. Transfer only took place on 4 March 2015.[18] The Applicants only became aware that of the sale

---

14 Record: p 438 -439; para 1 – 8.
15 Record: p 768.
16 The history of each family's occupation of the property is set out in detail at p 206 of the record.
17 Record: p 209
18 Record: p 14, para 18

agreement, the contents of which remain unknown to them, through a press statement released by the Woodstock Hub on 6 August 2016.[19]

26. The applicants continued to occupy the property after it was sold. Reza Syms collected rent on a monthly basis until early 2014.[20] 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.[21]

27. 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.[22] The applicants again approached the Tribunal for assistance but did not receive any feedback on its investigation.[23]

III LITIGATION HISTORY

28. 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

19 Record: p 767 & p 995.
20 Record: p 767: para 13
21 Record: p 767
22 Record: p 768 para 18
23 Record: p 767 para 13.

in relation to the citation of the applicants.[24] The City was cited as respondent in each eviction application. No relief was sought against it.

29. 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.

30. 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.[25]

31. On 17 March 2016 Hlophe JP granted a further order by agreement, in terms of which the applicants were directed to vacate the property by 31 July 2016.[26] 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.[27] The Applicants however, only became aware of the order through a social media post during May 2016, and immediately sought assistance from their attorney.

---

24 Record: p 16, para 22.
25 Record: p 8.
26 Record: p 97.
27 Record: p 17, para 27 – 28.

32. 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 31 November 2016. The variation application was dismissed by Weinkove AJ on 5 August 2016.[28] The applicants 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. The applicants, at that stage representing themselves but assisted by John Adams, filed notices of appeal against the 17 March 2016 order. Those notices of appeal were subsequently withdrawn in terms a settlement agreement concluded between the applicants and the first respondent on 19 August 2016, which provided inter-alia for the respondents to vacate the property by 9 September 2016.[29]

33. During 3 September 2016 to 19 September 2016, a series of discussions took place between the applicants, their attorneys, various City officials and the Executive Mayor concerning the availability of alternative accommodation for the applicants.[30]

34. 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 residents personal circumstances and sought the assistance of the City with regard to temporary emergency accommodation.[31]

---

28 Record: p 18, para 33.
29 Record: p 19, para 37.
30 Record: p 21 – p 30.
31 Record: p 181.

35. 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 apply and meet the criteria.[32]

36. On 7 September 2016, Executive Mayor De Lille, the local councilor and the Mayor's spokesperson met with the residents at the property. The Mayor agreed to look into possible solutions "*including whether land could be made available for the relocation of the residents*."[33] 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 residents, 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.[34]

37. 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

---

32 Record: p 184.
33 Record: p 558, para 90.
34 Record: p 189 – p 245.

developments in the Woodstock and Salt River areas once these had been developed in approximately 18 months.[35]

38. 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.[36] 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 September 2016 where the applicants' details were updated and registered on the housing database.[37]

39. 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 further recorded that four of the five 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.[38]

40. 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 residents failing which this court would be

35 Record: p 25, para 49.
36 Record: p 25, para 52.
37 Record: p 26, para 58.
38 Record: p 277.

approached for relief.[39] The City failed to respond to this letter save for statement from its legal advisor that she would take instructions. This application was launched on 20 September 2016 after no further response from the City.

The post September 2016 engagement process

41. 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 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.

42. 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.

43. 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.

---

[39] Record: p 291.

44. Against this background, we turn next to the context of the relief sought in this application.

IV THE HISTORICAL, SOCIAL AND ECONOMIC CONTEXT

45. Any assessment of the extent to which the State has complied with its constitutional obligations in respect of socio-economic rights requires an evaluation of context. The Constitutional Court has emphasized the importance of a contextual approach.[40] The Court observed that interpretation *"will often necessitate close attention to the socio-economic and institutional context in which a provision under examination functions. In addition it will be important to pay attention to the specific factual context that triggers the problem requiring solution"*.[41]

46. In *Grootboom*, the Constitutional Court held that the reasonableness of State conduct in relation to housing problems must be assessed not only in relation to the capacity of institutions responsible for implementing a housing programme, but in the light of the social, economic and historical context.[42]

47. The social, historical and economic context to affordable housing in Cape Town and the phenomenon of "gentrification" in the Woodstock / Salt River area has been set out in the affidavit of Lauren Royston ("Royston"), a development planning expert engaged by the applicants.[43]

---

40 See for example *Zondi v MEC for Traditional and Local Government Affairs and Others* 2005 (3) SA 589 (CC) and *Mohlomi v Minister of Defence* 1997 (1) SA 124 (CC).

41 *South African Police Service v Public Servants Association* 2007 (3) SA 521 (CC) para 20.

42 *Grootboom* at para 43.

43 Record: p 463 – p 511.

48. Royston observes 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.[44] To afford an average house, an average Cape Townian must earn three times the average household income resulting in a major shift towards rental accommodation.[45]

49. In relation to the Woodstock / Salt River area, Royston notes that the area, which was historically one in which Coloured households managed to survive forced evictions such as those in District 6, has seen changes in its residential demographics prompted by reduced household income as the textile industry began to falter and due to the onset of gentrification. The area began to attract individuals from the arts and creative sector "*wanting to live in a more affordable, mixed, urban and vibrant part of Cape Town*."[46]

50. Royston notes that a rising number of developments in the area, aided by the area falling under Cape Town's Urban Development Zone, a Treasury led intervention to incentivize redevelopment in inner city areas, catered for "m*iddle to high income people, have controlled physical access, private security and are experienced as alienating by poor Coloured residents*."[47]

---

44 Record: p 470, para 13.
45 Record: p 472, para 16 – 19.
46 Record: p 476, para 25.
47 Record: p 477.

51. There is no dispute[48] on the application papers in relation to the conclusions and observations made by Royston regarding the impact of gentrification on the ability of the area's households, including the applicants, to afford rental housing in the Woostock and Salt River area.[49] We set out below Royston's key conclusions in this regard:

> *"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. 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.*
>
> *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 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."*[50] (emphasis added)

V THE LEGAL FRAMEWORK

52. We respectfully submit that there are three categories of duties imposed on the City which are relevant to the determination of this application. The first is the

---

48 The allegations made by Royston at paragraphs 30 to 34 of her affidavit are "noted" in the City's Answering Affidavit (see Record: p 584, para 155).

49 Record: p 477, para 30 – 34.

50 Record: p 477, para 30 – 34.

general constitutional obligation to take reasonable measures to achieve the progressive realization of the right of access to adequate housing. The second is the duty of municipalities to provide emergency accommodation to persons who have been evicted from their homes and face potential homelessness. The third is the duty to address spatial injustice.

The duty to take reasonable measures to progressively realise access to adequate housing

53. The starting point in evaluating whether the measures taken by the City to give effect to the residents' right of access to adequate housing[51], including the location and proximity of such housing, is whether such measures are reasonable.

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

54.1 it must be capable of facilitating the realization of the right;[52]

54.2 it must be comprehensive, coherent and co-ordinated;[53]

54.3 appropriate financial and human resources must be made available for the programme;[54]

---

51 Section 26(1): "Everyone has the right to have access to adequate housing."; section 26(2): "The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right."

52 *Grootboom* at para 41.

53 *Grootboom*, para 41.

54 *Grootboom*, para 39.

54.4 it must be balanced and flexible and make provision for short, medium and long term needs;[55]

54.6 it must be reasonably conceived and implemented;[56]

54.7 it must be transparent and its contents made known effectively to the public;[57] and

54.8 it must make short term provision for those whose needs are urgent and who are living in intolerable conditions.[58]

55. 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.

56. What is required is the rational implementation and application of policy to the actual situation of the persons concerned. As Sachs J explained in *Port Elizabeth Municipality:*

> "*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*

55 *Grootboom*, para 43.
56 *Grootboom*, para 40 – 43.
57 *Grootboom*, para 43.
58 *Grootboom*, para 99.

care and concern; if the measures though statistically successful, fail to 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."[59] (emphasis added).

57. 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.[60] 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.)[61]

58. While the availability of resources is an important factor in deciding whether the measures taken are reasonable, it is not the decisive factor. The state may not

---

59 *Port Elizabeth Municipality* at para 29

60 *Blue Moonlight Properties v Occupiers of Saratoga Avenue* 2009 (1) SA 470 (W) at para 64

61 *Port Elizabeth Municipality* at para 31.

arbitrarily decide which measures to implement and the enquiry into whether the measures taken are reasonable must still take place.[62]

Duty to provide emergency accommodation

59. The Constitutional Court and Supreme Court of Appeal have repeatedly held that it will generally not be just and equitable for a court to grant an eviction order which leads to the occupiers of the property being rendered homeless.[63]

The obligation to ensure that evictions do not result in homelessness and further violations of human rights and is an incident of the over-arching obligation of the state to ensure that evictions, where they do take place, are executed humanely.[64] Municipalities are thus under a clear constitutional duty to provide emergency accommodation to persons who have been evicted from their homes and are at risk of homelessness. As Wallis JA explained *Changing Tides:*

> *"Much of the litigation around evictions has dealt with contentions by various local authorities that they do not owe constitutional obligations to provide emergency accommodation to persons evicted from their existing homes and facing homelessness as a result. Contentions that they were not obliged to provide emergency housing (Grootboom); alternative land on a secure basis (Port Elizabeth Municipality); use their own funds to provide emergency accommodation (Rand Properties); and provide emergency accommodation to persons evicted at the instance of private property owners (Blue Moonlight) <u>have all been advanced and rejected by this court and the Constitutional Court</u>."*[65]

---

62 *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* (CC) SA 104 (CC) at para 88.

63 *Occupiers of Shulana Court, 11 Hendon Road, Yeoville v Steele* 2010 (9) BCLR 911 (SCA) at para 16. See also *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 18 *("Port Elizabeth Municipality")* and *Modderfontein Squatters, Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, Amici Curiae); President of the Republic of South Africa & others v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, Amici Curiae)* 2004 (6) SA 40 (SCA).

64 *Government of the Republic of South Africa and others v Grootboom and others 2001* (1) SA 46 at para 16 ("Grootboom").

65 City of Johannesburg v Changing Tides 74 (Pty) Ltd and Others 2012 (6) SA 294 (SCA) at para 39

Duty to address patterns of spatial injustice

60. Municipalities are under a duty to address through their 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").

61. 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*."

62. 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 the following:

> *"7. The following principles apply to spatial planning, land development and land use management:*
>
> *(a) The principle of spatial justice, whereby—*
>
> *(i) <u>past spatial and other development imbalances must be redressed through improved access to and use of land</u>;*
>
> *(ii) spatial development frameworks and policies at all spheres of government <u>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</u>;*

(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)

64. 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.[66]

65. The principle of spatial justice must therefore guide *inter-alia* "*the preparation, 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.*"[67]

VIII POLICY FRAMEWORK

66. We submit that there is a foundation within existing planning and policy instruments for the City to take reasonable steps and implement a concrete case

66 SPLUMA: section 6(2)
67 SPLUMA: section 6(1)(b), (c) and (e).

specific solution to provide the residents with temporary emergency accommodation in an area as close as possible to the area where the residents reside. Two policy instruments are relevant in this regard, the Emergency Housing Policy and the Woodstock Salt River Revitalisation Framework.

The Emergency Housing Policy

67. The Emergency Housing Policy ("EHP") provided for in part 2 of the National Housing Code, 2009. The EHP provides for grants to be made available to municipalities to enable them to respond rapidly to emergencies by means of the provision of land, municipal engineering services and shelter. Such grants include the possible relocation and resettlement of people on a voluntary and co-operative basis in appropriate cases.[68] The EHP defines an emergency as existing "*when the MEC, on application by a municipality and or the PD, agrees that persons affected owing to situations beyond their control…..are evicted or threatened with imminent eviction from land or from unsafe buildings, or situations where pro-active steps ought to be taken to forestall such consequences*."[69]

68. The EHP provides for a municipality to enter into lease agreements for the use of land owned by another organ of state. The EHP states that "*in the case of non-housing land that vests or is registered in the name of a provincial government,*

68 EHP, para 2.2
69 EHP, para 2.3.

its department responsible for land reform must be approached to secure such land in accordance with appropriate provincial land administration legislation."[70]

The 2003 Woodstock Salt River Revitalisation Framework ("WSRF")

69. The City adopted the WSRF in 2003 in order to encourage inclusive redevelopment in Woodstock and Salt River.[71] It is common cause that the WSRF is a one of the district policies for the Table Bay District.[72]

70. 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 proposes 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.[73]

71. 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.[74] The WSRF

---

70 EHP, para 43.
71 Record: p 479, para 36.
72 Record: p 479, para 37; p 585, para 159.
73 Record: p 480, para 38.
74 Record: p 586, para 161.

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.[75]

72. 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*."[76] (emphasis added).

73. In her expert affidavit, 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. Royston states that the best of her knowledge, no new public affordable rental options have in fact been built in the Woodstock and Salt River area since the dawn of democracy.[77]

74. The City admits that the WSRF has been used to improve aspects of the built environment and some public facilities, as stated by Royston.[78] Its contention however is that "*it is not correct that housing solutions and social programmes have been excluded under the programme*."[79]

---

75 Record: p 586, para 160.
76 Record: p 586, para 160.
77 Record: p 480, para 38
78 Record: p 587, para 162
79 Record: p 587, para 162

75. The point however is not whether such programmes are excluded under the programme, but rather, whether the substantive housing solutions provided for in the WSRF have in fact been implemented, as appeared to be the case with the use of the WSRF incentive programme to convert buildings on Albert Road to "*loft apartments and mixed use*."[80] It is apparent from the City's response, we submit, that the substantive housing solutions provided for in the WSRF are available for use as policy instrument but have not been implemented beyond the planning stage. Plans for social housing in Woodstock outlined in a City of Cape Town social housing report in 2008 have still not materialised,[81] although according to the City, the developments are expected to be completed in 18 months time.[82]

IX LOCATION OF EMERGENCY ACCOMMODATION

76. In addition to the legal and policy framework set out above, we submit that there are two sources of precedent for the obligation of the City to provide the residents with temporary emergency accommodation in an area as close as possible to the area where the residents currently reside. The first is binding Constitutional Court and Supreme Court of Appeal authority in *Blue Moonlight* and *Changing Tides.* The second authority is the recognition in international law of location as a component of the right to adequate housing.

Blue Moonlight

80 Record: p 585, para 160
81 Record: p 481, para 39
82 Record: p 587, para 163

77. 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*."[83]

Changing Tides

78. 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."*[84]

Joe Slovo

79. It is necessary at this juncture to address the City's contention, by reference to *Joe Slovo*[85], that the residents have no right to entitlement to alternative

---

83 *Blue Moonlight* at para 104 (iv).
84 *Changing Tides* at para 56.
85 *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* (CCT 22/08) [2009] ZACC 16; 2009 (9) BCLR 847 (CC) ; 2010 (3) SA 454 (CC) (10 June 2009).

accommodation at a location of their choice. *Joe Slovo* concerned an appeal against an eviction order granted in an application brought by various organs of state against a 4386 households comprising of about 20 0000 people from the Joe Slovo settlement on the outskirts of Cape Town.

80. We submit that 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, and unlike the case here, the measures tendered by the state to ameliorate the consequences of the relocation of the Joe Slovo community.

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

> *"Some of the reasons advanced by the residents for refusing to relocate to the TRUs in Delft are a lack of schools and other amenities and a lack of employment. What must be stressed here is that relocation is necessary to develop Joe Slovo so that decent housing can be built there. This will benefit the residents. Moreover, the Constitution does not guarantee a person a right to housing at government expense at the locality of his or her choice. Locality is determined by a number of factors including the availability of land. <u>However, in deciding on the locality, the government must have regard to the relationship between the location of residents and their places of employment</u>."*[86]

82. 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

86 *Joe Slovo* at para 253.

were given a choice of getting their pension either in Delft or in Kwa-Langa.[87] Yacoob J writing for the majority noted that "*there are circumstances in which there is no choice but to undergo traumatic 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*."[88]

83. As we demonstrate later, the City's reliance on *Joe Slovo* is misplaced because unlike the State's offer of detailed measures to ameliorate the consequences of relocation in that case, the City has not undertaken to provide similar assistance to the Bromwell Street residents with regard to their proposed relocation to Wolwerivier.

International law

84. Section 39(1)(b) of the Constitution requires any court, tribunal or forum to consider international law when interpreting the Bill of Rights.[89] Section 233 of Constitution states that when interpreting any legislation, a court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.[90] When interpreting the Bill of Rights, this court may have regard to binding international law, non-binding international law, jurisprudence of international

87 *Joe Slovo* at para 254.
88 *Joe Slovo* at para 106.
89 Section 39(1)(b): "When interpretation the Bill of Rights, a court, tribunal or forum… must consider international law".
90 Section 233: "When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.'

human rights tribunals and where appropriate, the reports of specialised agencies. As Chaskalson P observed in *Makwanyane:*

> *"In the context of section 35(1), public international law would include non-binding as well as binding law. They may both be used under the section as tools of interpretation. International agreements and customary international law accordingly provide a framework within which Chapter Three can be evaluated and understood, and for that purpose, decisions of tribunals dealing with comparable instruments, such as the United Nations Committee on Human Rights, the Inter-American Commission on Human Rights, the Inter-American Court of Human Rights, the European Commission on Human Rights, and the European Court of Human Rights, and in appropriate cases, reports of specialised agencies such as the International Labour Organisation may provide guidance as to the correct interpretation of particular provisions of Chapter Three."*[91]

85. International human rights law recognises the centrality of location as a component of the right to adequate housing. South Africa is a party to and has recently ratified the International Convention on Economic, Social and Cultural Rights ("ICESCR").

86. General Comment 4 of the Committee on Economic, Social and Cultural Rights states that:

> "*(f) Location. Adequate housing must be in a location which allows access to employment options, health-care services, schools, childcare centres and other social facilities. This is true both in large cities and in rural areas where the temporal and financial costs of getting to and from the place of work can place excessive demands upon the budgets of poor households. Similarly, housing should not be built on polluted sites nor in immediate proximity to pollution sources that threaten the right to health of the inhabitants"*[92]

---

91 *S v Makwanyane and Another* 1995 (3) SA 391 (CC) at para 35

92 UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant)*, 13 December 1991, E/1992/23, available at: *http://www.refworld.org/docid/47a7079a1.html* [accessed 27 January 2017].

X FAILURE TO CONSIDER THE IMPACT OF RELOCATION

87. The residents will seek leave at the hearing of this application to introduce the affidavit of Shaun Gavin Russell ("Russell"), which *inter-alia* details the distance of Wolwerivier from the area where the residents live and are employed.

88. Russell's affidavit explains that Wolweriver, is 37.5km by taxi from Cape Town and that there is no direct taxi to Wolwerivier from Bromwell Street/Salt River, which means that a person travelling to Wolwerivier from Bromwell Street/Salt River would need to take a number taxis to reach Wolwerivier.[93] The route one way would cost a total of R30.00. Russell explains that a person would need to take a taxi on Salt River's Main road to the taxi rank in Cape Town. Then the person would need to get a taxi to Du Noon travelling along the N7 Highway. The person would then need to get off the taxi in Du Noon and take a taxi to Wolweriver. This taxi also travels along the N7, and there are only two trips made to Wolwerivier per day.[94]

89. Russell's affidavit annexes a map detailing the distances from Wolwerivier to the nearest services, such as bus stops, schools and clinics. The affidavit sets out the table below detailing the proximity of Wolwerivier to these services[95]:

Service	**Area**	**Distance from Wolwerivier**
Nearest regular taxi route	Outskirts of Melkbosstrand	2.5km
Nearest Golden Arrow Bus Stop	Philadelphia	3.9km
Nearest MyCiti Bus Stop	Melkbosstrand	10km
Nearest Train Station		17.5km

93 Russell: para 7 -8.
94 Russell: para 7
95 Russell: para 10.2

Nearest No Fee Primary School: Vaatjie More Primary School	South of Atlantis	8.2km
Nearest Fee Primary School: Sunningdale Primary School	Sunningdale	17.5km
Nearest No Fee Secondary School: Inkwekwezi Secondary School	Dunoon	10.8km
Nearest Fee Secondary School: Melkbosstrand High School	Melkbosstrand	10.6km
Nearest Clinic: Melkbos Clinic (which is only open twice a week)	Melkbosstrand	10km
Second Nearest Clinic: Dunoon Clinic	Dunoon	12.5km
Nearest Police Station: Melkbosstrand Police Station	Melkbosstrand	8.5km
Nearest Shopping Centre: The Birkenhead Centre	Melkbosstrand	10km

90. The applicants have explained in detail the negative consequences of being relocated to an area which is a great distance from where they currently reside, for example the impact on their children's schooling, access to medical care and increased travel costs impacting on their security of employment.[96] The applicants also raised concerns regarding media reports of lack of service delivery and violence which has occurred when new people have been relocated to Wolwerivier.[97]

91. The City was required to have regard to the relationship between the residents places of employment, their children's schooling and their access to health care facilities when deciding whether Wolwerivier was a reasonable and appropriate location for the provision of emergency accommodation to the residents. There is no evidence on the record that it has done so. Nor has the City proposed any measures to ameliorate the disruption to the residents lives which will be caused by relocation to Wolweriver. Instead, the City has adopted an inflexible and unreasonable approach, contending that no other possibility exists for the

96 See for example: Supporting Affidavit of Daphne Nel: p 425: para 8 - 12

97 Record: p 781: para 68, p 1035 to 1039.

relocation of the residents other than to Wolwerivier. We submit that this is impermissible. As the Court explained in *Blue Moonlight*:

> *"The inflexibility of the policy, which effectively precludes a proper consideration of the merits of the claims of evictees to be housed by the City, is in itself a basis for setting it aside. In the pre-constitutional era, in dealing with a fixed policy applied to the granting of housing permits by a township housing authority, the court in Mahlaela v De Beer NO, said the following:*
>
> *'[I]f the permit is refused or the grant of a permit is not considered on the ground of a fixed policy, there can be no proper exercise of a discretion or a performance of a duty and the decision of the superintendent falls to be set aside on this ground. This is also trite*.'"[98]

XI FAILURE TO CONSIDER ALTERNATIVE LAND

92. The applicants identified a number of available plots of land in the Woodstock and Salt River area as being suitable for the relocation of the applicants for the purposes of emergency housing.[99]

93. The City responded that the identified sites "*would not be suitable for a human settlement*" and that it is any event "*not in a position to provide individual tracts of land to beneficiaries…*"[100] Two of the sites identified by the applicants, erf 12161 and erf 10619 are however "*reserved for social housing*".[101] A further site, erf 13814, has been allocated as a transition area for people relocated from a site to be developed for housing, but according to the City, does not have capacity to accommodate the residents.[102] The City has not explained why the people who have been designated as beneficiaries of this transition area were

98 *Blue Moonlight*, para 56.
99 Record: p 33: para 76 – 77.
100 Record: p 567 – 569.
101 Record: p 568: para 125.4 & 125.8.
102 Affidavit of Riana Pretorius dated 9 November 2016, annexure RP2.

themselves not relocated to Wolwerivier and why the residents cannot be similarly accommodated at a transitional area developed in Woodstock or within the proximity of where they currently reside.

XII APPROPRIATE RELIEF

94. Section 38 of the Constitution provides for a court to grant *"appropriate relief including a declaration of rights*" where a right in the Bill of Rights has been infringed or threatened. The purpose of such relief is to vindicate the Constitution and deter future infringements. In *Fose*[103], the Constitutional Court made an important observation in relation to the duty of the courts when poor people, such as the residents, establish an infringement of their constitutional rights. Kriegler J said the following:

> *"Given the historical context in which the interim Constitution was adopted and the extensive violation of fundamental rights which had preceded it, I have no doubt that 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. In our context an appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced. 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*."[104] (emphasis added)

95 We submit that the relief sought by the applicants balances out the competing interests of Woodstock Hub and the residents by ensuring that Woodstock Hub

---

103 *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC)

104 *Fose*, para 56.

is able to obtain vacant occupation of the property once the City has complied with its constitutional obligations to provide temporary emergency accommodation in a location as near as possible to the residents current homes on the property. Woodstock Hub purchased the property for commercial purposes and was aware of the residents when it bought the property. The residents were at that stage lawfully occupying the property. The Constitutional Court has held that in such circumstances, a property owner must consider the possibility that occupation will endure for some time and may have to be somewhat patient.[105]

96. We respectfully submit that the reporting order sought in paragraph 4 of the notice of motion is appropriate given the City's failure to adopt a reasonable and flexible approach to addressing the actual situation of the residents and the consequences of relocating them to Wolwerivier.

XIII CONCLUSION

97. For the above reasons, we submit that the orders sought in paragraphs 2, 3, 4, 5 and 6 of the notice of motion should be granted and the City ordered to pay the residents costs.

SHELDON MAGARDIE

105 *Blue Moonlight*, para 40.

SIBONILE KHOZA

Counsel for the Applicants

Chambers

Cape Town

27 January 2017