**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:

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| **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 |

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| **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 |

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**HEADS OF ARGUMENT ON BEHALF OF THE APPLICANTS**

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## I INTRODUCTION

*"The dominant impact of wealth and private investment has also created and perpetuated spatial segregation and inequality in cities. In South Africa, for example, the impact of private investment in the urban core of cities has sustained the discriminatory patterns of the apartheid area, with wealthier, predominantly white households occupying areas close to the centre and poorer black South Africans living on the peripheries of cities. That "spatial mismatch", relegating poor black households to homeownership in peri-urban areas where employment opportunities are scarce, rather than rentals in the urban core, for example, has entrenched their poverty and cemented inequality."*[1]

[1] Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, Report to the United Nations General Assembly, Human Rights Council, Thirty-fourth session 27 February - 24 March 2017, A/HRC/34/51. See also Fedsure Ltd v Greater Johannesburg Transitional Metropolitan Council 1999 (1) SA 374 (CC) where Kriegler J observed at para 122: '*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*

1. The City of Cape Town ('the City') is one of the most historically spatially divided cities in the country. It is also in the midst of one of the worst housing affordability crises in the world.[2]

2. Despite this, the City has **no developments whatsoever** in the immediate City centre and surrounds to cater for the emergency housing needs of poor people who face eviction and homelessness due to unaffordable rents and rampant "gentrification" of inner city Cape Town neighbourhoods.

3. This application is brought by 27 low income and unemployed men, women and children ('the Bromwell Residents' or 'the Applicants') who have been evicted from their homes in which they have lived for virtually their entire lives.

4. The homes of the Applicants are in Bromwell Street, Salt River.

5. The reason why the Bromwell Residents have been evicted from their homes is simple: the property in which they live has been sold to the First Respondent, the Woodstock Hub, who intends to build "middle income" rental units in the rental band of R5000.00 to R9000.00 per month[3]. These rentals are simply beyond the means of the Bromwell Residents.

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*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.'*

[2] Record: p 470, para 12; Pretorius: p 583, para 152

[3] Record: annexure 'CC22': p 297, para 7

6. The Woodstock and Salt River area is one of the few inner city areas 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] It is a neighbourhood where the Applicants live, where those who are employed work, where their children go to school, where they access employment opportunities and family support structures and where they are readily able to access health care facilities.

7. The City is obliged by section 7(2) of the Constitution[5] to protect, promote and fulfill the Applicants' rights of access to adequate housing.[6] We submit that this duty includes the City taking reasonable measures to address evictions resulting from gentrification and unaffordability of inner city housing, planning and budgeting proactively for inner city emergency accommodation for people in the situation of the Applicants who are in desperate need and implementing its housing policy in a manner which is reasonable, flexible and does not contribute to spatial injustice and inequality.

8. The issue in this case is whether it is reasonable for the City to consider and offer temporary emergency accommodation for the Applicants at one location only: an isolated 'incremental development area' known as Wolwerivier, situated on the outskirts of Cape Town, some 28.2 km from Bromwell Street.

9. The Applicants submit that if the right of access to adequate housing in

[4] Record: p 470, para 12; p 477, para 31
[5] Section 7(2): 'The state must respect, protect, promote and fulfil the rights in the Bill of Rights.'
[6] 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.'

section 26 of the Constitution is to mean anything, it is that state action should mitigate, and not intensify spatial injustice and the marginalisation of poor and homeless people.

10. Yet it is precisely this marginalisation and continuing special injustice which results from what we submit is demonstrated by the evidence: an inflexible and unreasonable approach by the City to finding pragmatic case specific solutions to the emergency housing needs of the Applicants other than a non-negotiable offer of temporary emergency accommodation in Wolwerivier.

**Outline of the Applicants submissions**

11. The main submissions to be advanced by the Applicants are these:

    11.1. The City has a constitutional duty to provide the Applicants and their dependents residing with them with temporary emergency housing in a location as near as possible to the area in which they currently reside;

    11.2. By adopting an inflexible policy that relocation can only occur to an established incremental development area (IDA) and not individual parcels of City land, the City has taken an inflexible and unreasonable approach to the emergency housing needs of the Applicants which has precluded it from properly and reasonably considering any alternatives or case specific solutions except providing the Applicants with emergency housing units at Wolwerivier;

11.3. The City has failed to plan and budget proactively for the provision of emergency accommodation in proximity to the City which caters for the situations of persons such as the Applicants who have been evicted and face homelessness due to the unaffordability of housing in the inner city of Cape Town;

11.4. This Court may review the measures and policies adopted by the City to provide emergency accommodation in order to ensure that they meet the constitutional standard of reasonableness and do not include unreasonable limitations or exclusions. The relief sought by the Applicants in this regard is just and equitable and appropriate relief in terms of section 38 of the Constitution.

**The structure of these heads**

12. These heads of argument are structured as follows:

12.1. 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;

12.2. Second, we summarise the factual background and litigation history;

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

12.4. Fourth, we address the Wolwerivier Incremental Development Area development in more detail;

12.5. Fifth, we deal with the legal and policy frameworks;

12.6. Sixth, we detail the manner in which the inflexible approach adopted by the City to the situation of the Applicants violates its obligations to respect, protect and promote the Applicants' right of access to adequate housing; and

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

## II THE CURRENT POSITION ON THE PROPERTY

### Applicants who have vacated the property

13. The Second, Third, Sixth, Seventh, Fourteenth, Fifteenth, Sixteenth, Twenty-Fifth and Twenty-Sixth Applicants have obtained alternative accommodation and vacated the property. These Applicants no longer pursue any relief in this application on their behalf.

### Applicants in occupation of the property

14. A number of households / family units and individuals living on the property have not qualified for alternative housing and pursue the relief sought in this application. 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.

15. 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[7].

**Family Unit 1: Charnell Commando and Gicille Commando**

16. Charnell Commando (First Applicant) is a 29 year old now unemployed woman. She 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.[8]

**Family Unit 3: Priscilla Nel and Dylan Nel**

17. Priscilla Nel (Eighth Applicant) is 45 years old and is unemployed. She lives

[7] With regard to the constant attempts of these families to obtain alternative accommodation, see: p 1931 – 1944 of the record.
[8] Record: p 405 – 406; para 7 – 17. A supplementary affidavit will be filed shortly before the hearing of this application with updated details of the Applicants and recording any changes in their personal circumstances.

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.

18. 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.

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

19. 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 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.

20. 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.

21. 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**

22. Mark Neil Smith (Twenty-Third Applicant) is a 45 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 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.

23. 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.[10]

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

24. Brenda Sarah Smith (Seventeenth Applicant) is a 76 year old pensioner. She 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

[9] Record: p 429 – 430; para 1 – 11.
[10] Record: p448 – 449; para 1 – 10

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.[11]

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

25. Machal (Michelle) Smith (Eighteenth Applicant) is a 41 year old char worker in Salt River. She 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.[12]

[11] Record: p 452 – 455; para 1 -11
[12] Record: p 452 – 455; para 1 -11

**George Faria Rodrigues**

26. George Faria Rodrigues (Thirteenth Applicant) 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.[13]

**Faiza Fisher**

27. Faiza Fisher (Twelfth Applicant) is 46 years old and is 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 month on a temporary basis. She has been on the state housing waiting list since 2016.[14]

## IV FACTUAL BACKGROUND

28. 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.[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

[13] Record: p 432 – 435; para 1 – 9
[14] Record: p 438 -439; para 1 – 8.
[15] Record: p 768

tenancies of the Applicants being linked to previous lease agreements between their parents and grandparents and various owners of the property.[16]

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

30. On 30 October 2013, Reza Syms entered into a sale agreement with Woodstock Hub. Transfer only took place on 4 March 2015.[18] The Applicants only became aware of the sale agreement, through a press statement released by the Woodstock Hub on 26 August 2016.[19]

31. 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]

32. 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

[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
[19] Record: p 767 & p 995
[20] Record: p 767: para 13
[21] Record: p 767 para 13

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

33. 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.[24] The City was cited as respondent in each eviction application. No relief was sought against it.

34. 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.

35. 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]

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[22] Record: p 768 para 18
[23] Record: p 767 para 13
[24] Record: p 16, para 22.
[25] Record: p 8.

36. On 17 March 2016 Hlophe JP granted a further order allegedly 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 and the specific date to vacate through a social media post during May 2016, and immediately sought assistance from their attorney.

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

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

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[26] 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)

[27] Record: p 17, para 27 – 28

[28] 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.[29]

39. 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]

40. 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.[31]

41. 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.[32]

42. On 7 September 2016, Executive Mayor De Lille, the local councilor and the Mayor's spokesperson met with the Applicants at the property.

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[29] Record: p 19, para 37
[30] Record: p 21 – p 30
[31] Record: p 181
[32] Record: p 184

43. The Mayor agreed to look into possible solutions "*including whether land could be made available for the relocation of the Applicants*."[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 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.[34]

44. 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.[35]

45. 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

[33] Record: p 558, para 90
[34] Record: p 189 – p 245
[35] Record: p 25, para 49
[36] Record: p 25, para 52

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

46. 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.[38]

47. 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.[39] The City failed to respond to this letter save for a 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**

48. 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

[37] Record: p 26, para 58
[38] Record: p 277
[39] 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.[40]

49. 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.

50. 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.[41]

51. 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.[42]

52. 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

[40] Record: p 373-378
[41] Record: p 1123-1126
[42] The correspondence and information relating to the transportation issue is set out at p 1995 to 2173 of the record

on 31 January 2017 gave rise to an apprehension of bias against the Applicants.

53. 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.[43]

54. 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 from 12 – 14 September 2017 and setting time-lines for the delivery of further papers and heads of argument.[44]

55. Against this background, we turn next to the context against which we submit this application should be determined.

## IV THE HISTORICAL, SOCIAL AND ECONOMIC CONTEXT

56. 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.

57. The Constitutional Court has emphasized the importance of a contextual

[43] Record: p 2177 - 2178
[44] Record: p 2373.1 – 2373.3

approach.[45] 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"*.[46]

58. 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 in which the problem arises.[47]

59. An assessment of context is therefore at the centre of the enquiry into whether a government programme is reasonable.[48]

60. 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.[49]

[45] 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)
[46] South African Police Service v Public Servants Association 2007 (3) SA 521 (CC) para 20
[47] Government of the Republic of SA & Others vs Grootboom & Others 2001 (1) SA 46 (CC) at 43
[48] Mazibuko and Others v City of Johannesburg and Others 2010 (4) SA 1 (CC) at para 49
[49] Record: p 463 – p 511.

61. 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.[50] 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.[51]

62. 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*."[52]

63. 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 "middle to high income people, have controlled physical access, private security and are experienced as alienating by poor Coloured residents."[53]

[50] Record: p 470, para 13.
[51] Record: p 472, para 16 – 19
[52] Record: p 476, para 25
[53] Record: p 477

64. There is no dispute[54] on the 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 Woodstock and Salt River area.[55] 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."*[56] (emphasis added).

## V THE WOLWERIVIER DEVELOPMENT

### Background to the establishment of the Wolwerivier IDA

[54] 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).
[55] Record: p 477, para 30 – 34
[56] Record: p 477, para 30 – 34

65. The history of the Wolwerivier IDA is set out in the Draft Environmental Impact Assessment ('EIA') which informed an application for an environmental authorization, in terms of the National Environmental Management Act 107 of 1998 ('NEMA') for its use as a resettlement site.[57]

66. The environmental authorization related to a project for moving approximately 266 – 300 families from the Rooidakkies and Skandaalkamp informal settlements at the Vissershok landfill site to a new 6 ha site at Wolwerivier Farm 101 Portion 5, a property owned by the City.[58] In identifying a site for the relocation of the Vissershok occupiers, the draft EIA records that the criteria included "*…not relocating the beneficiaries too far from their current place of residence.*"[59] In considering the question of whether location factors favoured the proposed land use at the Wolwerivier site, the EIA recorded further that "*there is no intention to bring in people from anywhere other than the west coast area.*"[60]

**The Wolwerivier Social Audit**

67. During the course of November 2015, researchers from Ndifuna Ukwazi assisted a task team of residents from Wolwerivier in conducting a social audit of Wolwerivier.[61]

[57] Record: p 2219 - 2266
[58] Record: p 2213
[59] Record: p 2219
[60] Record: p 2235
[61] Record: p 2188 para 9

68. The findings of the social audit[62] were subsequently submitted to the Western Cape Provincial Government. On 18 December 2015, Ms Hopolang Selabalo, the previous head of the research unit at Ndifuna Ukwazi emailed a letter to the Minister of Local Government, Environmental Affairs and Development Planning, MEC Anton Bredell ("the MEC") and to the head of the Department of Environmental Affairs and Development Planning ("DEADP"), Mr Piet Van Zyl ("Mr Van Zyl").[63]

69. The letter alerted the MEC and the DEADP to the findings of the social audit, which included findings of the negative impact of relocation to Wolwerivier on the livelihoods of people who had been moved there and the people who had been relocated to Wolwerivier in July 2015 despite certain conditions and recommendations of the Environmental Authorisation for Wolwerivier ("the EA") not having been complied with.[64]

70. The DEADP responded on 31 January 2016 stating that it had consulted with the City and investigated the issues that the social audit raised and had found that '*five of the eight conditions of the EA raised in the Social Audit have not been fully complied with.*' The areas of non-compliance due to "*third party action/inaction"* included conditions relating to the provision of street lighting, the underground installation of electricity cables and putting in place Nuclear Urgent Protection Zone sirens or a public address system.[65]

[62] Record: p 2267 – 2307
[63] Record: p 2189 para 12
[64] Record: p 2189 para 13
[65] Record: p 2190 – 2191 para 16 - 17

71. In relation to conditions relating to the service provided by a mobile clinic at Wolwerivier to accommodate the increase in population, the letter noted that the City had indicated that a fully equipped Health container would soon be permanently placed in Wolwerivier as a local clinic.[66]

72. The letter addressed compliance by the City with various recommendations made in the EA and concluded by confirming that the Department would take up the issues with the City.[67]

73. In its latest affidavit, the City does not suggest that the Wolwerivier development was at all times in compliance with its EA conditions and states that "*in order to address the specific issues of implementation of the EA conditions*", the City will be submitting an application to amend the relevant conditions of the EA by 15 September 2017.[68]

## VI LEGAL FRAMEWORK

74. 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 general constitutional obligation of the City 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.

[66] Record: p 2191
[67] Record: p 2195 para 18
[68] Pretorius: para 40

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

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

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

76.1 it must be capable of facilitating the realization of the right;[69]

76.2 it must be comprehensive, coherent and co-ordinated;[70]

76.3 appropriate financial and human resources must be made available for the programme;[71]

76.4 it must be balanced and flexible and make provision for short, medium and long term needs;[72]

76.6 it must be reasonably conceived and implemented;[73]

76.7 it must be transparent and its contents made known effectively to the

[69] Grootboom at para 41
[70] Grootboom, para 41
[71] Grootboom, para 39
[72] Grootboom, para 43
[73] Grootboom, para 40 – 43

public;[74] and

75.8 it must make short term provision for those whose needs are urgent and who are living in intolerable conditions.[75]

77. 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. 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 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*

[74] Grootboom, para 43
[75] Grootboom, para 99

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

78. 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.[77] 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.)[78]

**Availability of resources**

79. The City has not expressly raised resources constraints as a defence to the relief sought by the Applicants. The City's answering affidavit resists the relief sought on the basis that its approach to emergency housing requires in the first place a determination of whether the household is able to address their housing needs through their own resources.[79]

[76] Port Elizabeth Municipality v Various Occupiers 2005 (1) 217 at para 29
[77] Blue Moonlight Properties v Occupiers of Saratoga Avenue 2009 (1) SA 470 (W) at para 64
[78] Port Elizabeth Municipality at para 31
[79] Record: p 542; para 47 and 48

80. On this score we respectfully submit that the City's suggestion that certain Applicants who are employed may not be in need of emergency accommodation[80], is mistaken. It is clear that households that live in sub-optimal housing circumstances and earn between R3500 and R13000 are entitled to state intervention.[81]

81. In relation to the determination of the location for its housing programmes, the City refers to its "*spread of different housing options available across its jurisdiction*" but confirms that *"as regards emergency housing, it is correct that there are no developments in the immediate City centre and surrounds*."[82] The City contends in vague terms that the reasons for this "*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."*[83]

82. According to the City "*There are however other housing programmes in which the immediate surrounds of the City is being targeted. These are aimed at creating affordable inner city housing and temporary housing projects. These are all in planning stages but at varying levels of planning and preparation*."[84] The examples of these programmes cited by the City include targeting of six separate inner city housing sites in Woodstock for

[80] For example family units 5 and 7
[81] Record: p 537 para 34
[82] Record: p 551 para 66
[83] Record: p 551 para 66.3
[84] Record: p 551 para 66.4

different housing projects, a transitional housing development and a social housing development in Salt River, the Cape Town Foreshore Freeways Project, the Maiden's Cove development and the Two Rivers Urban Park development.[85]

83. Notably, all of these examples relate to planned formal housing programmes. None of the planned projects make provision for inner city emergency accommodation for people facing a situation of homelessness and a situation of crisis due to eviction from their homes. In relation to the identification of land for emergency housing circumstances, it is apparent from the City's integrated development planning objectives, that the identification of such sites is confined to those which the City has identified as integrated development areas (IDA's)[86] which do not include any areas within the inner city of Cape Town.

84. The City's inflexible approach in this respect we submit is clear from its statement in terms that relocation can only occur to an established IDA "…*and not on ad hoc basis to individual parcels of City land. Costs, the regulatory framework as well as the prescripts of fairness do not allow for this to be done*."[87]

85. 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 arbitrarily decide which measures to implement and the enquiry into

[85] Record: 552
[86] Record: p 578 para 146.2.2
[87] Record: annexure RA3 p 795 - 799

whether the measures taken are reasonable must still take place.[88] In this regard, a balance between goal and means is required and the measures must be calculated to attain the goal expeditiously and effectively.[89] We submit in this regard that the City's inflexible approach to considering relocation of persons facing eviction in all cases only to an established IDA fails to achieve this balance.

**Duty to provide emergency accommodation**

86. 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.[90]

87. The obligation to ensure that evictions do not result in homelessness and further violations of human rights is an incident of the over-arching obligation of the state to ensure that evictions, where they do take place, are executed humanely.[91] 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 in

[88] City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another (CC) SA 104 (CC) at para 88.
[89] Grootboom at para 46
[90] 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 (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)
[91] Grootbooom para 16

*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) have all been advanced and rejected by this court and the Constitutional Court."*[92]

**Duty to address patterns of spatial injustice**

88. 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").

89. 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*."

90. 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:

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

*"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)

91. 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.[93]

92. 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*

[93] SPLUMA: section 6(2)

*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.*"[94]

## VIII POLICY FRAMEWORK

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

### The Emergency Housing Policy

94. 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.[95] 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*

[94] SPLUMA: section 6(1)(b), (c) and (e).
[95] EHP, para 2.2

*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*."[96]

95. The EHP also provides that "*assistance under the programme should wherever possible represent an initial phase towards a permanent housing solution. Where this is not possible, housing assistance under this programme can be provided through development of a temporary settlement area where feasible or practicable, while steps are being taken to prepare and develop land for permanent settlement purposes in terms of approved municipal IDP development priorities*."[97]

96. 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, its department responsible for land reform must be approached to secure such land in accordance with appropriate provincial land administration legislation.*"[98]

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

97. The City adopted the WSRF in 2003 in order to encourage inclusive redevelopment in Woodstock and Salt River.[99] It is common cause that the

[96] EHP, para 2.3
[97] EHP para 43
[98] EHP, para 43
[99] Record: p 479, para 36

WSRF is a one of the district policies for the Table Bay District.[100]

98. 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.[101]

99. 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.[102] The 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.[103]

100. 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 <u>to loft apartments and mixed use to accommodate the anticipated</u>*

[100] Record: p 479, para 37; p 585, para 159
[101] Record: p 480, para 38
[102] Record: p 586, para 161
[103] Record: p 586, para 160

*increase in demand for housing in the area as a result of the anticipated revitalization of the area*."[104] (emphasis added).

101. 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.[105]

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.[106] Its contention however is that "*it is not correct that housing solutions and social programmes have been excluded under the programme*."[107]

103. 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 by the City, 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*."[108] 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

[104] Record: p 586, para 160
[105] Record: p 480, para 38
[106] Record: p 587, para 162
[107] Record: p 587, para 162
[108] Record: p 585, para 160

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,[109] although according to the City, the developments are expected to be completed in 18 months time.[110]

## IX LOCATION OF EMERGENCY ACCOMMODATION

104. In addition to the legal and policy framework set out above, we submit that our courts and international instruments on the right to housing have recognised the importance of location as a component of the right to adequate housing.

### Blue Moonlight

105. 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*."[111]

### Changing Tides

106. 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:

[109] Record: p 481, para 39
[110] Record: p 587, para 163
[111] Blue Moonlight at para 104 (iv).

> *"….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."*[112]

**Joe Slovo**

107. *Joe Slovo*[113] 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.

108. 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, the measures tendered by the state to ameliorate the consequences of the relocation of the Joe Slovo community.

109. 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*

[112] Changing Tides at para 56.
[113] Residents of Joe Slovo Community, Western Cape v Thubelisha Homes 2010 (3) SA 454 (CC)

*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*."[114]

110. 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.[115] 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*."[116]

**Baron v Claytile**

111. In *Baron and others v Claytile (Pty) Limited and Another* ('Baron')[117], 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

[114] Joe Slovo at para 253
[115] Joe Slovo at para 254
[116] Joe Slovo at para 106
[117]Baron and others v Claytile (Pty) Limited and Another (CCT241/16) [2017] ZACC 24 (13 July 2017)

Extension of Security of Tenure Act 108 of 1997 ('ESTA').

112. During the course of the proceedings, the City had made the appellants an offer of alternative accommodation of five housing units at Wolwerivier.[118] 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.[119] 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*."

113. We respectfully submit 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.[120]

[118] Baron, para 30
[119] Baron, para 31
[120] Baron, para 32

114. In the present case, the Applicants have set out in detail the hardships and prejudice they will suffer if relocated to Wolverivier.[121] 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*."[122]

**International law**

115. Section 39(1)(b) of the Constitution requires any court, tribunal or forum to consider international law when interpreting the Bill of Rights.[123] 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

[121] See for example the affidavits at page 1838 to 1849 of the record
[122] Baron, para 20
[123] Section 39(1)(b): "When interpretation the Bill of Rights, a court, tribunal or forum… must consider international law".

international law.[124] When interpreting the Bill of Rights, this Court may have regard to binding international law, non-binding international law, jurisprudence of international 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."*[125]

116. 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").

117. 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*

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124 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.'

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

*sites nor in immediate proximity to pollution sources that threaten the right to health of the inhabitants"*[126]

## X FAILURE TO CONSIDER THE IMPACT OF RELOCATION

118. The Applicants have sought to introduce the affidavit of Shaun Gavin Russell ("Russell"), which *inter-alia* details the distance of Wolwerivier from the area where the Applicants live and are employed.[127]

119. Russell's affidavit explains that Wolwerivier, 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.[128] 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 Wolwerivier. This taxi also travels along the N7, and there are only two trips made to Wolwerivier per day.[129]

120. 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

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126 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].

127 Record: p 1902 - 1910

128 Record: p 1905

129 Russell: p 1906 para 7.1.3.3

services[130]:

| 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 |
| 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 |

121. 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.[131] 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.[132]

[130] Record: p 1908
[131] See for example: Supporting Affidavit of Daphne Nel: p 425: para 8 - 12
[132] Record: p 781: para 68, p 1035 to 1039.

122. The City was required to have regard to the relationship between the Applicants 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. Instead, the City has adopted an inflexible and unreasonable approach, contending that no other possibility exists for the relocation of the Applicants 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*."'[133]

123. In an attempt to address the obvious concerns relating to the transportation needs of the residents and the schooling needs of their children, the City has provided what it has determined to be an "estimated monthly cost" of the transport needs of the residents[134] being an amount of R7615.40 per month and suggested that the Woodstock Hub not the City should pay this amount to the residents. The Woodstock Hub has in turn tendered payment of this amount.[135]

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[133] Blue Moonlight, para 56
[134] Record: 2149 para 8.4
[135] Record: p 2150 para 8.5

124. The Applicants responded to this tender of a specified monetary amount for all the residents by recording inter-alia that it failed to take into account the times of the available transport options, how the number of "assumed trips" was determined, the need for parents to travel with their children and persons to attend health care facilities and why certain Applicants were excluded.[136]

125. We submit that the City's stance regarding the provision of transportation assistance, while expressly denying that the City itself had any obligation to provide such assistance with transport and schooling for children, is consistent with its non-negotiable approach to the provision of emergency accommodation at Wolwerivier only. For measures to be truly ameliorative and consistent with meaningful engagement, the actual situation of the persons affected must be taken into account.

126. The underlying premise of the City's approach, as evidenced by its statements on the provision of transport, is in effect that there is "*no conceivable reason*"[137] why the Applicants should continue to access schools, health facilities and pension points from the places that they do while living in Bromwell Street. If, according to the City, the Applicants "*choose*" to do so, it is "*unreasonable*" for that cost to be subsidised by the City.

127. We submit that this approach by the City of Cape Town, with respect,

[136] Record: p 2037 - 2039
[137] Record: p 2147 para 8.1

demonstrates a bland disregard for the impact of a forced eviction from one's home on the actual day to day lives of those who are subject to it. As Sachs J observed in PE Municipality:

> *"Section 26(3) evinces special constitutional regard for a person's place of abode. It acknowledges that a home is more than just a shelter from the elements. It is a zone of personal intimacy and family security. Often it will be the only relatively secure space of privacy and tranquillity in what (for poor people in particular) is a turbulent and hostile world. Forced removal is a shock for any family, the more so for one that has established itself on a site that has become its familiar habitat. As the United Nations Housing Rights Programme report points out: To live in a place, and to have established one's own personal habitat with peace, security and dignity, should be considered neither a luxury, a privilege nor purely the good fortune of those who can afford a decent home. Rather, the requisite imperative of housing for personal security, privacy, health, safety, protection from the elements and many other attributes of a shared humanity, has led the international community to recognize adequate housing as a basic and fundamental human right."*[138]

## XI FAILURE TO CONSIDER ALTERNATIVE LAND

128. The Applicants with the assistance of their attorneys identified a number of City and Western Cape Provincial Government parcels of land in the Woodstock and Salt River area (within 5km of their homes) zoned for residential use.[139] Annexure CC21 to the Applicants founding affidavit listed 45 parcels of land, 15 owned by the City and 30 by the Provincial Government of the Western Cape.[140]

[138] PE Municipality at para 17
[139] Record: p 33: para 76 – 77.
[140] Record: p 295

129. The City responded that "*many*" of the identified sites "*are too small for a human development"* and that it is any event "*not in a position to provide individual tracts of land to beneficiaries; to do to do so is simply unaffordable (the costs of individual provision by far exceeding the costs of a development). It would also create a great unfairness amongst different beneficiaries of State assisted housing. Simply put, a beneficiary in Khayelitsha would receive a structure to a value of under R 200 000.00, whereas as a beneficiary of an individual land parcel in the City could receive property to a value of perhaps ten-fold that figure. Such a result is neither sustainable nor fair."*[141]

130. Two of the sites identified by the applicants, erf 12161 and erf 10619 are however "*reserved for social housing*".[142] A further site, erf 13814, has been allocated as a temporary transition area for people who need to be relocated from a site to be developed for housing, but according to the City, does not have capacity to accommodate any further occupiers the residents.[143]

131. Erf 13814 is located in the Woodstock area and its allocation as a temporary transition area is for persons who need to be relocated from another site in Woodstock to be developed for social housing.[144]

[141] Record: p 569 para 126
[142] Record: p 568: para 125.4 & 125.8.
[143] Record: p 1881.
[144] Record: p 1976 para 20

132. The City does not explain in its affidavit[145] why the people who have been designated as beneficiaries of this particular transition area were themselves not relocated to Wolwerivier and instead accommodated in a temporary transition area in the Woodstock / Salt River area.

133. We submit that the relocation of the erf 13814 beneficiaries to an area close to where they currently reside belies the City's argument about the unfairness which it alleges follows from the difference between a beneficiary receiving housing assistance in Khayelitsha and receiving such assistance in the City.

134. In a letter to the City dated 8 December 2016[146] the Applicant's attorneys provided details of further state owned vacant buildings/properties and requested that these be considered and asked for the City to respond and advise if these properties could be used for emergency accommodation and if not the reasons why the properties were unsuitable. The City responded that 13 of the properties identified belong to the Department of Public Works, for whom it could not speak and that the City had determined that none of the properties were suitable for temporary accommodation "*save for one*" (erf 13814), but which had no capacity to accommodate further occupiers.[147]

135. In relation to the sites owned by the Department of Public Works and Western Cape Provincial Government, the City confirms that the state land disposal committee considers requests to transfer property to municipalities

[145] Record: p 1975 - 1976
[146] Record: p 1835
[147] Record: p 1881 para 15

and that such transfers have taken place in relation to both national and provincial land holdings.[148]

136. The EHP in this regard specifically provides for a municipality to approach a provincial department of land reform for the use of land for emergency housing which *vests or is registered in the name of a provincial government.*[149] We submit that the City has not demonstrated what reasonable measures it has taken to approach the national or provincial sphere of government if it is unable to meet an emergency housing need from its own resources. Given their intertwined responsibilities, all spheres of government should generally be involved in complex legal proceedings regarding eviction and access to adequate housing.[150]

## XII APPROPRIATE RELIEF

137. 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*[151], the Constitutional Court made an important observation in relation to the duty of the courts when poor people, such as the Applicants, establish an infringement of their constitutional rights. Kriegler J said the following:

[148] Record p 567 para 124.2 -124.3
[149] EHP, para 43
[150] Blue Moonlight para 45
[151] Fose v Minister of Safety and Security 1997 (3) SA 786 (CC)

> *"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."*[152] (emphasis added)

138. We submit that the relief sought by the Applicants balances the competing interests of Woodstock Hub and the Applicants by ensuring that Woodstock Hub 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 Applicants current homes on the property.

139. Woodstock Hub purchased the property for commercial purposes. It was aware that the Applicants lived there when it bought the property. The Applicants 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.[153]

[152] Fose, para 56
[153] Blue Moonlight, para 40

140. It is submitted 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 Applicants and the consequences of relocating them to Wolwerivier.

## XIII CONCLUSION

141. For the above reasons, it is submitted that the orders sought in paragraphs 2, 3, 4, 5 and 6 of the notice of motion should be granted and the City and the Woodstock Hub must be ordered to pay the costs of this application.

**SHELDON MAGARDIE**
Counsel for the Bromwell Residents

Chambers
Cape Town
31 August 2017

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