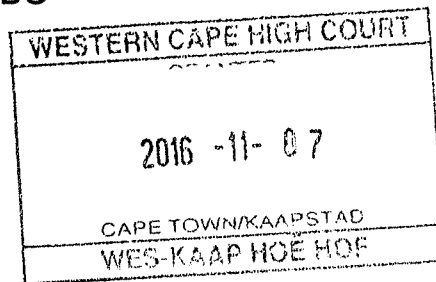


IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case Number: 13946/2015
13947/2015
13951/2015
13952/2015

In the matter between:

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



DELIA SMITH	Sixteenth Applicant
BRENDA SARAH SMITH	Seventeenth Applicant
MICHELLE SMITH	Eighteenth Applicant
MEGAN SMITH	Nineteenth Applicant
ROSELINE SMITH	Twentieth Applicant
CHESLYN SMITH	Twenty-First Applicant
RASHIEDA SMITH	Twenty-Second Applicant
MARK NEIL SMITH	Twenty-Third Applicant
MOGAMAT TAURIQ SMITH	Twenty-Fourth Applicant
GRAHAM BEUKES	Twenty-Fifth Applicant
SOFIE MASILO	Twenty-Sixth Applicant

and

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

FILING NOTICE: APPLICANTS' HEADS OF ARGUMENT

PLEASE TAKE NOTICE THAT the following documents are delivered evenly
herewith:

1. Applicants' Heads of Argument

DATED AT CAPE TOWN ON THIS 7th DAY OF NOVEMBER 2016



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

Case Number: 13946F15
13947F15
13951F15
13952F15

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
MEESHADÉ 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

APPLICANTS' HEADS OF ARGUMENT

A INTRODUCTION

1. The applicants are a group of 41 women, men and children living in four housing units at erf 10626, Bromwell Street, Salt River, Cape Town ("the property").¹ The applicants have lived on the property for most of their lives. It is their only home. They currently face eviction from their homes and the prospect of being left homeless with literally no roof over their heads.
2. We submit that the first respondent ("the City") is under a duty in terms of section 7(2) of the Constitution to respect, protect and promote the applicants'

¹ The second and third applicants no longer seek the relief sought in this application.

rights of access to adequate housing by providing the applicant's with temporary emergency accommodation in the event of their eviction from the property.

3. This application raises two issues in relation to the City's obligation to provide temporary emergency accommodation. The first issue is whether the City is required to provide such temporary emergency accommodation in circumstances where the applicants have applied for but have not yet been allocated housing in terms of alternative state funded housing programmes. The second issue relates to the location of the temporary emergency accommodation itself.

4. In relation to the first issue, the applicants have simultaneously with the filing of these heads of argument, filed an application for the postponement of the hearing set down for 9 November 2016. The basis of the postponement application is that the applicants' applications for social and GAP/FLISP housing have not yet been determined and that it is necessary for this court to be appraised of the outcome of those applications before determining this application. These heads of argument address the merits of the application in the event that the postponement application is refused. They are structured as follows:
 - 4.1 First, we set out the factual background and litigation history;
 - 4.2 Second, we address the applicable legal principles; and
 - 4.3 Third, we deal with the issue of an appropriate remedy.

B FACTUAL BACKGROUND

5. 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, second applicant, sixth applicant, eleventh applicant, seventeenth applicant and twenty-fifth applicant were parties to the lease agreements.² 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.³
6. The Syms brothers were co-owners of the property. Reza Syms was responsible for the collection of rent from the lessees.⁴
7. On 30 October 2013, Reza Syms entered into a sale agreement with the first respondent in terms of which the latter purchased the property. Transfer took place on 4 March 2015.⁵ The applicants only became that the sale agreement has been entered into on 30 October 2013 through a press statement released by the first respondent on 6 August 2016.⁶

² Replying Affidavit: Vol 3: p 768

³ The history of each family unit's occupation of the property is set out in detail in annexure "D" at p 206, Vol 3 of the record.

⁴ Founding Affidavit: annexure CC9: Vol 2: page 206.

⁵ Founding Affidavit: Vol 2: p 14: para 18

⁶ Replying Affidavit: Vol 3: p 767 & 995.

8. The applicants continued to occupy the property after it was sold. Reza Syms collected rent on a monthly basis until early 2014.⁷ 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 could not assist.⁸
9. During June 2014, applicants received letters of cancellation of their leases from attorneys acting on behalf of the first respondent. The letters required the applicants to vacate the property.⁹ The applicants again approached the Tribunal for assistance but did not receive any feedback on its investigation.¹⁰

Litigation history

10. The first respondent 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.¹¹ The City was cited as respondent in each eviction application. No relief was sought against it.
11. The eviction applications were initially set down for hearing on 8 September 2015. The hearing was postponed to 22 September 2015 in order

⁷ Replying Affidavit: Vol 3: p 767: para 13

⁸ Replying Affidavit: Vol 3: p 767

⁹ Replying Affidavit: Vol 3: p 768 para 18

¹⁰ Replying Affidavit: Volume 3: p 767 para 13

¹¹ Founding Affidavit: Vol 2: p 15-16 para 22

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.

12. 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.¹² 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 2016.¹³ According to the applicants, this order was taken 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.¹⁴
13. On 4 August 2016, after becoming aware of the 17 March 2016 order, 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 2016.¹⁵
14. 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

¹² Vol 1: part B, p 8

¹³ Founding Affidavit: Vol 2: annexure CC2: p 97

¹⁴ Founding Affidavit: Vol 2: p 17: para 27 - 28

¹⁵ Founding Affidavit: Vol 2: p 18: para 33

2016 order. That application was struck off the roll by Yekiso J on 8 August 2016. The applicants, at that stage still 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 2016.¹⁶

15. During 3 September 2016 to 19 September 2016, a series of engagements took place between the applicants, their attorneys, various City officials and the Executive Mayor concerning the availability of alternative accommodation for the applicants.¹⁷ These engagements 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.¹⁸

16. The City responded on 5 September 2016 stating inter-alia that the eviction was a "private eviction" which was apparently "just and equitable" without emergency accommodation being provided to the applicants and that in any event 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, should they apply and meet the criteria.¹⁹

¹⁶ Founding Affidavit: Vol 2: p 19: para 37

¹⁷ Founding Affidavit: Vol 2: p 21 to 30

¹⁸ Founding Affidavit: Vol 2: annexure CC7: p 181

¹⁹ Founding Affidavit: annexure CC8: Vol 2: p 184

17. 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.²⁰ 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.²¹
18. 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 residents to apply for social housing and that the residents 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.²²
19. 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.²³ What then followed was a telephone call to the applicants' community representatives requesting the applicants to attend a meeting "to apply for

²⁰ First Respondent's Answering Affidavit: Vol 3: p 558: para 90

²¹ Founding Affidavit: annexure CC9: p 189 - 245

²² Founding Affidavit: Vol 2: p 25: para 49

²³ Founding Affidavit: Vol 2: p 25: para 52

housing". This meeting was held at the City's housing office on 12 September 2016 where the applicants' details were updated and registered on the housing database.²⁴

20. 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.²⁵
21. 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 approached for relief.²⁶ The City failed to respond to this letter save for a statement from its legal advisor that she would take instructions. This application was then launched on 20 September 2016.

²⁴ Founding Affidavit: Vol 2: p 26: para 58

²⁵ Founding Affidavit: annexure CC16: Vol 2: p 277

²⁶ Founding Affidavit: annexure CC19: Vol 2: p 291

C APPLICABLE LEGAL PRINCIPLES

The City's obligation to provide temporary emergency accommodation

22. It is now well established from a number of Constitutional Court and Supreme Court of Appeal decisions 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.²⁷ 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.²⁸
23. To the extent that any confusion remained on the extent of a municipality's obligations to provide emergency housing to people facing imminent homelessness due to eviction from their homes, this was dispelled in *Changing Tides*, where Wallis JA observed:

"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

²⁷ 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) at para 46.

²⁸ Government of the Republic of South Africa and others v Grootboom and others 2001 (1) SA 46 at para 88.

*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."*²⁹

24. The City does not appear to dispute that as a matter of general principle municipalities are under a constitutional duty to provide temporary emergency accommodation to persons facing homelessness due to eviction from their homes. Indeed the City accepts that *"an eviction of longstanding tenants and in the light of the facts of this matter, should not result persons being rendered homeless."*³⁰

25. The essence of the City's opposition to the relief sought by the applicants is however the contention that it is not obliged to provide all of the residents with temporary emergency accommodation as *"at least some of these residents earn substantially in excess of the cut-off for state assisted housing (R3 500.00) and would, as a result, be eligible for other housing programmes: those residents have no right to emergency accommodation."* We submit that this contention is inconsistent with both the established case law and the terms of the National Housing Code: Emergency Housing Programme.

²⁹ City of Johannesburg v Changing Tides 74 (Pty) Ltd and Others 2012 (6) SA 294 (SCA) at para 39

³⁰ Second Respondent's Answering Affidavit: Vol 3: p 571: para 133

26. The Emergency Housing Programme ("EHP") forms part of the National Housing Code, 2009 adopted in terms of the Housing Act 107 of 1997 and regulates the provision of temporary housing in emergency circumstances. This includes the provision of temporary shelter in the aftermath of evictions.³¹ The EHP provides for the availability of funding for emergency housing, specifies the steps to be taken to apply for such funding and specifies the standard of shelter to be provided.
27. Paragraph 2.3.1 of the EHP defines an emergency housing circumstance as including a situation where persons are "*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*".³²
28. The EHP provides that persons who are eligible for assistance are those "*who are not in a position to address their housing emergency from their own resources...*" and includes "*households that comply with the Housing Subsidy Scheme qualification criteria*" and "*households/persons with a monthly income exceeding the maximum income limit as approved by the Minister from time to time.*" The EHP also provides for assistance to be given to "*persons who have previously received housing assistance and who previously owned and/or currently own a residential property. Assistance may be considered on condition that access to the benefits of the Programme will be considered on a case by*

³¹ Founding Affidavit: Vol 2: p 35: para 84 - 86

³² Emergency Housing Programme, p 15: para 2.3.1

*case basis to determine the facts and the approval of access in accordance with the provisions of the detailed Implementation Guidelines of the Programme.”*³³

29. We submit that it is clear that the EHP does not expressly exclude persons who may qualify for housing benefits under alternative housing programmes. This is evident from the provisions of the EHP which permit assistance under the EHP to be provided to persons with a monthly income “*exceeding the maximum limit determined by the Minister*”, and for assistance under the EHP to be provided on a “*case by case basis*”. The overriding criteria, we submit, is whether persons are facing “*imminent eviction from their homes*” and are “*unable to address their housing emergency using their own resources.*”

30. As matters presently stand, the vast majority of the applicants have applied for, but have not been allocated housing under alternative housing programmes. All the applicants who potentially qualify for social housing have submitted their applications which are pending before the relevant social housing institutions.³⁴ Insofar as the ability of those residents who are employed to obtain alternative accommodation is concerned, they have filed affidavits recording their unsuccessful attempts to secure affordable alternative accommodation.³⁵

31. The applicants' inability to afford suitable alternative accommodation is borne out by the contents of Ms Royston's expert affidavit which records that the average rental price for all properties in Woodstock for the two years has been R5275.00

³³ Emergency Housing Programme, p 16, para 2.4

³⁴ Replying Affidavit: Vol 3: p 779: para 62

³⁵ Applicants' Supporting Affidavits: Vol 2: p 402 – p 461

per month, in contrast to the average rental in 2003 of between R1000.00 and R2000.00 per month. The average sale price of houses and apartments in Woodstock in 2015 was R1.6 million. Ms Royston attributes the rise in rentals and property prices to the phenomenon of “gentrification” of the area, with the adverse consequences of urban regeneration on the affordability of inner City Cape Town also being recognised by the provincial Premier.³⁶

32. We submit that Ms Royston’s affidavit also provides an important context to this application and the issues it raises concerning the City’s obligations to protect the housing rights of poor, working class people in the Woodstock / Salt River area who are losing their homes as a result of commercial developments such as that of the first respondent. The Constitutional Court has frequently emphasised the importance of context in the determination of cases involving the interpretation of socio-economic rights.³⁷ As the Court explained in *South African Police Service v Public Servants Association*, “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”.³⁸

33. On the issue of whether the applicants are entitled to emergency housing, the City appears to contend that it is entitled to “weed out” those applicants who

³⁶ Supplementary Affidavit: Vol 2: p 477 - 478

³⁷ *Zondi v MEC for Traditional and Local Government Affairs and Others* 2005 (3) SA 589 (CC); *Dawood and Another v Minister of Home Affairs and Others*; *Shalabi v Minister of Home Affairs and Others*; *Thomas and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC); *Mohlomi v Minister of Defence* 1997 (1) SA 124 (CC); *Minister of Home Affairs v Fourie*; *Lesbian and Gay Equality Project and Others v Minister of Home Affairs* 2006 (1) SA 524 (CC)

³⁸ *South African Police Service v Public Servants Association* 2007 (3) SA 521 (CC) at para 20

qualify for housing under alternative housing programmes before providing the applicants with emergency housing.

34. A similar contention was advanced by the City of Johannesburg in *Changing Tides* and rejected by Wallis JA who stated the following:

"The argument before us claimed an entitlement on the part of the City to determine whether the persons seeking temporary emergency accommodation were entitled thereto before providing such accommodation. It was for this reason submitted that persons requiring that assistance should apply to one of the City's ESP centres, for their situation to be assessed and the City to decide whether to afford them the accommodation they seek.

I do not think that the approach of the City, that the affected people must approach one of its ESP Centres for assistance and follow conventional procedures thereafter, is either correct or desirable. Its immediate disadvantage is that it sets in train a bureaucratic process that will inevitably involve delay and probably spawn further disputes and litigation.

The procedure the City proposed was clearly directed at weeding out those who in its view would not qualify for such assistance on grounds of income, need, ability to find accommodation elsewhere and the like. All of this is conducive to delay in a case where there is no challenge to the proposition that an eviction order is just and equitable, subject to

determining a just and equitable date and suitable conditions concerning alternative accommodation.³⁹

35. The City's contention that it is entitled to refuse the emergency accommodation claims of persons who may qualify for alternative state housing assistance is based on a misconception which wrongly equates potential qualification for alternative housing with actually being allocated such housing. None of the applicants have been allocated housing under the alternative housing programmes. They are all currently unable to provide for their housing needs using their own resources and are therefore in a situation of emergency housing need as contemplated by the EHP as a result of imminent eviction from their homes. We submit that in these circumstances, the City is under a constitutional obligation to provide the applicants, who are all facing possible homelessness, with temporary emergency accommodation.

Location of emergency accommodation

36. The Constitutional Court and Supreme Court of Appeal have repeatedly upheld on appeal orders directing local authorities to ensure that temporary emergency accommodation is provided in a location as near as reasonable possible to the premises where evictees reside. 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

³⁹ Changing Tides, at paras 49 - 50

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."⁴⁰

37. 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."*⁴¹

38. 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.⁴² A specified number of available plots of land in the Woodstock and Salt River area were in this regard identified in the applicants' founding affidavit as being suitable for the relocation of the applicants for the purposes of emergency housing.⁴³

⁴⁰ Blue Moonlight at para 104

⁴¹ Changing Tides at para 56

⁴² See for example: Supporting Affidavit of Daphne Nel: p 425: para 8 - 12

⁴³ Founding Affidavit: Vol 2: p 33: para 76 - 77

39. 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...*"⁴⁴ Two of the sites identified by the applicants, erf 12161 and erf 10619 are however "*reserved for social housing*".⁴⁵
40. Insofar as Wolwerivier (the City's incremental development area) is concerned, the applicants have raised concerns regarding media reports of lack of service delivery and violence which has occurred when new people have been relocated to Wolwerivier.⁴⁶ Notwithstanding that these allegations regarding the situation at Wolwerivier were raised (unavoidably) for the first time in the Applicant's Replying Affidavit, a further reply thereto by the City would have been expected and appropriate, if the allegations contained in the media reports relied by the applicants were false or unsubstantiated.

D APPROPRIATE RELIEF

41. In *Port Elizabeth Municipality*, the Constitutional Court noted that section 26(3) of the Constitution⁴⁷ requires courts to "*seek concrete and case-specific solutions to the difficult problems that arise*"⁴⁸ in eviction proceedings. In this regard, section 26(3) is deliberately non-prescriptive:

⁴⁴ Answering Affidavit: Vol 3: p 567 - 569

⁴⁵ Answering affidavit: Vol 3: p 568: para 125.4 & 125.8

⁴⁶ Replying Affidavit: Vol 3: p 781: para 68: annexure RA19: p 1035 to 1039

⁴⁷ Section 26(3): "No one may be evicted from their home or have their home demolished without an order of court made after considering all relevant circumstances. No legislation may permit arbitrary evictions."

⁴⁸ PE Municipality, at para 22

"The way in which the courts are to manage the process has accordingly been left as wide open as constitutional language could achieve, by design and not by accident, by deliberate purpose and not by omission."⁴⁹

42. The Court observed that:

"the Constitution imposes new obligations on the courts concerning rights relating to property not previously recognised by the common law. It counterposes to the normal ownership rights of possession, use and occupation, a new and equally relevant right not arbitrarily to be deprived of a home. The expectations that ordinarily go with title could clash head-on with the genuine despair of people in dire need of accommodation. The judicial function in these circumstances is not to establish a hierarchical arrangement between the different interests involved, privileging in an abstract and mechanical way the rights of ownership over the right not to be dispossessed of a home, or vice versa. Rather it is to balance out and reconcile the opposed claims in as just a manner as possible taking account of all the interests involved and the specific factors relevant in each particular case."⁵⁰

43. We submit that the relief sought by the applicants balances out the competing interests of the first respondent and the applicants by ensuring that the first respondent is able to obtain vacant occupation of the property once the City has

⁴⁹ PE Municipality, at para 22

⁵⁰ PE Municipality, at para 23

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.

44. The reporting order sought in paragraph 4 of the notice of motion is appropriate given the City's apparent failure to come to grips with its constitutional obligations and its adoption of an approach which denies access to emergency housing to the applicants notwithstanding that they are in a situation of emergency housing need and are unable to obtain alternative accommodation from their own resources.

E CONCLUSION

45. 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 applicants' costs.

SHELDON MAGARDIE
SIBONILE KHOZA
Counsel for the Applicants

Chambers
Cape Town
7 November 2016

LIST OF AUTHORITIES

1. Occupiers of Shulana Court, 11 Hendon Road, Yeoville v Steele 2010 (9) BCLR 911 (SCA)
2. Port Elizabeth Municipality v Various Occupiers 2005 (1) SA 217 (CC)
3. 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)
4. Government of the Republic of South Africa and others v Grootboom and others 2001 (1) SA 46 (CC)
5. City of Johannesburg v Changing Tides 74 (Pty) Ltd and Others 2012 (6) SA 294 (SCA) ✓
6. Zondi v MEC for Traditional and Local Government Affairs and Others 2005 (3) SA 589 (CC)
7. Dawood and Another v Minister of Home Affairs and Others; Shalabi v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others 2000 (3) SA 936 (CC)
8. Mhlomi v Minister of Defence 1997 (1) SA 124 (CC)
9. Minister of Home Affairs v Fourie; Lesbian and Gay Equality Project and Others v Minister of Home Affairs 2006 (1) SA 524 (CC)
10. South African Police Service v Public Servants Association 2007 (3) SA 521 (CC)