

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

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

In the matter between:

CHARNELL COMMANDO	First Applicant
GERALDINE STHEPHANIE CUPIDO	Second Applicant
NORMAN ANDREW CUPIDO	Third Applicant
GICILLE VANNESSA COMMANDO	Fourth Applicant
WILLEM NEL	Fifth Applicant
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

HEADS OF ARGUMENT ON BEHALF OF SECOND RESPONDENT

Table of Contents

INTRODUCTION.....	3
AN OVERVIEW OF THE RELEVANT FACTUAL BACKGROUND	4
THE OBLIGATION TO PROVIDE EMERGENCY ACCOMMODATION	5
The law	5
The facts.....	8
THE LOCATION OF ALTERNATIVE HOUSING	11
RELIEF	14

INTRODUCTION

1. The Applicants ("**the Residents**") instituted these proceedings on 20 September 2016, in which they seek a suspension of the execution of inter alia a previous Order for their eviction in terms of Part A of the Notice of Motion. The Second Respondent ("**the City**") abides the outcome of Part A of the application.
2. As regards Part B of the Notice of Motion, the Residents seek inter alia the following Orders as against the City:
 - 2.1. An Order declaring that the City is under a constitutional duty to provide the Residents and their dependants residing with them with temporary emergency accommodation in a location as near as possible to the property at which they currently reside.¹
 - 2.2. An Order directing the City to make available the temporary emergency accommodation within three months of the date of this Order.²
3. On 7 November 2016, the Residents brought an application for a postponement in respect of the merits of the matter. The City has no objection to the postponement sought and abides the outcome of that application.
4. In the event that a postponement is refused, we anticipate that the matter will proceed to be heard on the merits. These Heads of Argument accordingly address the merits of the matter in relation to two key issues, viz:

¹ NM; page 4; par 2.

² NM; page 4; par 3.

- 4.1. Whether the City has an obligation to provide the ALL of the Residents and their dependants with temporary emergency accommodation .
 - 4.2. If so, the location of such emergency accommodation.
5. Before addressing each of these issues in turn, we first provide an overview of the relevant factual background.

AN OVERVIEW OF THE RELEVANT FACTUAL BACKGROUND

6. The factual background against which this application falls to be considered is the following:
- 6.1. The property that is the subject of this application is Erf No 10626, Bromwell Street, Salt River ("**the property**").³
 - 6.2. The erf size of the property is approximately 806m² in extent (and consists of five different units (122, 124, 126 and 130 (including 130A)).⁴
 - 6.3. The property is owned by the First Respondent. It was acquired pursuant to a Deed of Sale with the previous owners of the property, seemingly concluded on 30 October 2013. The First Respondent took transfer of the property on 4 March 2015 and subsequent to having done so it brought various applications for the eviction of the Residents. The City played no role in the sale or acquisition of the property.⁵

³ City AA; page 523; par 5.

⁴ City AA; page 523; par 6.

⁵ City AA; page 523; par 7.

- 6.4. An eviction order has already been granted; that Order stands.
- 6.5. The property has been occupied by the Residents over a prolonged and extended period; they have done so pursuant to rental agreements with the previous owner (which was another private entity) of the property.⁶
- 6.6. The Residents comprise ten family units and two individual households.⁷
The number of residents is 43, including 17 children.⁸

THE OBLIGATION TO PROVIDE EMERGENCY ACCOMMODATION

The law

7. We respectfully submit that the point of departure in the adjudication of this matter is section 26 of the Constitution which provides as follows:
 - "(1) Everyone has the right to have access to adequate housing.
 - (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of this right.
 - (3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions."
8. There is no challenge as to the reasonableness of the City's delivery of housing, including its delivery of emergency housing; it must accordingly be accepted as such.

⁶ City AA; page 524; par 9.

⁷ SFA; par 20.

⁸ City AA; page 524; par 10.

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

9.1. That the framework for housing development as well as the general principles underpinning it do not contemplate the provision of housing that falls short of the definition of housing development in the Housing Act. In other words, "there is no express provision to facilitate access to temporary relief for people who have no access to land, no roof over their heads, for people who are living in intolerable conditions and for people who are in crisis because of natural disasters such as floods and fires, or because their homes are under threat of demolition. These are people in desperate need. Their immediate need can be met by relief short of housing which fulfils the requisite standards of durability, habitability and stability encompassed by the definition of housing development in the Act."⁹

9.2. That in assessing the reasonableness of the housing programme, "one must consider whether the absence of a component catering for those in desperate need is reasonable in the circumstances".¹⁰

9.3. That:

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

⁹ At par 52.

¹⁰ At par 63.

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

10. Pursuant to the dictum of the Constitutional Court in **Grootboom**, National Government has enacted Part 3 of the Housing Code to cater for emergency housing; this section of the Code is known as "the Emergency Housing Programme".
11. In **City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another** 2012 (2) SA 104 (CC) at par 27 the Constitutional Court observed that the National Housing Code was enacted under section 4 of the Housing Act; it contains the national housing policy and sets out the principles, guidelines and standards that apply to the various programmes effected by the State in relation to housing. As regards Chapter 12 of the Code, it explained that it was introduced after its decision in **Grootboom** and provides for assistance to people who find themselves in a housing emergency for reasons beyond their control.

12. The Emergency Housing Programme applies to "emergency situations of exceptional housing need". It applies to various categories of persons including persons who are evicted or threatened with imminent eviction from land or from unsafe buildings, or situations where proactive steps ought to be taken to forestall such consequences. The Programme is intended to benefit all affected persons who are not in a position to address their housing emergency from their own resources or from other sources.
13. As recognised in **Blue Moonlight** at par 47, chapter 12 provides for assistance to people who find themselves in need of emergency housing for reasons beyond their control. Included in the definition of an emergency is the situation where people 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'.
14. We submit that it is clear that the envisaged "emergency" contemplated by the Emergency arises only in instances where persons will be rendered homeless by eviction unless the City provides them with accommodation.

The facts

15. As regards its approach to Emergency Housing, the City has explained¹¹:

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

It is for this reason that applicants for emergency housing are required to place their names on the housing database. Once this is done, they

¹¹ City AA; page 542; par 47 and 48.

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

16. According to the City, on having assessed the Residents against the criteria for various housing programmes, indications are that they could all be accommodated under one of three housing programmes. The City has further explained that what it makes available to the Residents in respect of alternative accommodation must be considered against the backdrop of the financial contribution that has been made available for the Residents (approximately R 75 000.00).¹²

17. As regards the respective incomes of the various households, the City has explained that¹³:

17.1. Household 1 earns R 3190.

17.2. Household 2 earns between R 2600 and R 3500.

17.3. Household 3 has no income.

17.4. Household 4 earns R 6480.

17.5. Household 5 earns about R 4000 to R 7000 per month.

¹² City AA; page 546; par 60.

¹³ City AA; page 546; par 60.

- 17.6. Household 6 earns R 11 271.93 per month.
- 17.7. Household 7 earns R 10 000.00 per month.
- 17.8. Household 8 has an income of about R 4800 per month.
- 17.9. Household 9 earns a combined income of R 10 000.00 per month.
- 17.10. Household 10 has no income.
18. We submit that the Residents are wrong in their submission that irrespective of their income levels and whether or not they qualify for other forms of State assisted housing, they have an entitlement to emergency housing.¹⁴ The Emergency Housing Programme is very clearly intended to benefit all affected persons who are not in a position to address their housing emergency from their own resources or from other sources.
19. We submit that all the Residents (save for the four households who qualify for emergency housing) are able to meet their housing need from either their own sources or from other sources; the reason for this is that their respective income levels will enable them to do so.
20. We submit that the Residents are not correct in their submission that because they are unable to afford suitable accommodation in areas of their choice, they are entitled to emergency accommodation.¹⁵ We respectfully submit that in light of their income levels, they will not be rendered homeless on account of an

¹⁴ Residents' HOA; page 11; par 25 and following.

¹⁵ Residents' HOA; page 13; par 29 and following.

eviction and for that reason alone, they have no entitlement to emergency accommodation.

THE LOCATION OF ALTERNATIVE HOUSING

21. As regards the question of the location of alternative accommodation, we submit that the Residents have no right or entitlement to alternative accommodation at a location of their choice.
22. As regards the question of the location of alternative accommodation, according to Justice Ngcobo (as he then was) in **Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others (Centre on Housing Rights and Evictions and Another, Amici Curiae)** 2010 (3) SA 454 (CC):

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

.....

[254] Some of the reasons advanced by the residents for refusing to relocate to the TRUs in Delft are a lack of schools and other

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

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

(Own Emphasis)

23. In **City of Johannesburg v Changing Tides 74 (Pty) Ltd and Others** 2012 (6) SA 294 (SCA), the SCA held as follows:

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

24. While in **City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another** 2012 (2) SA 104 (CC) the Court ordered that

the Municipality must provide those Occupiers whose names appear in the document entitled 'Survey of Occupiers of 7 Saratoga Avenue, Johannesburg' filed on 30 April 2008 with temporary accommodation in a location as near as possible to the area where the property is situated on or before 1 April 2012, provided that they are still resident at the property and have not voluntarily vacated it, it did not make any findings in relation to this issue which does not appear to have arisen on the papers.

25. We submit that there is no authority for the proposition that the Applicants are entitled to alternative accommodation in a location as near as possible to where they currently reside. On the contrary, the Constitutional Court authority in **Joe Slovo** suggests that this is manifestly not the case.
26. In any event, at the level of fact the City has proffered the following explanation:
 - 26.1. There are a number of housing programmes across the City's jurisdiction. Some of these housing delivery programmes (for example Social Housing initiatives) are located within the City Centre, while others are located further afield.¹⁶
 - 26.2. The fact that there is no Integrated Development Area available in close proximity to the City Centre, does not translate into there being no housing programmes that are delivered within the City Centre.¹⁷
 - 26.3. That it accepts that if possible, relocations should be in areas in the vicinity from where people are evicted; this however is a complex issue.

¹⁶ City AA; page 594; par 193.

¹⁷ City AA; page 594; par 193.

In the case of the City, there are many issues that have not rendered this possible, including access to land and the high costs of development.¹⁸

- 26.4. That there are certain housing programmes in close proximity to the City that are currently underway, such as Social Housing units that are targeted for the Woodstock and Salt River areas; and the inner city programmes that are presently being planned. In any event, the City Centre is by no means the only economic hub or employment centre.¹⁹

RELIEF

27. In light of the foregoing, we submit that the Residents have no general entitlement to temporary emergency accommodation. Instead, on the facts four households have demonstrated (by virtue of their income levels) that there is a genuine possibility that they will be rendered homeless on account of an eviction, unless they are provided with Emergency Housing. The City has no objection (and indeed has tendered) to provide Emergency Accommodation to these four households.
28. As to the location of the Emergency Housing, the City submits that Residents have no entitlement to alternative housing at a locality of their choice. Furthermore, the City has explained that at the level of fact, it has no emergency housing units in the area of the subject property.

¹⁸ City AA; page 593; par 190.

¹⁹ City AA; page 583; par 153.

29. As regards alternative housing assistance measures, the City has no objection to requesting that the housing institutions expedite the decision-making process. It must however be emphasised that the City is not responsible for decision-making in relation to GAP, FLISP or social housing.
30. We accordingly submit that save for the four households referred to above which qualify for emergency housing, the relief sought against the City falls to be dismissed.

KARRISHA PILLAY

Counsel for the Second Respondent

8 November 2016

Chambers

Cape Town