

**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:

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

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**SECOND RESPONDENT'S HEADS OF ARGUMENT**

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## Contents

INTRODUCTION.....	4
THE HISTORY OF THE LITIGATION IN THIS MATTER .....	6
THE CIRCUMSTANCES OF THE OCCUPIERS .....	8
THE CITY'S OFFERS OF ALTERNATIVE ACCOMODATION TO THE OCCUPIERS.....	17
Wolwerivier.....	17
Maitland.....	18
Kampies .....	21
THE LEGAL PRINCIPLES REGARDING THE CITY'S OBLIGATION TO PROVIDE EMERGENCY ACCOMMODATION .....	26
THE AMENDED RELIEF SOUGHT AND THE BASIS FOR IT: THE CONSTITUTIONAL CHALLENGE.....	36
The proper ambit of the relief .....	36
The legal basis for the amended relief.....	37
GROUND ON WHICH THE CITY OPPOSES THE AMENDED RELIEF .....	38
There is no constitutional or statutory provision that has been infringed .....	38
The threshold of reasonableness .....	40
Applying the threshold of reasonableness in relation to the evidence .....	45
The City's initial affidavits .....	45
The City's affidavit of 2 March 2020.....	51
There is no inflexible or irrational differentiation.....	57
The City's evidence .....	58
The City's conduct is not unreasonable or irrational .....	64
CONCLUSION.....	65

## INTRODUCTION

1. This litigation has a long history and spans some five years.
2. The Applicants ("**the Occupiers**") in respect of whom this application pertains fall into three categories, viz: (a) persons who have voluntarily vacated subsequent to the eviction order having been granted; (b) persons who have been offered alternative accommodation which they have accepted and, as a result have vacated the property; and (c) persons who remain in the property, have rejected the City of Cape Town's offer of alternative accommodation and claim a right and entitlement to alternative accommodation in Woodstock, Salt River and the inner city. The latter category of occupiers consists of six family households and two individual households.
3. At this stage, the litigation presents a singular question: does the City of Cape Town ("**the City**") bear a constitutional and/or statutory obligation to provide emergency accommodation in the inner city and surrounds. This is the principle the Occupiers seek to vindicate in this litigation.
4. The Occupiers cannot source the obligation contended for in a direct reference in the Constitution. They are therefore driven to rely on a particular interpretation of section 26(2) of the Constitution so as to contend that emergency accommodation in the inner city and surrounds forms part of the State's obligation to take reasonable legislative and other measures to realise housing rights and that a failure to do so results in a breach of section 26(2) of the Constitution.

5. So too, the Occupiers cannot source the obligation contended for in a direct statutory reference. They are therefore driven to refer to principles of spatial justice provided for in the Spatial Planning and Land Use Management Act No 16 of 2013 ("**SPLUMA**"). It is however trite that general principles do not found legal obligations.
6. The City opposes this application on the basis that: (a) there is no direct constitutional or statutory obligation that supports the relief sought; (b) on a proper assessment and application of the threshold of reasonableness applied to the evidence of this matter, the Occupiers' argument is unsustainable.
7. These Heads of Argument are structured as follows:
  - 7.1. First, we provide a brief overview of the litigation history in this matter and the relief presently sought.
  - 7.2. Second, we address the personal circumstances of the Occupiers.
  - 7.3. Third, we address the City's offers of alternative accommodation to the Occupiers.
  - 7.4. Fourth, we address the legal principles in respect of the provision of alternative accommodation.
  - 7.5. Fifth, we address the amended relief and the basis on which it is sought.
  - 7.6. Finally, we address make submissions as to why the amended relief must fail.

## THE HISTORY OF THE LITIGATION IN THIS MATTER

8. The salient aspects of the history of the litigation in this matter is as follows:
  - 8.1. Woodstock Hub instituted eviction proceedings in July 2015.
  - 8.2. On 17 March 2016, Hlophe JP granted an order by agreement between the parties in terms whereof the Occupiers were directed to vacate the property by 31 July 2016 ("**the eviction order**").<sup>1</sup>
  - 8.3. The various endeavours to appeal or vary the eviction order were ultimately not pursued or yielded no success. The result is that the eviction order remains in place.
  - 8.4. The execution of the eviction order was suspended.
  - 8.5. Various engagements occurred between the City and the Occupiers, which resulted in some Occupiers voluntarily vacating the property and other Occupiers accepting offers of alternative accommodation made by the City. The details of the various Occupiers who have vacated the property appears from the Table provided below.
  - 8.6. The application was argued before Weinkove AJ on 31 January 2017 and 1 February 2017 ("**the first hearing**"), whereafter the parties were directed to engage on certain aspects.

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<sup>1</sup> Record: page 97.

- 8.7. On 23 March 2017, after the hearing of the matter the Occupiers brought an application for the recusal of Weinkove AJ. This resulted in Weinkove AJ stepping out of the matter on 14 June 2017 and an Order being granted on 20 July 2020 for a hearing *de novo* before Sher AJ (as he then was) on 12 to 14 September 2017.
- 8.8. The matter was argued in September 2017 ("**the second hearing**"). This hearing resulted in the filing of a further affidavit by the Occupiers.<sup>2</sup>
- 8.9. On 4 December 2017, the Occupiers filed an application for leave to amend the relief they sought. The application was opposed but leave to amend was ultimately granted on 13 August 2020.
- 8.10. The present hearing pertains to the amended relief ("**the third hearing**").
9. The amended relief as sought in this application is as follows ("**the amended relief**"):
- "1. It is declared that the housing programme of the Second Respondent and its implementation in terms of the City of Cape Town Integrated Human Settlements: Five Year Plan is inconsistent with the Second Respondent's constitutional and statutory obligations to the extent that:
    - 1.1. It fails to provide the Applicants and people living in Woodstock and Salt River who are at risk of homelessness and in a crisis situation due to eviction from their homes with access to transitional housing or temporary emergency accommodation in the immediate City centre and surrounds.
  2. It is declared that the Second Respondent is under a constitutional duty to provide the Applicants and their

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<sup>2</sup> Record: page 2464.

dependents residing with them with temporary emergency accommodation or transitional housing:

- 2.1. in Woodstock, Salt River and inner city precinct as identified in the Prospectus for Affordable Housing in the Woodstock and Salt River Precinct issued by the Second Respondent on 28 September 2017; and
- 2.2. in a location as near as possible to the property where the Applicants currently reside at erf 10626, Bromwell Street, Cape Town ("the property).
3. The Second Respondent is directed to make available the temporary emergency accommodation referred to in paragraph 2 above to the Applicants within 12 (twelve) months of the date of this order.
4. The Second Respondent is ordered to comply with its constitutional obligations as declared in this order."

#### **THE CIRCUMSTANCES OF THE OCCUPIERS**

10. According to the Applicants, the following family units require emergency housing<sup>3</sup>:

- 10.1. Family Unit 1;
- 10.2. Family Unit 3;
- 10.3. Family Unit 5;
- 10.4. Family Unit 7;
- 10.5. Family Unit 8A;

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<sup>3</sup> Record: page 1940; par 17.3. Further affidavit dated 4 November 2020.



10.6. Family Unit 8B;

10.7. Individual Households 1 and 2.

11. All of these family units (6 in total) and individual households (2 in total) have been offered emergency accommodation by the City, first at Wolwerivier and more recently at Kampies. None of them have to date accepted either of the two offers made by the City.

12. On 4 November 2020, the Occupiers (through their attorney) filed a further affidavit in which they updated their personal circumstances. In the table below we set out the relevant personal circumstances of the Occupiers (as previously addressed and as updated on 4 November 2020):

<b>FAMILY UNIT</b>	<b>RELEVANT PERSONAL CIRCUMSTANCES AS PREVIOUSLY INDICATED</b>	<b>RELEVANT PERSONAL CIRCUMSTANCES AS AT 4 NOVEMBER 2020</b>	<b>ALTERNATIVE HOUSING</b>
Family Unit 1: Charnell and Vanessa Commando with minor daughter (Willem Nel was incarcerated)	The household monthly income is R 3190. <sup>4</sup> The one member of the household who previously worked in Observatory is presently unemployed and her sister attends a primary school in Salt River. <sup>5</sup> Her mother receives treatment	The total monthly income is less than R 5190. <sup>11</sup> When Daphne Nel (Family Unit 4) vacated 130A Bromwell Street, Charnell Commando moved into the room "to ensure the safety of the property". <sup>12</sup>	Status: The City has offered <b>emergency accommodation</b> . <sup>14</sup>

<sup>4</sup> SFA; page 405; par 8.

<sup>5</sup> SFA; page 405; par 7 and 10.

<sup>11</sup> Affidavit filed on 4 November 2020; par 4.2.

<sup>12</sup> Affidavit filed on 4 November 2020; par 4.1.

<sup>14</sup> Record: page 1933; par 5.3.

	<p>from the Woodstock Clinic.<sup>6</sup> Despite raising certain complaints about living “far away”, the family has searched for alternative accommodation in “various areas”<sup>7</sup>, including Salt River, Woodstock, Maitland<sup>8</sup>, Mannenberg<sup>9</sup> and Mitchells Plain<sup>10</sup>.</p>	<p>Vanessa, Willem (who was previously incarcerated and has since been released) and Lakeesha continue to reside at 124 Bromwell, while Charnell has moved to 130A Bromwell.<sup>13</sup></p>	
<p>Family Unit 2: Meeshade Nel and minor son</p>	<p>The household monthly income is R 2600.<sup>15</sup> The one member of the household works in Observatory and her child attends a primary school in Woodstock.<sup>16</sup> Despite raising certain complaints about living “far away”, the family has searched for alternative accommodation in “various areas”<sup>17</sup>, including Salt River, Woodstock, Maitland<sup>18</sup>, Brookland<sup>19</sup>,</p>		<p><b>Relocated</b> to social housing.<sup>22</sup></p>

<sup>6</sup> SFA; page 406; par 15

<sup>7</sup> SFA; page 406; par 12.

<sup>8</sup> According to Google Maps, the distance from Bromwell Street is 4.5 km.

<sup>9</sup> According to Google Maps, the distance from Bromwell Street is 14.1 km.

<sup>10</sup> According to Google Maps, the distance from Bromwell Street is 24.6 km.

<sup>13</sup> Affidavit filed on 4 November 2020; par 4.1.

<sup>15</sup> SFA; SA1; page 414; par 4.

<sup>16</sup> SFA; SA1; page 414; par 6.

<sup>17</sup> SFA; page 406; par 12.

<sup>18</sup> According to Google Maps the distance from Bromwell Street is 4.5 km.

<sup>19</sup> According to Google Maps the distance from Bromwell Street is 4.1. km.

<sup>22</sup> Record: page 1933; par 6.1.

	Goodwood <sup>20</sup> and Athlone <sup>21</sup> .		
Family Unit 3: Priscilla Nel and adult son Dylan Nel.	The household (which consists of a 19 year old son and mother) has no income; both members are unemployed. <sup>23</sup> They have "recently" applied to the City for subsidised housing. <sup>24</sup> Ms Nel alleges that she receives her medication from Woodstock Clinic and contends that if they were forced to move from the area, it would "negatively affect" access to her medication and healthcare. <sup>25</sup>	They have relocated to 130 Bromwell Street "to ensure the safety of the property when Family Unit 9 (Sophie Masilo, Graham Beukes and his children) vacated." <sup>26</sup> In this regard, it is alleged that this was "previously communicated" and "to the extent that this was not updated in previous affidavits post the move, this was an oversight". <sup>27</sup> Priscilla is unemployed and Dylan earns R 2000 per month. <sup>28</sup>	Status: Has no income and requires <b>emergency accommodation</b> , which the City has offered.
Family Unit 4: Daphne Nel and minor son	N/A	Charnell from Family Unit 1 has moved into this structure. <sup>29</sup>	Status: <b>Relocated</b> to Communicare Social Housing. <sup>30</sup>
Family Unit 5: Sulaiman Golaith, Ma Aida Abels and Nashiet	Mr Goliath is self-employed at an undisclosed location and earns	Sulaiman and his family continue to live at 126 Bromwell Street. <sup>43</sup>	Status: Despite the family income, the City has <b>offered</b>

<sup>20</sup> According to Google Maps the distance from Bromwell Street is 9.1. km.

<sup>21</sup> According to Google Maps the distance from Bromwell Street is 9 km.

<sup>23</sup> SFA; SA2; page 419; par 4.

<sup>24</sup> SFA; SA2; page 419; par 7.

<sup>25</sup> SFA; SA1; page 420; par 8 and 9.

<sup>26</sup> Affidavit filed on 4 November 2020; par 5.1.

<sup>27</sup> Affidavit filed on 4 November 2020; par 5.1.

<sup>28</sup> Affidavit filed on 4 November 2020; par 5.2.

<sup>29</sup> Affidavit filed on 4 November 2020; par 4.1.

<sup>30</sup> Record: page 1934; par 8.

<sup>43</sup> Affidavit filed on 4 November 2020; par 6.1.

<p>Abels and 3 minors.</p>	<p>approximately R 4000 per month.<sup>31</sup> His children attend school in Salt River.<sup>32</sup> Despite raising certain complaints about living far away, he explains that the family has searched for alternative accommodation in "various areas"<sup>33</sup>, including Salt River, Woodstock, Maitland<sup>34</sup>, Brookland<sup>35</sup>, Kensington<sup>36</sup>, Goodwood<sup>37</sup> and Athlone<sup>38</sup>. This family unit has made a verbal offer to purchase a property (at a location not disclosed) but are awaiting a response from the seller.<sup>39</sup> They have also "recently" applied to the City for subsidised housing.<sup>40</sup> His son has to attend at Red</p>	<p>Sulaiman is no longer able to work due to injuries that he sustained. He underwent hip replacement surgery and sustained a knee injury. He has applied for a disability grant which is yet to be approved.<sup>44</sup> Ma Aida is still unemployed but continues to try and sell chips and sweets. Her income is minimal, irregular and approximately R 3000 per month.<sup>45</sup> Although Sulaiman's aunt is current living there, she understands that the property is not her home.<sup>46</sup></p>	<p><b>emergency accommodation.</b></p>
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<sup>31</sup> SFA; SA4; page 429; par 4.

<sup>32</sup> SFA; SA4; page 429; par 6.

<sup>33</sup> SFA; SA 4; page 430; par 8.

<sup>34</sup> According to Google Maps is 4.5 km.

<sup>35</sup> According to Google Maps is 4.1. km.

<sup>36</sup> According to Google Maps is 6.2. km.

<sup>37</sup> According to Google Maps is 9.1. km.

<sup>38</sup> According to Google Maps is 9 km.

<sup>39</sup> Record: page 1935; par 9.

<sup>40</sup> SFA; SA 4; page 430; par 9.

<sup>44</sup> Affidavit filed on 4 November 2020; par 6.1.

<sup>45</sup> Affidavit filed on 4 November 2020; par 6.2.

<sup>46</sup> Affidavit filed on 4 November 2020; par 6.2.

	<p>Cross Hospital every second month and his daughter attends on the Spencer Road Clinic once a month.<sup>41</sup></p> <p>They contend that this family unit will be rendered homeless if the eviction proceeds.<sup>42</sup></p>		
Household 6: Delia Smith and Chrashanna Smith and minor child.	N/A		Status: Were offered a social housing unit and have <b>vacated</b> the property. <sup>47</sup>
Household 7: Mark and Rashieda Smith, Mogamat (adult son), and 3 minor children	<p>According to the Supplementary Founding Affidavit, Mr Smith is employed by the City and earns approximately R 5000 per month and his wife is also employed and earns approximately R 3000 per month.<sup>48</sup></p> <p>Elsewhere, Mr Smith alleges that his household earns a combined family income of R 10 780.20<sup>49</sup> and accordingly potentially qualifies for a</p>	<p>The family continue to live at 128 Bromwell Street.<sup>54</sup></p> <p>The family unit's gross monthly income is R 11 159.25.<sup>55</sup></p>	Status: Despite the household income being <b>R 10 780.20</b> <sup>56</sup> the City has <b>offered emergency accommodation.</b>

<sup>41</sup> SFA; SA 4; page 430; par 11.

<sup>42</sup> SFA; SA 4; page 431; par 13.

<sup>47</sup> Record: page 1935.

<sup>48</sup> SFA; SA8; page 448; par 4.

<sup>49</sup> Record: page 1357.

<sup>54</sup> Affidavit filed on 4 November 2020; par 7.1.

<sup>55</sup> Affidavit filed on 4 November 2020; par 7.1.

<sup>56</sup> Record: page 1357.

	<p>home loan in the amount of R 324 048.00.<sup>50</sup></p> <p>His minor children attend a primary school in Woodstock.<sup>51</sup></p> <p>They have tried to move in with his wife's parents on the Cape Flats but the house is "too full" and they are concerned about their children's safety; significantly their concern about living on the Cape Flats is not expressed as being the distance from Bromwell despite the Cape Flats being about 20.3 km from Bromwell Street.<sup>52</sup></p> <p>They have been on the City's waiting list for subsidised housing since 2014.<sup>53</sup></p>		
<p>Family Unit 8A: Brenda Smith, Roseline and their major daughters Cheslyn and Megan and 4 minor children</p>	<p>Concerned about travel costs to work; this despite the fact that no one works in this household. It is alleged in the Heads of Argument that the Twentieth Applicant "sometimes earns some income from looking after some</p>	<p>Brenda and Roseline continue to live at 128 Bromwell Street.<sup>57</sup> Brenda is receiving a pension and Roseline is receiving a disability grant. Cheslyn (who has found employment at a call centre) is</p>	<p>Status: Mrs Smith has enquired about an offer of housing previously made to her. The City has offered the entire household <b>emergency accommodation.</b></p>

<sup>50</sup> Record: page 1936; par 11.

<sup>51</sup> SFA; SA8; page 448; par 6.

<sup>52</sup> SFA; SA8; page 449; par 8.

<sup>53</sup> SFA; SA8; page 449; par 10.

<sup>57</sup> Affidavit filed on 4 November 2020; par 8.1.

	family member's children".	also supporting them. <sup>58</sup>	
Family Unit 8B: Michelle Smith and children	Concerned about travel costs to work; this despite the fact that there is one person who works as a part time char and whose income is undisclosed. They have "recently" applied to the City for subsidised housing. Should they be forced to move far away, the one family member (Michelle) who does part time char work for an undisclosed income, will not be able to afford travel costs to work and school.	The family continues to live at 128 Bromwell. Michelle was previously employed as a char but is currently unemployed. Megan is still unemployed. Meghan, Michelle and the minor children rely on the child support grants (R 790 per grant) which they receive for the 3 minor children. One of the minor children's dad's have been visiting but he is not living on the property. <sup>59</sup>	Status: The City has offered <b>emergency accommodation.</b>
Family Unit 9: Graham Beukes, Sofie Masilo and 3 minors	N/A	Family Unit 3 have relocated to 130 Bromwell Street "to ensure the safety of the property when Family Unit 9 (Sophie Masilo, Graham Beukes and his children) vacated." <sup>60</sup> In this regard, it is alleged that this was "previously communicated" and "to the	Has found alternative accommodation and have <b>relocated.</b> <sup>63</sup>

<sup>58</sup> Affidavit filed on 4 November 2020; par 8.2.

<sup>59</sup> Affidavit filed on 4 November 2020; par 9.1. and 9.2.

<sup>60</sup> Affidavit filed on 4 November 2020; par 5.1.

<sup>63</sup> Record: page 1938

		extent that this was not updated in previous affidavits post the move, this was an oversight". <sup>61</sup> Priscilla is unemployed and Dylan earns R 2000 per month. <sup>62</sup>	
Individual Household 1: George Rodriques	Used to be employed in Parow (which according to Google maps is 19.1 km away from Bromwell Street), earning an salary of R 4000 per month. <sup>64</sup> Has been unemployed since 30 September 2016. <sup>65</sup> According to the Heads of Argument, is employed as a casual worker at Fruit and Veg (at par 26). Has searched for accommodation as far afield as "the Northern Suburbs". <sup>66</sup>	George continues to live at 126 Bromwell and is still employed on a casual basis and gets paid approximately R 2400 per month. <sup>67</sup>	The City has offered <b>emergency accommodation.</b>
Individual Household 2: Faiza Fischer	Moved in with Mr Goliath and his family when she was struggling and had nowhere to live. <sup>68</sup>	Continues to live at 126 Bromwell and is still unemployed. The renewal of her disability	The City has offered <b>emergency accommodation</b> (to be shared with

<sup>61</sup> Affidavit filed on 4 November 2020; par 5.1.

<sup>62</sup> Affidavit filed on 4 November 2020; par 5.2.

<sup>64</sup> SFA; SA5; page 434; par 4.

<sup>65</sup> SFA; SA5; page 434; par 4.

<sup>66</sup> SFA; SA 5; page 435; par 7.

<sup>67</sup> Affidavit filed on 4 November 2020; par 10.1.

<sup>68</sup> SFA; SA6; page 439; par 3.



	<p>Is unemployed but receives "some support" (the amount of which is undisclosed), from the Eleventh and Thirteenth Applicants and her children who do not live with her.<sup>69</sup></p> <p>Has searched for accommodation but has no money for rental.<sup>70</sup></p> <p>Has been on the waiting list for subsidised housing since 2016.<sup>71</sup></p>	<p>grant was rejected.<sup>72</sup></p>	<p>individual household 1).</p>
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### THE CITY'S OFFERS OF ALTERNATIVE ACCOMODATION TO THE OCCUPIERS

13. It is clear that no person will be rendered homeless by the execution of the eviction order. This is so because the City has offered all of the remaining Occupiers alternative accommodation (at two different locations) which they have not accepted and instead, have opted to pursue the amended relief.

#### Wolwerivier

14. The City offered the Occupiers alternative accommodation at Wolwerivier.

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<sup>69</sup> SFA; SA6; page 439; par 4.

<sup>70</sup> SFA; SA6; page 439; par 6.

<sup>71</sup> SFA; SA6; page 439; par 8.

<sup>72</sup> Affidavit filed on 4 November 2020; par 11.1.

15. As regards the structures at Wolwerivier, the City has explained<sup>73</sup>:
- 15.1. Plumbing installation, the bulk water installation and the electricity infrastructure has been completed.
  - 15.2. Internal gravel roads have been provided to the site, whilst the entrance to the development has been constructed to black top standard. The property is serviced by the ME215 Morningstar Road.
  - 15.3. Beneficiaries will be provided with a 26.5 m<sup>2</sup> emergency housing structure, which consists of a prefabricated light gauge steel structure with corrugated cladding. Each structure will be fitted with an internal toilet and wash basin.
  - 15.4. The entire development will be fenced with a concrete palisade fence.
  - 15.5. Space has been reserved within the development for the establishment of a crèche or pre-primary education facilities. Space for a community facility is also being provided for in the layout.
16. The Occupiers rejected the offer.

## **Maitland**

17. In light of the complaints raised by the Residents as to the suitability of Wolwerivier (and in particular its distance from Bromwell Street), the City embarked on a process to source an alternative option for relocation of the Occupiers. This was

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<sup>73</sup> City AA; page 550; par 65.

at a site in Maitland. The City identified two sites in Maitland for relocation of the Residents. The first site was withdrawn before a full proposal could be made. The proposal regarding the second site was sent to the Occupiers on 19 February 2019.<sup>74</sup>

18. In correspondence, the City<sup>75</sup>:

18.1. Advised that it identified an area for emergency accommodation in Maitland, not far from the Occupiers' current place of residence.

18.2. Offered the emergency housing to the following families:

18.2.1.1. Family Unit 1: Charnel Commando and Vanessa Commando and minor daughter. William Nel was incarcerated.

18.2.1.2. Family Unit 3: Priscilla Nel and Dylan Nel.

18.2.1.3. Family Unit 5: Sulaiman Golaith and Ma Aida Abels and Nashief Abels and 3 minor children.

18.2.1.4. Family Unit 7: Mark and Rashieda Smith and Mogamat Smith and 3 minor children.

18.2.1.5. Family Unit 8A: Brenda, Roseline, Cheslyn and Megan Smith and 4 minor children.

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<sup>74</sup> Record: page 2807; par 56.2.

<sup>75</sup> Record: page 2807; par 56.2. read with AR3.

18.2.1.6. Family Unit 8B: Michelle Smith and children.

18.2.1.7. Individual Household 1 and 2: George Rodrigues and Faiza Fischer.

18.3. Explained that the emergency housing would consist of the following:

18.3.1. 1 x 26sqm dwelling structure consisting of a pre-assembled wall panels made up of corrugated metal sheeting and thermal insulation on light weight steel framework. The wall panels are anchored to 75mm concrete surface beds.

18.3.2. Internal water and sanitation provided on a 1:1 ratio.

18.3.3. Suggested that the Occupiers avail themselves for a site inspection so that they are apprised of the exact location of the site.

18.4. The Maitland sites were ultimately not available for relocation. This is on account of the resistance from the extant communities in the areas surrounding the site. This is an important dynamic that the City has asked that the Court have regard to, more particularly:

18.4.1. First, the City does not relocate persons to a new area with an extant community without prior engagement with the latter community. In this regard, the City engaged with the surrounding communities of the Maitland site.

18.4.2. Second, in this instance, the surrounding communities refused to agree to the relocation of the Occupiers to Maitland. They gave the following reasons for their position: that the needs of that Maitland community needed to be prioritised in respect of the land that was available (as opposed to resettling persons from other communities on it); there were concerns about a TRA devaluing property values in the area and introducing elements of crime and social ills in the community. The City has explained that while it did not agree with all of the reasons given by the surrounding community, it was acutely aware of the very high levels of resistance (and prior instances where in such cases the City had nevertheless gone ahead – ultimately resulted in violence). In light of the extent of resistance from the receiving community, the City ultimately could not take the risk of relocating the Occupiers there. As a result, the City informed the Occupiers of this and proceeded to try and source alternative land.

## **Kampies**

19. When the option at Maitland yielded no solution, the City offered the Residents Kampies, in Philippi.

20. The City explained the following to the Occupiers<sup>76</sup>:

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<sup>76</sup> Record: page 2810; par 56.3.3.

- 20.1. Each numbered household will receive one plot of 36m<sup>2</sup> with building materials for 18m<sup>2</sup> structures. The supplies include a door and a window. It was clarified that the City would not be erecting the structures and that they were being given the materials based on the fact that their current dwellings would not survive a move.
- 20.2. The services that would be provided would be as per offer made- 1:5 for water and 1:25 for toilets. Standpipes would be available. Importantly it was highlighted that these services would only be in place after the plots were occupied. Solid waste would be provided for 1 bag per household, collected once a week from communal container that would be made available on site. It was clarified that there would be no electricity provided.
- 20.3. A portable flush toilet would be made available to the single disabled person. It was suggested that the disabled person set up their plot and structure on the outskirts of the community near access roads.
- 20.4. All three types of schools - pre-primary, primary and high are within 3 km of the site in Hannover Park.
- 20.5. Two high-mast lights were recently installed at the site.
- 20.6. Crime statistics had to be requested from SAPS.
- 20.7. The site was near Govan Mbeki Road and was on an established bus and taxi route.

- 20.8. The indication was given that the City would not be building the structures and was only furnishing materials.
- 20.9. The clinic and hospital were in Hannover Park and not more than 3 km away.
- 20.10. Each household would get one plot with materials.
- 20.11. The City would provide a contractor to relocate the movable assets, but not transport the individuals.
21. The City further explained in its affidavit of 2 March 2020 that it had done a further exercise in order to identify the amenities in the area. In this regard, it prepared a site map showing the site and the surrounding area (attached to the City's affidavit) which depicts three circles: the first circle is within 1 km of the site, the second circle is within 2 km from the site and the third circle is within 3 km from the site. In terms thereof, the City explained<sup>77</sup>:
- 21.1. The pink line represents the Golden Arrow Bus Service and the Blue line is the My Citi line.
- 21.2. There are a large number of economic activities in the immediate area.
- 21.3. There are a number of public spaces and open spaces in the three circles.

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<sup>77</sup> Record: page 2812; par 56.4.

- 21.4. There are primary schools within the 1 km radius (including Belmore Primary, Summit Primary and Voorspoed Primary). The primary schools are both English and Afrikaans. High Schools (including Chrystal Secondary School) are within the 1 km radius.
- 21.5. The clinic and police station (Philippi) are less than 200m from the development (they have a red and blue dot and are within the inner circle). Other clinics include the Hanover Park clinic at the community centre.
- 21.6. There are several residential developments in the area abutting Kampies – these include Wetton, Yorkshire Estate, Phola Park, Browns Farm, Sweet Home.
- 21.7. Distance from Woodstock to Kampies is 16.6 km.
22. The City also explained that Kampies was not previously available for offer to the Occupiers and that it had negotiated long and hard with the surrounding community in order to obtain their agreement for the Occupiers to be relocated there.<sup>78</sup>
23. In their replying affidavit<sup>79</sup> and the letter attached thereto as “CCR15” (the letter dated 6 April 2020), the Occupiers rejected the offer at Kampies. In the correspondence, the Occupiers contend that the accommodation at Kampies “does not meet the City's constitutional and statutory obligations”.<sup>80</sup>

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<sup>78</sup> Record: page 2813; par 56.5.

<sup>79</sup> Record: page 2984; par 97 and following.

<sup>80</sup> Record: page 3095.



24. It appears that the key reasons for rejecting the offer of alternative accommodation as Kampies are as follows:

24.1. First, that the structures were not large enough to accommodate each of the family units.<sup>81</sup> The City has however indicated a flexibility (subject to a motivation) to making more than one unit available to a family structure.<sup>82</sup> Instead of engaging the City on this option, the Occupiers resort to criticising the City for having “failed to apply its mind.”<sup>83</sup>

24.2. Second, that the communal toilets are based on the edge of the settlement.<sup>84</sup>

24.3. Third, that the City would only make electricity available after the Occupiers take occupation. Seemingly, the Occupiers are aggrieved because no indication was given as to how long this could take.<sup>85</sup>

24.4. Fourth, that the City provided “no information about the community dynamics or community structure or issues”.<sup>86</sup>

24.5. Fifth, that the City provided no information as to transport routes or costs,<sup>87</sup> schools<sup>88</sup>, where health care services in the area could be obtained for the Occupiers specific ailments<sup>89</sup>.

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<sup>81</sup> Record: page 2986; par 97.1.6 and 97.1.7.

<sup>82</sup> Record: page 2986; par 97.1.6 and 97.1.7.

<sup>83</sup> Record: page 2986; 97.1.7.

<sup>84</sup> Record: page 2987; 97.2.1.

<sup>85</sup> Record: page 2987; par 97.2.2.

<sup>86</sup> Record: page 2988; par 97.3.4. and 97.6.2.

<sup>87</sup> Record: page 2988; par 97.4.3.

<sup>88</sup> Record: page 2989; par 97.5.3.

<sup>89</sup> Record: page 2990; par 97.5.6.

25. Importantly, despite the several criticisms levelled against the City the Occupiers do not point to a single reference of any attempts having been made by themselves (or indeed their legal representatives) in order to address any of their concerns. We submit that the City has provided the Occupiers with sufficient information in order to make a decision. This reason for the Occupiers' stance in this regard is clear: despite the reasonableness of the City's offer, they maintain that they have an entitlement to alternative accommodation specifically in Woodstock, Salt River or the inner city precinct and, as a result have rejected the offers made to date.

#### **THE LEGAL PRINCIPLES REGARDING THE CITY'S OBLIGATION TO PROVIDE EMERGENCY ACCOMMODATION**

26. 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.”

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

27.1. 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.”<sup>90</sup> (It is significant that this threshold does not include location.)

27.2. 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”.<sup>91</sup> (There is no such absence of emergency accommodation in the present instance.)

27.3. That the housing development policy as set out in the Housing Act is in itself laudable; it has medium and long-term objectives that cannot be criticised.<sup>92</sup> But unless some temporary measures exist as an integral part of the nationwide housing program, the result is that people in desperate need are left without any form of assistance with no end in sight. According to the Court, not only are the immediate crises not met; the consequent pressure on existing settlements inevitably results in land

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<sup>90</sup> At par 52.

<sup>91</sup> At par 63.

<sup>92</sup> At par 64.

invasions by the desperate thereby frustrating the attainment of the medium and long-term objectives of the nationwide housing program.<sup>93</sup>

28. 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".

29. Part 2.3 of the NHC, 8 under the "Definition of Emergency Housing Circumstances" provides that:

"This Programme will apply to emergency situations of exceptional housing need, such situations being referred to as "Emergencies", as defined below:

An emergency exists when the MEC, on application by a municipality and or the PD, agrees that persons affected owing to situations beyond their control:

Having become homeless as a result of a declared state of disaster, where assistance is required, including cases where initial remedial measures have been taken in terms of the Disaster Management Act, 2002 (Act No 57 of 2002) by government, to alleviate the immediate crisis situation;

Have become homeless as a result of a situation which is not declared as a disaster, but destitution is caused by extraordinary occurrences such as floods, strong winds, severe rainstorms and/or hail, snow, devastating fires, earthquakes and/or sinkholes or large disastrous industrial incidents;

Live in dangerous conditions such as on land being prone to dangerous flooding, or land which is dolomitic, undermined at shallow depth, or prone to sinkholes and who require emergency assistance;

Live in the way of engineering services or proposed services such as those for water, sewerage, power, roads or railways, or in

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<sup>93</sup> At par 65.

reserves established for any such purposes and who require emergency assistance; . . . .”

30. In addition part 2.4 9 in the first paragraph thereof provides that:

“The Programme will benefit all affected persons who are not in a position to address their housing emergency from their own resources or from other sources such as the proceeds of superstructure insurance policies and the following households will qualify for assistance under this Programme: . . . .”

31. It warrants emphasising that 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.

32. It is therefore of particular importance that emergency housing (given the breadth of its beneficiary base) not be conflated with the provision for long-term adequate housing. To do so, we respectfully submit will result in the arbitrary, haphazard provision of housing in that persons facing an emergency will be provided with comparable housing to those who are patiently awaiting their turn on the housing waiting list. Furthermore, there are stringent criteria including income levels which apply to the provision of permanent subsidised housing, all of which do not apply to emergency housing.

33. Indeed, the cogency of this proposition has already been recognised by the Courts.

34. Binns-Ward J in **City of Cape Town v Hoosain NO and Others**, unreported WCC case No 10334/2011, delivered on 21 October 2011: [2011] ZAWCHC 391 at par 9 and 14 said the following in this regard<sup>94</sup>:

"9. Turning then to the substantive issue. The matter of the provision of alternative accommodation in this case arises not out of the state's obligation to promote the access by everyone to *adequate* housing by taking reasonable measures, within its available resources, to achieve the progressive realisation of the right as understood by the concept of 'housing development' as defined in **s 1** of the **Housing Act 107 of 1997**<sup>3</sup>, but rather out of the related and incidental obligation within any state housing programme to provide for the needs of people for basic shelter occurring in situations of crisis because of natural or manmade emergency or because their homes are under threat of demolition as in the current case. Thus the state's obligation in the current context 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 **[2000] ZACC 19; Act**' (see *Government of the Republic of South Africa and Others v Grootboom and Others* **2001 (1) SA 46** (CC) **(2000 (11) BCLR 1169)** at para 52). How far short of the requisite standards of permanent housing the relief offered by the state can be allowed to fall is a question not easily answered. The answer has to be informed in the main by the striking of a reasonable balance between available resources and the extent, in the given context, of the overall demands on those resources, not just by the persons immediately under consideration, but the population in general. In the consideration of available resources account has to be taken of the need for a proportionate allocation of resources so as to avoid the demands of the provision of emergency shelter becoming an undue impediment to the state's ability in the ordinary course to progressively provide permanent housing to those in need.

....

14. Once it is recognised that emergency accommodation by its very nature will invariably fall short of the standards reasonably expected of permanent housing accommodation, it follows that those who need to occupy such accommodation must accept less than what would ordinarily be acceptable. The apparent harshness of an acceptance of this recognition has to be seen against the realities imposed by the vast scale of the housing

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<sup>94</sup> Endorsed by the SCA in *City of Johannesburg v Dladla and Others* 2016 (6) SA 377 (SCA) at par 20.

backlogs which the State, in general, and the City, in particular, are having to engage."

35. In **City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another** 2012 (2) SA 104 (CC), the Constitutional Court, reaffirmed the differentiation between emergency housing and other housing which it previously recognised in **Grootboom**:

"[95] As a result, I find that whereas differentiation between emergency housing needs and housing needs that do not constitute an emergency might well be reasonable, the differentiation the City's policy makes is not. To the extent that eviction may result in homelessness, it is of little relevance whether removal from one's home is at the instance of the City or a private property owner. The policy follows from the City's incorrect understanding of its obligations under Ch 12 and its claim that it lacks resources. The City's housing policy is unconstitutional to the extent that it excludes the Occupiers and others similarly evicted from consideration for temporary accommodation. The exclusion is unreasonable."

36. 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.

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[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)

37. 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."

38. Accordingly, while the SCA referred to a report being provided in **Changing Tides** and to accommodation being provided in a location as near as feasibly possible to the property from which they were being evicted, it made no pronouncement that there is an unqualified right to emergency accommodation in the immediate vicinity from where persons are being evicted. Indeed, the judgment does not address the question of proximity to the area from which persons are being evicted or specific State obligations in that regard.
39. 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.
40. Most recently in **Baron and others v Claytile (Pty) Limited and Another (CCT241/16) [2017] ZACC 24 (13 July 2017)** the Constitutional Court decisively pronounced on the question of alternative accommodation in the context of an eviction under ESTA. In that matter, the City had offered, *albeit* shortly before the hearing of the matter before the Constitutional Court to make alternative

accommodation available to the Occupiers at Wolwerivier.<sup>95</sup> That offer was rejected by the Occupiers on the basis of the distance from Wolwerivier to their places of employment and the children's school; and further that the housing units at Wolwerivier were inadequate structures as the units had been constructed with corrugated cladding.<sup>96</sup> The Constitutional Court rejected the concerns raised by the Occupiers and concluded as follows:

“[32] The applicants urged this Court to make a value judgment as to what is just and equitable, which includes consideration of the distance from the applicants' places of employment and the distance from social amenities, such as schools, clinics and shopping centres. The applicants failed to deal with the objection that Wolwerivier was far from their places of employment, but relied on a bald allegation, without setting out any particulars as to where they were employed and the distance from Wolwerivier. They did not deal with any hardship they would suffer should they move to Wolwerivier.

....

[50] 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.”

41. In light of the above case-law, we submit that the following legal principles find application in respect of the City's offer of emergency accommodation:

41.1. First, emergency accommodation is distinct from permanent subsidised accommodation. Indeed, the definition of housing development in the Housing Act does not find application in respect of emergency housing.

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<sup>95</sup> At par 30.

<sup>96</sup> At par 31.

In addition, the Constitutional Court has recognised that the State's obligation in the current context 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 Housing Act. There are compelling reasons as to why emergency housing ought not to be conflated with other permanent forms of housing. Key to these reasons is the fact that emergency housing is provided pending the acquisition of alternative permanent housing.

- 41.2. Second, the Housing Code and chapter 12 in particular does not impose location as being a necessary prerequisite in respect of the provision of emergency accommodation.
- 41.3. Third, the Constitutional Court has already recognised that the Constitution does not guarantee a person a right to housing at government expense at the locality of his or her choice and further that locality is determined by a number of factors, including the availability of land.
- 41.4. Fourth, the Constitutional Court has already ruled that Wolwerivier constitutes suitable alternative accommodation that is with the City's available resources.
- 41.5. Finally and in any event, at best for the Occupiers, the emergency housing must be as near as is feasibly possible to their current place of residence. We submit on the facts, the City has shown that Wolwerivier has met this criterion. It is this factual enquiry that we now turn to.

42. It follows, we submit, that the offers of alternative accommodation made by the City to the Occupiers are reasonable in the circumstances.

## **THE AMENDED RELIEF SOUGHT AND THE BASIS FOR IT: THE CONSTITUTIONAL CHALLENGE**

### **The proper ambit of the relief**

43. In their Heads of Argument, the Occupiers identify the “target of the constitutional challenge”.<sup>97</sup> They say that the constitutional challenge relates to both the City's housing programme and its implementation in terms of the Five Year Plan.<sup>98</sup>

44. Despite the Applicants' endeavour to expand the ambit of the relief sought we submit that the amended relief speaks for itself. On a proper construction, the challenge relates to:

44.1. The Housing Programme in terms of the City of Cape Town's Integrated Human Settlements: Five Year Plan.

44.2. The implementation of the housing programme in respect of the City of Cape Town Integrated Human Settlements: Five Year Plan is inconsistent with the Second Respondent's constitutional and statutory obligations.

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<sup>97</sup> Applicants' Heads of Argument: p 28; par 66 and ffl.

<sup>98</sup> Applicants' Heads of Argument: p 28; par 67.

## The legal basis for the amended relief

45. The Occupiers pin their challenge to a contention that the City's Housing Programme is deficient and inconsistent with the positive duties imposed on the City in terms of section 26(2) of the Constitution in the following respects<sup>99</sup>:

45.1. First, the City's housing programme does not provide for access to emergency or transitional accommodation in the immediate inner city and surrounds in order to meet the urgent, emergency housing needs of the Occupiers and people living in Woodstock and Salt River who are at risk of homelessness and in a crisis situation due to eviction from their homes.<sup>100</sup>

45.2. Second, the City's provision of transitional housing in the immediate inner City centre and surrounds, "irrationally and inflexibly differentiates between persons relocated by the City in order to facilitate social housing in the inner City and persons such as the applicants who have been evicted from their homes in the Woodstock / Salt River area and face imminent homelessness."<sup>101</sup>

45.3. Third, the implementation of the City's Housing Programme in the immediate inner City and surrounds is unreasonable and inconsistent with the objectives of the programmes and the City's own public statements.<sup>102</sup>

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<sup>99</sup> Applicants' Heads of Argument: p 38; par 87.

<sup>100</sup> Applicants' Heads of Argument: p 38; par 87.1.

<sup>101</sup> Applicants' Heads of Argument: p 38; par 87.2.

<sup>102</sup> Applicants' Heads of Argument: p 39; par 87.3.

45.4. Fourth, the implementation of the City's housing programme in relation to emergency accommodation needs is unreasonable and inconsistent with the City's duty to mitigate the effects of spatial apartheid.<sup>103</sup>

#### **GROUNDS ON WHICH THE CITY OPPOSES THE AMENDED RELIEF**

46. The City opposes the amended relief on the following grounds:

46.1. First, there is no constitutional provision that directs the City to provide emergency accommodation in any particular area.

46.2. Second, there is no statutory provision that directs the City to provide emergency accommodation in any particular area.

46.3. Third, the analysis of the case-law dealing with reasonableness in the context of housing rights does not support a right to emergency housing in a particular area.

46.4. Fourth, on the evidence the City has met the threshold of reasonableness in its delivery of emergency housing.

46.5. Fifth, there is no inflexible and irrational differentiation.

#### **There is no constitutional or statutory provision that has been infringed**

47. As stated in the introduction to these Heads of Argument, there is an important point of departure in the adjudication of the amended relief. It is this: the

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<sup>103</sup> Applicants' Heads of Argument: p 39; par 87.4.

Occupiers do not identify a single constitutional or statutory provision that (a) directly and expressly provides for a right of access to emergency housing in a particular area (inner city or otherwise); (b) places an obligation on the City to deliver emergency housing in a particular area.

48. Importantly, although the Housing Act No 107 of 1997 ("**the Housing Act**") has been adopted to give effect to the State's obligations pursuant to section 26(2) of the Constitution it contains no provision directing that emergency housing be provided in particular locations.

49. For instance, with regard to permanent housing, section 9(1)(a)(ii) of the Housing Act provides that:

"(1) Every municipality must, as part of the municipality's process of integrated development planning, take all reasonable and necessary steps within the framework of national and provincial housing legislation policy to —

(a) ensure that —

(i) the inhabitants of its area of jurisdiction have access to adequate housing on a progressive basis;

(ii) conditions not conducive to the health and safety of the inhabitants of its area of jurisdiction are prevented or removed;

(iii) services in respect of water, sanitation, electricity, roads, stormwater drainage and transport are provided in a manner which is economically efficient."

50. Section 1 of the Housing Act defines "housing development" in very broad terms to mean:

“(T)he establishment and maintenance of habitable, stable and sustainable public and private residential environments to ensure viable households and communities in areas allowing convenient access to economic opportunities, and to health, educational and social amenities in which all citizens and permanent residents of the Republic will, on a progressive basis, have access to —

- (a) permanent residential structures with secure tenure, ensuring internal and external privacy and providing adequate protection against the elements; and
- (b) potable water, adequate sanitary facilities and domestic energy supply; . . . .”

- 51. Section 4 of the Housing Act provides for the adoption of the Housing Code.
- 52. Chapter 12 of the Housing Code, in regulating the provision of emergency housing, imposes no obligation as to the location of such housing.
- 53. The Occupiers refer to SPLUMA and more particularly sections 6 and 7. However, these provisions speak to general development principles and “apply to all organs of state and other authorities responsible for the implementation of legislation regulating the use and development of land, and guide” a range of functions. These provisions do not, we submit, found an obligation of the nature contended for by the Occupiers.

### **The threshold of reasonableness**

- 54. A court considering the reasonableness of legislative or other measures taken by the State will not enquire into whether other more desirable or favourable measures could have been adopted, or whether public resources could have been better spent. A wide range of possible measures could be adopted by the State to meet its obligations and many of these may meet the requirement of reasonableness. Once it is shown that the measures do so, this requirement



would be met.<sup>104</sup>

55. The Occupiers would have the Court do precisely what the Constitutional Court has said the judicial function does not lend itself to: factual enquiries, cost-benefit analyses, political compromises, budgetary priority decisions and the like.<sup>105</sup> It is not the province of courts, when judging the administration, to make their own evaluation of the public good; nor to substitute their personal assessment of the social and economic advantage of a decision.<sup>106</sup>

56. In **Mazibuko and Others v City of Johannesburg and Others** 2010 (4) SA 1 (CC) the applicants, residents of one of the poorer areas of the first respondent city, challenged the constitutionality of the city's decision to supply 6 kilolitres of free water per month to every account-holder in the city on the ground that the policy was in conflict with s 27(1)(b) of the Constitution, which provides that everyone has the right to access to sufficient water. The applicants also argued that the city's installation of prepaid water meters for certain households was unlawful. The question that arose was what the city's obligations, as an organ of State, were in this regard. The Constitutional Court held as follows:

56.1. At the time the Constitution was adopted millions of South Africans did not have access to the basic necessities of life, including water. The purpose of the constitutional entrenchment of social and economic rights was thus to ensure that the State continue to take reasonable legislative and other measures progressively to achieve the realisation

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<sup>104</sup> *Khosa and others v Minister of Social Development and others; Mahlaule and Others v Minister of Social Development and others* 2004 (6) SA 505 (CC) para 48.

<sup>105</sup> *Du Plessis and others v De Klerk and another* 1996 (3) 850 (CC) par 180.

<sup>106</sup> *Minister of Home Affairs and others v Scalabrini Centre and others* 2013 (6) SA 421 (SCA) para 59.

of the rights to the basic necessities of life. It was not expected, nor could it have been, that the State would be able to furnish citizens immediately with all the basic necessities of life.<sup>107</sup>

56.2. Social and economic rights empower citizens to demand of the State that it act reasonably and progressively to ensure that all enjoy the basic necessities of life. In so doing, the social and economic rights enable citizens to hold government to account for the manner in which it seeks to pursue the achievement of social and economic rights.<sup>108</sup>

56.3. Moreover, what the right requires will vary over time and context. Fixing a quantified content might in a rigid and counter-productive manner prevent an analysis of context. The concept of reasonableness places context at the centre of the enquiry and permits an assessment of context to determine whether a government programme is indeed reasonable.<sup>109</sup>

56.4. Ordinarily it is institutionally inappropriate for a court to determine precisely what the achievement of any particular social and economic right entails and what steps government should take to ensure the progressive realisation of the right. This is a matter in the first place for the legislature and executive, the institutions of government best placed to investigate social conditions in the light of available budgets and to determine what targets are achievable in relation to social and economic rights. Indeed, the Court held that it is desirable as a matter

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<sup>107</sup> At para 59.

<sup>108</sup> At para 59.

<sup>109</sup> At para 60.

of democratic accountability that they should do so, for it is their programmes and promises that are subjected to democratic popular choice.<sup>110</sup>

56.5. Courts are ill-placed to make these assessments for both institutional and democratic reasons.<sup>111</sup>

56.6. The positive obligations imposed upon government by the social and economic rights in our Constitution will be enforced by courts in at least the following ways. If government takes no steps to realise the rights, the courts will require government to take steps. If government's adopted measures are unreasonable, the courts will similarly require that they be reviewed so as to meet the constitutional standard of reasonableness.<sup>112</sup>

56.7. The obligation of progressive realisation imposes a duty upon government continually to review its policies to ensure that the achievement of the right is progressively realised.<sup>113</sup>

57. In **Khosa and Others v Minister of Social Development and Others, Mahlaule and Another v Minister of Social Development** (CCT 13/03, CCT 12/03) [2004] ZACC 11; 2004 (6) SA 505 (CC); 2004 (6) BCLR 569 (CC) at par 48 and 49 the Constitutional Court held:

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<sup>110</sup> At para 61.

<sup>111</sup> At para 62.

<sup>112</sup> At para 67.

<sup>113</sup> At para 67.

- 57.1. A court considering the reasonableness of legislative or other measures taken by the state will not enquire into whether other more desirable or favourable measures could have been adopted, or whether public resources could have been better spent.
- 57.2. A wide range of possible measures could be adopted by the state to meet its obligations and many of these may meet the requirement of reasonableness. Once it is shown that the measures do so, this requirement would be met.
- 57.3. In dealing with the issue of reasonableness, context is all important.
58. In **Grootboom** the Constitutional Court held that in determining whether a set of measures is reasonable, it will be necessary for housing problems to be considered in their social, economic and historic context and to consider the capacity of institutions responsible for implementing the programme.<sup>114</sup> The Constitutional Court also held that reasonableness must be understood in the context of the Bill of Rights as a whole.<sup>115</sup>
59. It must be emphasised that different interest groups and individuals will demand that different housing programmes are implemented in the inner City. The reality however is that while demand is high for inner City development, the limitations are great. In the matter of **Adonisi and Others v Minister for Transport and Public Works Western Cape and Others; Minister of Human Settlements and Others v Premier of the Western Cape Province and Others (7908/2017; 12327/2017) [2020]**

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<sup>114</sup> At par 43.

<sup>115</sup> At par 43.

**ZAWCHC 87**, the Applicants advanced a preference for social housing in the inner City; in this matter the Occupiers advance a preference for emergency housing in the inner City. The City has explained the various constraints in terms of inter alia, affordability and land availability for housing development in the inner City. Within these constraints, the City must prioritise those housing programmes which it believes will work within the inner city – it has done so and determined that the priority is to social housing.

### **Applying the threshold of reasonableness in relation to the evidence**

#### The City's initial affidavits

60. The City has explained its approach to the determination of the location for its housing programmes. It has stated<sup>116</sup>:

60.1. The City has a spread of different housing options available across its jurisdiction.

60.2. As regards emergency housing, it is correct that there are no developments in the immediate City centre and surrounds.

60.3. The reasons for this are complex but include: (a) 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)

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<sup>116</sup> City AA; page 551; par 66.

the scarcity of land in the immediate surrounds of the City and the competing demands on such land.

60.4. 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. Various examples in this regard have been provided which include:

60.4.1. Inner City Housing in Woodstock: there are six separate sites that are being targeted for different housing projects.

60.4.2. A transitional housing development and a social housing development in Salt River.

60.4.3. The Cape Town Foreshore Freeways Project: the City's Transport for Cape Town directorate has put out a Request for Proposals (RFP) for prospective investors and developers to consider and present a comprehensive proposal that effectively harnesses world-leading design and development, thereby enabling the full potential of this immensely valuable city asset to be unlocked. Proposals should present a comprehensive development solution for the Foreshore Freeway Precinct as a mixed land use development, including transportation, housing, social and economic opportunities, supported by ancillary uses, such as open space. It is recognised that opening up some of this space

for multiple-income housing, including affordable housing, could bring lower-income people closer to work opportunities.

60.4.4. Maiden's Cove: the City is taking an innovative approach to the Maiden's Cove development, by leveraging City-owned land and encouraging investment in projects that unlock transit-oriented development. It is vital that partnerships with various sector bodies and the private sector are formed if Cape Town is to truly realise a revitalised, integrated city. It is for this reason that the project has gone out for proposal call. 10% of the financial offer for Maiden's Cove will be allocated to near-inner City housing projects, which would amount to R150 million planned budget spend on affordable housing.

60.4.5. Two Rivers Urban Park ("**TRUP**"): the City of Cape Town and Western Cape Government have embarked on a joint project that is primarily aimed at overcoming the legacy of apartheid spatial planning. TRUP is an all-inclusive development designed to bring people closer to work opportunities and living within a green, compact environment that is serviced by multiple transport networks. The site is strategically located along the M5 and between Voortrekker Road and the N2, and is bordered by two rivers, the Liesbeek and the Black River. It is informed by the Table Bay District Spatial Plan. TRUP aims to release 120 ha of land within the area for the creation of a mixed-use, fully inclusive development.

61. The Residents identified 45 parcels of vacant state owned land within 5 kilometres from the property which they submit are suitable for development or at the very least temporary emergency accommodation.<sup>117</sup>
62. In response the City has explained: (a) its approach to identifying land for housing development; and (b) why none of the land parcels referred to can be used by the City for emergency accommodation to the Residents.
63. As regards the question of identifying land, the City has explained that a land disposal committee which meets twice a year, or more often if required, has on its agenda as a standing item the transfer of land that is surplus to the core business of the national department it is assigned to. Should any national land holdings be usable for low income housing provision in Cape Town a request to transfer that property to the municipality, by way either of donation or purchase, is made. The legal process is thus followed to action the transfer. A few transfers have taken place but many large parcels are as yet not released.<sup>118</sup>
64. The City has further explained why none of the land parcels identified by the Residents (and in respect of which the City is alleged to be the owner) can be used as emergency accommodation for them.<sup>119</sup> The City has specifically dealt with each of the identified erven in this regard.<sup>120</sup>
65. The City has also explained<sup>121</sup>:

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<sup>117</sup>FA; page 33; par 76.

<sup>118</sup> City AA; page 566; par 124.

<sup>119</sup> City AA; page 569; par 125.

<sup>120</sup> City AA; page 569; par 125.

<sup>121</sup> City AA; page 569; par 126.



“126. As is apparent from what I have stated above, many of these land parcels are too small for a housing development. The City is not in a position to provide individual tracts of land to beneficiaries; 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.”

66. Importantly, in the Occupiers' Replying affidavit, none of these allegations are placed in dispute. Instead, the Occupiers make the following (incorrect) averment in response<sup>122</sup>:

“75. I wish to highlight that the City has not stated why these parcels of land could not be used to provide emergency accommodation but merely that they are too small for a viable housing project.”

67. We emphasise the following:

67.1. First, the City proactively, but also on an ad hoc basis, identifies suitably located sites where it can accommodate households in terms of the provisions of the National Housing Programme for Housing Assistance in Emergency Housing Circumstances. The City has conceptualised a process and product that is quicker to deliver and is premised on being permanent, albeit incremental – hence the name incremental development areas (IDAs). A number of possible IDA locations have been identified such as Sir Lowry's Pass and Busasa. These will be planned and developed in the coming three years, and more such sites will be identified across the City.<sup>123</sup> The City has explained that a

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<sup>122</sup> RA; page 782; par 75.

<sup>123</sup> City AA; page 578; par 146.2.2.

combination of urbanisation, population growth and climate change impacts has meant that demand for this type of accommodation is increasing. Consequently, the City has embarked on various initiatives to establish more of these temporary housing opportunities.<sup>124</sup>

67.2. Second, due to land shortages and the high costs of development, the City does not have emergency housing developments available in the City Centre.

67.3. Third, the City is not in a position to provide individual tracts of land to beneficiaries because it considers it to be unaffordable (the costs of individual provision by far exceeding the costs of a development). The City has also pointed to the disparity that such an approach would create between the subject Residents and other persons in need of housing.

67.4. Fourth, the City has further explained that it has limited options available in the vicinity of Bromwell Street but has stated that in the event that these households move into social housing, they will be at liberty to apply for occupation of the social housing units that are scheduled to be constructed in Salt River and Woodstock (in the next eighteen months).<sup>125</sup>

67.5. Finally, the City accepts that if possible, relocations should be in areas in the vicinity from where people are evicted. However, as explained by

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<sup>124</sup> City AA; page 581; par 147.

<sup>125</sup> City AA; page 574; par 143.

the City, this is a complex issue; 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. Despite these challenges, as stated there are measures afoot for social housing in Woodstock and Salt River.<sup>126</sup>

#### The City's affidavit of 2 March 2020

68. In its affidavit dated 2 March 2020 the City has specifically explained that there is no constitutional obligation on the City to provide for emergency accommodation in particular areas. Instead, the obligation placed on the State emanates from section 26(2) of the Constitution which provides as follows: "The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right." The City has explained in this regard:

68.1. First, although there is no constitutional right to adequate housing in a particular location, and therefore to adequate housing in, for instance, the centre of Cape Town, the City does however implement specific housing programmes (such as the Social Housing programme) in these areas.<sup>127</sup>

68.2. Second, the delivery of housing in the inner City is significantly more costly than housing delivery elsewhere. This is due to, *inter alia*, the cost of land in the inner City, the economies of scale in respect of building

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<sup>126</sup> City AA; page 593; par 190.

<sup>127</sup> Record; page 2797; par 49.2.1.

costs given the limited land availability in the inner City, and the high cost of rates and taxes in the inner City. What this means is that if housing delivery as part of the state's Breaking New Ground housing policy (i.e. subsidised state housing) were to occur in the inner City, the subsidy provided by national government for the provision of such housing would be wholly inadequate.<sup>128</sup>

68.3. Third, the Emergency Housing programme is targeted at a temporary housing intervention. It is generally regarded as too costly for this to be done in central Cape Town. Assistance under the Emergency Housing programme takes the form of grants to municipalities so as to enable them to respond rapidly to emergencies by way of the provision of land, municipal-engineering services and shelter. The value of the grants are insufficient for emergency housing to be provided in the inner City.<sup>129</sup>

68.4. Fourth, with the exception of social housing, not a single other housing programme is delivered in this inner City. What the Occupiers in this matter seek, therefore, is emergency housing in the inner City that is better located than would be the case for other persons in need and are awaiting housing allocation in terms of the waiting list. This is not fair and creates a preferential right in respect of emergency housing. It could also have the perverse consequence of persons seeking emergency housing so as to ensure a better location, as opposed to awaiting their turn on the housing waiting list.<sup>130</sup>

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<sup>128</sup> Record: page 2797; par 49.2.2.

<sup>129</sup> Record: page 2798; par 49.2.3.

<sup>130</sup> Record: page 2798; par 49.2.4.

- 68.5. Fifth, the fact that no other housing programme (with the exception of social housing) is delivered within the inner city is by no means unique to Cape Town. The fact that the value of the grant for each of these programmes is determined at national level means that if there is any shortfall in the implementation of a particular programme, it is the City that needs to meet that shortfall from its funding. The City prefers not to do so, in order that housing may be delivered to as many households in need as possible.<sup>131</sup>
- 68.6. Sixth, largely due to the level of subsidisation by National Government and the individual contribution, the City has determined that social housing can occur in the inner City and surrounds. Consistent with this position, social housing (as opposed to emergency housing) has been delivered in areas such as: Steenberg (700); Brooklyn (219); Bothasig (120); Behar Gardens (629); Kraaifontein (500).<sup>132</sup>
- 68.7. Seventh, as regards Woodstock, there are five identified social housing sites: Pine Road; Dillon Lane; the Woodstock Hospital site; Salt River Market; and Pickwick Road. According to the City's Prospectus for Affordable Housing for Woodstock, Salt River and the Inner City Precinct issued on 29 September 2017: the total area of the Woodstock Hospital site, which is identified at page 17 (para 3.1.2.), is 18 411 m<sup>2</sup>; provision is made for a minimum number of social housing units of 700: these are to cater for households in the income brackets for social housing. On 6 December 2017 the provincial Cabinet resolved as follows: (a) the

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<sup>131</sup> Record: page 2799; par 49.2.5.

<sup>132</sup> Record: page 2799; par 49.2.6.

Cabinet grants approval for the disposal of twelve erven to the City at a price of R5,1 million for social rental housing purposes, which price is below the current market value of R9 million; (b) the disposal is subject to *inter alia* a reversionary right to be registered in favour of the WCG against the title deeds to the effect that, should they not be used for social rental housing purposes within a specified period, the properties will revert to the WCG at no cost, which reversionary clause must be finalised and agreed to between the DTPW and the DHS.<sup>133</sup>

68.8. Finally, it must be emphasised that land is a scarce commodity in the inner City and surrounds. In light thereof, it is simply not possible for the City to deliver on every housing programme in the inner City and surrounds. For reasons addressed, emergency housing is generally not delivered in the inner City and surrounds.<sup>134</sup>

69. The City has also specifically addressed in some detail:

69.1. The competing broader constitutional obligations that it bears, contending that emergency housing in the City cannot be viewed in isolation.<sup>135</sup>

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<sup>133</sup> Record: page 2799; par 49.2.7.

<sup>134</sup> Record: page 2800; par 49.2.8.

<sup>135</sup> Record: page 2769; par 7 and ffl.

69.2. The broader context of housing delivery and why the Occupier's challenge cannot be viewed in isolation.<sup>136</sup> In particular, the City has emphasised the following<sup>137</sup>:

69.2.1. The legacy of apartheid continues to permeate every aspect of socio-economic development in South Africa. For this reason, housing cannot be considered in isolation of the many other socio-economic deliverables that the City must provide to an increasingly large number of persons. In delivering on these competing obligations, the City has a finite pool of resources that can be and are dedicated to housing. Simply put, any decision that the City takes to expend funds on one housing project means that there are less funds available for another housing project. The City has targeted social housing development for the inner City and surrounds. The Residents would, for obvious reasons have preferred that the City provide emergency housing in that area; however, the fact that the City has chosen not to do so, does not make its decisions unconstitutional.

69.2.2. There is a growing demand for people wanting to reside in the inner city. In light of the scarcity of land within the inner city, coupled by the very high costs of development and the City's shrinking share of the national housing budget, unrealistic expectations have no space on the delivery

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<sup>136</sup> Record: page 2772; par 11 and ffl.

<sup>137</sup> Record: page 2772; par 11.2 and ffl.

agenda for the City. In this regard, the City is facing the prospect of a reduction of some **R 310 million** in its Urban Settlements Development Grant (USDG); this grant forms the backbone of the City's funding source for housing. There is currently ongoing engagement between the relevant organs of state in this regard. If a decision is ultimately taken to reduce the City's USDG by R 310 million, this impacts substantially on the extent of its delivery on housing and would, of necessity, require that certain housing projects not be pursued as a result of inadequate funding.

69.2.3. While the City has historically delivered on its emergency housing obligations by way of specific settlements (Blikkiesdorp and Wolwerivier), given the scale of the demand for emergency housing and the City's acceptance that emergency housing must also be integrated into other housing developments, where possible, the City's current strategy is to also focus on emergency housing as a component of a broader housing development. I return to this issue elsewhere in this affidavit.

69.2.4. In meeting its housing obligations, the City, inter alia executes and implements the housing programmes as identified in the Housing Code. There are several different housing programmes provided for in the Housing Code. So too, there are different categories of housing need in that State intervention is needed for households: (a) that earn an



income of below R 3500; and (b) that are living in sub-optimal housing circumstances and have incomes of between R 3 500 and R 13 000. It is estimated that between 2012 and 2032 (20 year period) 651,788 households in Cape Town will need some support from the City in respect of housing. (In addition, State intervention is needed for persons living in emergency circumstances.) The City will implement at least seven different housing programmes over the next 20 years to address the housing plight of some 650 000 households that need support.

69.2.5. It is simply not possible for the City to accommodate the demand for housing in the inner City and surrounds. It is precisely for that reason that the City is focussing on the development of economic nodes outside of the inner City and surrounds and on a reliable public transport system.

69.3. As to its emergency housing plan.<sup>138</sup>

### **There is no inflexible or irrational differentiation**

70. The Occupiers contend in their Heads of Argument that the City unreasonably and irrationality differentiates between different categories of persons with the same emergency housing needs.<sup>139</sup>

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<sup>138</sup> Record: page 2790; par 42.

<sup>139</sup> Applicants' Heads of Argument: p 47; par 110.

71. The underlying complaint arises from the fact that the City provides transitional housing on a particular basis in the inner City.

### The City's evidence

72. In this regard, careful consideration must be given the City's evidence in this regard:

73. In previous affidavits filed before this Court, the City explained that the Prospectus noted the sites that have been identified for development are as follows<sup>140</sup>:

73.1. Site A - Erf 13814 (Remainder of Pickwick Road): is approximately 3.3. ha and will have to be rezoned for residential development. It further notes that a minimum of **600 social housing units** are to be provided and that a small portion of the site will be developed as transitional housing.<sup>141</sup>

73.2. Site B - Erven 13130-13013; 13132-13135; 13138-13140; 13143-13144; 13146 (Woodstock Hospital): is approximately 18 411m<sup>2</sup> and is zoned as General Residential 4 which zoning permits a high density development. The minimum number of **social housing units** to be provided on this site is **700**.<sup>142</sup>

73.3. Site C – Erven 13126, 13127, 13136, 13137 (Woodstock Hospital Park): is described as the park next to Woodstock Hospital and is relatively underutilised; there is a crèche on the site which must be incorporated

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<sup>140</sup> Record: page 2801; par 50.

<sup>141</sup> At page 15.

<sup>142</sup> At page 16.

in the redevelopment. The minimum number of **social housing units** to be provided on this site is **200**.<sup>143</sup>

73.4. Site D – Erf 14888 (New Market Street): is 8483m<sup>2</sup> and is zoned as public open space and is being leased as a parking for surrounding offices. It is located on reclaimed land which may present constraints in respect of foundations which must be factored into development costs. The minimum number of **social housing units** to be provided on this site is **300**.<sup>144</sup>

73.5. Site E – Erf 5667 (Fruit and Veg): is along Canterbury Road and is 2730m<sup>2</sup>. The minimum number of **social housing units** to be provided on this site is **50**.<sup>145</sup>

74. As regards the sites that have already been allocated to **social housing institutions**, the Prospectus notes<sup>146</sup>:

74.1. That the Pine Road and Dillon Lane sites are part of a single development and are proposed for 240 social housing residential units, with development being completed in two phases; I refer to it as the Pine Road development. Development of the Pine Road site will commence first.<sup>147</sup>

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<sup>143</sup> At page 17.

<sup>144</sup> At page 18.

<sup>145</sup> At page 19.

<sup>146</sup> Record: page 2802; par 51.

<sup>147</sup> At page 22.

74.2. That multiple scenarios have been outlined for the Salt River Market site.<sup>148</sup>

74.3. The Upper Canterbury site has been identified as being available for development at a later stage and not being currently available for proposals.<sup>149</sup>

74.4. Subject to the exclusion of Mr Smith, none of the Residents in respect of whom the present relief is sought, falls within this income bracket.

75. As regards transitional housing, the Prospectus notes<sup>150</sup>:

75.1. In respect of Erf 13814 (Pickwick Road):

"This site is in the process of being developed. The Pickwick site is located along Pickwick Road in Salt River. A small portion of the site that is fenced off has been identified for development as transitional housing in order to accommodate the residents of an informal settlement that is currently housed on the Pine Road site. The small portion of the site that already houses a night shelter for boys will be subdivided. The City has reached an agreement with the shelter management to use the back part of the building for transitional housing units.

It is estimated that around 42 transitional housing units will be developed on this site. A social housing institution has been allocated the rights to design and implement the development, and Community Residential Unit (CRU) funding will be used for this project. An initial estimate suggests that 52 rooms can be developed on this site."

75.2. In respect of Erven 12010 and 12011 (St James Street):

"The site has been identified for development as transitional housing, in order to accommodate the residents of an informal

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<sup>148</sup> At page 22.

<sup>149</sup> At page 23.

<sup>150</sup> Record: page 2803; par 53

settlement that is currently located on the Salt River Market site. An initial estimate suggests that 42 rooms can be developed on this site."

76. The following progress has been made as regards the sites that have been identified in Salt River and Woodstock<sup>151</sup>:

76.1. The transitional housing on Pickwick Road has been constructed; it yielded a total of 42 rooms.

76.2. All 42 rooms are occupied by the residents of the informal settlement on Pine Road. As stated in the Prospectus, the transitional housing in Pickwick Street was built specifically for this purpose.

76.3. As things presently stand, there is accordingly no further capacity at the Pickwick transitional site (for at least the next two years but possibly longer) to accommodate the Occupiers or indeed anyone else.

76.4. The transitional housing sites were identified primarily to house the occupiers of the informal settlements in Pine Rd and Salt River Market Site, to enable both sites to be developed for social housing. The intention is for it to be transitional in the sense that if persons qualify for Pine Road or other social housing, alternatively other housing opportunities, they move out of the transitional housing into those units.

76.5. The transitional housing at St James Street has not commenced as yet, which was intended to accommodate the residents of an informal settlement that is currently located on the Salt River Market site. This is

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<sup>151</sup> Record: page 2803; par 54

on account of various delays in respect of planning approvals. Depending on the timeline by which the current occupants of the Pickwick Transitional Housing vacate those structures and by when transitional housing for the Salt River Market is required, they may have to use the Pickwick Transitional Housing for the persons residing on the Salt River Market site.

76.6. The St James transitional housing is therefore not available to the Occupiers; it does not exist at this stage and nor has construction started.

76.7. Save for both the above-mentioned sites, there are no other sites for emergency or transitional housing in the inner city and surrounds.

76.8. The City's approach to the transitional housing referred to is guided by the following:

76.8.1. In instances where there is land available in the inner city and surrounds, these sites are being developed for social housing. This is one of the housing programmes that the City is required to ensure delivery on.

76.8.2. Social housing works on a different model in that it is not aimed at the poorest of the poor and is dependent on a contribution factor by the recipient. In light of the funding model (and with due regard to the high land costs in the inner city and surrounds), the City has determined that social housing projects are best accommodated in those areas.

Delivering these social housing projects too, forms part of the package of housing delivery objectives.

76.8.3. To date, a significant impediment to the delivery of social housing in certain areas has been that the land parcels in question are being occupied. It is for this reason that transitional housing was specifically committed to so as to ensure that vacant occupation could be obtained on certain sites in order for social housing to be developed.

76.8.4. If the transitional housing in Woodstock is to now be used for the Occupiers (as they seek), it means that it will not be available for the intended purpose. This means that vacant occupation of the social housing sites will not be obtained, and ultimately, the social housing developments cannot proceed.

76.8.5. It must therefore be emphasised that the consequence of the Occupiers' demands for transitional housing is that it will result in the identified social housing developments not being able to move forward. If the orders sought in the amended relief are granted, it will impede the realisation of housing rights.

77. Finally, the City has explained that once the transitional housing in Pickwick and St James (when it is constructed) have been used for their intended purpose the City will make them available more broadly. It is however at this stage, entirely premature to do so for reasons addressed.

The City's conduct is not unreasonable or irrational

78. The Occupiers argue that because the City has targeted the transitional site for persons occupying sites on which social housing intended to be built, the City has acted unreasonably and irrationally.<sup>152</sup> In support of this contention, the Occupiers refer to the judgment of the Constitutional Court in **Blue Moonlight**.<sup>153</sup>
79. We submit that there is no merit to the argument for at least the following reasons:
- 79.1. First, the City has explained (with reference to detailed reasons) as to why it does not generally develop emergency accommodation in the inner city. There is no basis on which to reject or refute those reasons.
- 79.2. Second, the City has specifically explained the purpose of the transitional housing in Woodstock, viz to facilitate access to land for the construction of social housing. The fact that the City takes a specific initiative in this regard in order to realise housing rights, does not mean that it is duty-bound to take the same measures in relation to other categories of persons such as the Occupiers.
- 79.3. Third, unlike the case in Blue Moonlight whereby the policy excluded evictees by private landowners, in the present instance there is no such exclusion. The City has explained that the transitional housing was constructed for a specific purpose and that once the transitional housing in Pickwick and St James (when it is constructed) have been

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<sup>152</sup> Applicants' Heads of Argument: p 51; par 120.

<sup>153</sup> Applicants' Heads of Argument: p 51; par 121.



used for their intended purpose the City will make them available more broadly.

79.4. Finally, the effect of the Occupiers' argument is that notwithstanding the transitional housing having been constructed for a particular purpose, it ought to be made available to them (and not the intended beneficiaries) despite the fact that the consequence of such a course would be that the social housing cannot be constructed. Such an argument must fail.

## **CONCLUSION**

80. For reasons addressed, we ask that the application be dismissed with costs.

**KARRISHA PILLAY SC**

Counsel for the City of Cape Town

11 November 2020

Chambers

Cape Town