IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

SCA Case Number: 1303/21
WC Case Number: 13946/2015
13947/2015
13951/2015
13952/2015

In the matter between:

CITY OF CAPE TOWN Appellant
(Second Respondent in the Court *a quo*)

and

CHARNELL COMMANDO AND OTHERS First to Twenty-Sixth Respondents
(First to Twenty-Sixth Applicants in the Court *a quo*)

WOODSTOCK HUB (PTY) LTD Twenty-Seventh Respondent
(Second Respondent in the Court *a quo*)

FIRST TO TWENTY-SIXTH RESPONDENTS HEADS OF ARGUMENT

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I INTRODUCTION

1. This case is about the perpetuation of spatial apartheid by the City of Cape Town. The evidence in this case shows that City of Cape Town implements an emergency housing programme which excludes the development of emergency housing in the immediate City centre and its surrounds and instead only provides emergency housing in informal settlements and areas on the outskirts of the City. As a consequence of this, not a single emergency housing site has been developed by the City in the immediate City centre and its surrounds since the dawn of democracy. This in a context where the undisputed evidence is that Cape Town is one of the most historically spatially divided cities in South Africa and in the midst of one of the worst housing affordability crises in the world.

2. The evidence also shows that the City implements a policy which provides transitional housing in Woodstock and Salt River to persons unlawfully occupying land which has been designated in these areas for social housing. The evidence is clear that unlike the City's conduct in respect of the Residents, these occupiers are not required to avail themselves of emergency housing provided by the City in informal settlements and areas on the outskirts of the City. They are instead accommodated by the City in transitional housing in areas close to their previous informal homes in the inner City. The City says that this is fair and reasonable.

3. The issue in this appeal is whether the City has demonstrated that its policies and programme regarding emergency housing and the implementation thereof, are reasonable and consistent with the Constitution. The City seeks to reverse a

judgment of the Western Cape High Court, which held that they were not.[1]

4. It is important to emphasize at the outset what this case is not about. This case is not about judicial overreach into policy laden and polycentric executive decision-making. There is no basis for this charge. The Courts of the land are mandated by the Constitution itself to step in when persuaded by argument and evidence to intervene and protect rights infringed by unreasonable conduct in social and economic programmes.[2]

5. That is precisely what the Court *a quo* did. And in doing so, its order remedying breaches of constitutional rights should not be stigmatized as violating the separation of power between the executive and the judiciary. Nor is there any basis for the further contention by the City that the "…*the true concern of the Court a quo was to come to the aid of the Occupiers*…". The submission is both unfounded and inappropriate.

6. These heads are structured as follows:

   6.1 **Part II** sets out the social and historical context to the application before the Court *a quo*;

   6.2 **Part III** sets out the factual background and litigation history;

   6.3 **Part IV** outlines legal principles which apply to the evaluation of the reasonableness of social and economic programmes;

   6.4 **Part V** deals with the evidence demonstrating the City's failure to show

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[1] Commando and Others v Woodstock Hub (Pty) Ltd and Another [2021] 4 All SA 408 (WCC)

[2] Mwelase and Others v Director-General for the Department of Rural Development and Land Reform and Another (2019 (6) SA 597 (CC) at para 51.

that its emergency housing programme and the implementation thereof are reasonable and consistent with the Constitution;

6.5 **Part VI** deals with certain new arguments advanced by the City in its heads of argument; and

6.6 **Part VII** addresses the issue of remedy.

II THE SOCIAL, HISTORICAL AND ECONOMIC CONTEXT

7. An assessment of the broader social, historical and economic context is central to the question of the reasonableness of a government programme delivering socio-economic rights. 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.[3] In relation to the right of access to adequate housing in particular, social, historical and economic context is relevant to what is required of the State to achieve this right, which may vary over time and context.

8. The appropriateness and reasonableness of the State's response to housing needs depends on the context within those needs arise. For example, and to paraphrase *Grootboom*, what may be an appropriate and reasonable response to the housing needs of persons who are able to qualify for and afford access to social housing, may not be a reasonable response to the housing needs of desperately poor people who have emergency housing needs as a result of eviction and imminent homelessness.[4]

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[3] Mazibuko and Others v City of Johannesburg and Others 2010 (4) SA 1 (CC) ('Mazibuko') at para 59.

[4] As Yacoob J explained in Government of the Republic of SA & Others vs Grootboom & Others 2001 (1) SA 46 (CC) ('Grootboom') at para 37, "…*The State's obligation to provide access to adequate housing depends on context, and may differ from province to province, from city to city, from rural to urban areas and from person to person. Some may need access to land and no more; some may need access to land and building materials; some may need access to finance; some may need access to services such as*

9. It is precisely because socio-economic conditions such as housing needs do not remain static and change over time, that measures directed at achieving a particular socio-economic right must be balanced and flexible in order to pass the test of reasonableness.[5] It is submitted that the evidence in this case demonstrates that the City's emergency housing programme and its implementation in relation to persons such as the Residents, who are being forced out of their homes in Woodstock and Salt River due to gentrification of these areas, fails this test.

10. To begin with, there are two central aspects of the historical, social and economic context of this case that require emphasis. The first is the ongoing legacy of spatial apartheid in South African cities. The second is the phenomenon of gentrification in the Woodstock and Salt River area of Cape Town in particular, which as the Court *a quo* correctly pointed out, has led to the situation in which the Residents found themselves.[6]

Spatial apartheid

11. The cause of the housing crisis in South Africa lies fundamentally in our history, and in particular apartheid and the pillars of racial segregation, 'influx control', and forced removals upon which it was built.[7] This toxic legacy of the apartheid zoning and spatial planning system remains imprinted on the spatial structure of South African cities to this day.[8]

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water, sewage, electricity and roads. What might be appropriate in a rural area where people live together in communities engaging in subsistence farming may not be appropriate in an urban area where people are looking for employment and a place to live."

[5] Grootboom at para 44.

[6] V10: p 1791: para 127.

[7] Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others (2010 (3) SA 454 (CC) at paras 192 to 197 sets out this history and its relevance to the constitutional commitment to address the plight of millions of people living in great poverty and in deplorable conditions.

[8] Kriegler J described the legacy of the apartheid city as follows in Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others 1999 (1) SA 374 (CC) at 122, *"The*

12. The state at all levels has a constitutional and statutory duty to consider and address the consequences of apartheid spatial planning and to militate against its effects. It is submitted that what the state is not permitted to do, is to either fail to take appropriate and reasonable measures to address spatial apartheid or to take inappropriate and unreasonable measures which perpetuate it.

13. In *Thubakgale*, Majiedt J (Khampepe J, Theron J and Tlaletsi AJ concurring), said the following with regard to the duty to address spatial apartheid:

> *"It follows then, that when this Court determines the content and scope of socio economic rights, it must consider their primary purpose, which is to promote substantive equality and human dignity, and also to undo the racialised system of poverty inherited from apartheid. The right to adequate housing enshrined in section 26 is one such right, which must therefore serve a purpose that is both remedial and transformative. The same applies to the land rights that are implicit in section 25. Together, these rights function to overturn the many spatial injustices created under apartheid and colonialism, and perpetuated today. They would ring hollow – and could not achieve their central aims – if actions to fulfil housing and land rights did not include a consideration of spatial apartheid."*[9]

14. The statutory source for the obligation to address spatial injustice, which is a direct consequence of spatial apartheid, are the duties imposed by the Spatial Planning and Land Use Management Act 16, of 2013 ("SPLUMA").[10]

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

[9] Thubakgale and Others v Ekurhuleni Metropolitan Municipality and Others (CCT 157/20) [2021] ZACC 45 (7 December 2021) at para 107.

[10] The legacy of apartheid spatial planning which SPLUMA is meant to address is set out in its preamble, which records that "*WHEREAS many people in South Africa continue to live and work in places defined and influenced by past spatial planning and land use laws and practices which were based on: racial inequality; segregation and unsustainable settlement patterns*."

15. Section 7 of SPLUMA sets out various principles which apply to spatial planning, land development and land use management. One of these is the principle of spatial justice. Section 7(a) of SPLUMA.[11] In terms of section 6 of SPLUMA, the general principles set out in section 7 apply to all organs of state responsible for the implementation of legislation regulating the use and development of land. The principle of spatial justice applies to all aspects of spatial development planning, land development and land use management.[12] The principle of spatial justice must therefore guide *inter-alia* "*the preparation, adoption and implementation of any spatial development framework, policy or by-law concerning spatial planning and the development or use of land*", "*the sustainable use and development of land*" and "*the performance of any function in terms of this Act or any other law regulating spatial planning and land use management.*"[13]

Gentrification in the Woodstock and Salt River area

16. The phenomenon of gentrification contributes to the perpetuation of spatial apartheid in the City and cements the inequalities of the past. The Residents placed expert evidence before the Court *a quo* to this effect, in an affidavit by Ms Lauren Royston, a development planning expert. Her conclusions were largely undisputed save in minor respects which are addressed later in these heads. Ms Royston's evidence provides important historical and socio-economic contextual information and explains the effect of rising property prices and gentrification on

[11] Section 7(1)(a)(i) of SPLUMA provides that "*past spatial and other development imbalances must be redressed through improved access to and use of land.*"
[12] SPLUMA: section 6(2)
[13] SPLUMA: section 6(1)(b), (c) and (e).

working class tenants in the Woodstock and Salt River area.

17. With regard to the historical context, Ms Royston noted at the outset of her affidavit that while all South African cities struggle with the legacy of spatial apartheid, "…*Cape Town faces unique challenges in that it is both one the most historically spatially divided cities in the country and is also in the midst of one of the worst housing affordability crises in the world*."[14] Ms Royston pointed out that the Woodstock and Salt River area was one of the few inner-city neighborhoods in which Coloured households managed to survive forced evictions such as those in District Six, which saw 60 000 residents ejected from the inner-city. African people were also forcefully removed and displaced from Woodstock and Salt River.[15] This historical background is also confirmed by the City's Affordable Housing Prospectus for the Woodstock, Salt River and Inner City Precinct.[16]

18. According to Ms Royston evidence, Woodstock and Salt River began to be viewed more widely as an investment destination, corporate hub, and a space for retail and entertainment. Research on the exclusivity of these new developments shows how many of the new creative developments catered for middle to high income people, have controlled access, private security and are experienced as alienating by poor Coloured residents.[17]

19. Ms Royston's expert affidavit made a number of important observations and conclusions regarding the socio-economic context of rental housing in the Woodstock and Salt River area and the impacts of rising property prices and affordability of rentals in the area for working class tenants. These conclusions

[14] V2: p 277: para 12.
[15] V2: p 282: para 24.
[16] V9: p 1583.
[17] V2: p 283: para 29.

were not disputed by the City nor placed in issue by countervailing expert evidence.

20. The evidence was that year on year average property price growth in Cape Town (the third highest in the world after Shanghai and Vancouver) has rendered it increasingly difficult for poor, working and middle class households to afford well-located and quality homes in or close to the city.[18] To afford an average house, an average Cape Town resident would have to earn three times the average household income resulting in a major shift towards rental accommodation.[19]

21. Rapidly rising home prices in desirable areas of Cape Town had forced many residents into the rental market. The Housing Development Agency noted in a 2013 report that based on 2011 Census data, there had been "*a noticeable shift toward rental accommodation*" in the Western Cape. This shift to rental was mirrored by 2011 Census data on Cape Town. This was accompanied by a rise in rental rates. According to PayProp Research, average rental rates in the Western Cape increased by 28.76% between 2012 and 2015. The average rental in the province was calculated at R7161.00 per month – this is higher than the national average and the Gauteng average. Limited data existed at the City level, where average rental increases are likely to be higher.[20]

22. According to the 2011 census, approximately 42% of households in Woodstock earned R6,400 per month or less. Using the affordability measure, of 30% of household income, these households could afford rent of R1 920 or less. The majority of households in Woodstock earned R12 800 or less per month, using the affordability measure of 30% of household income, the majority of

[18] V2: p 277: para 13.
[19] V2: p 278: para 16 – 19.
[20] V2: p 278: para 17.

households could only afford rent of R3 840 or less per month. TPN Credit Bureau rental reports for the area indicate that the average rental price for all properties over the past two years in Woodstock has been R5275.00. This contrasts to rental in 2003, which, according to the Woodstock-Salt River Revitalisation Framework ('WSRF'), were between R1000.00 and R2000.00 per month.[21]

23. The WSRF further noted that the purchase price for property in the area ranged between R100 000 to R300 000 in 2003. Data collated on sales prices by Property24 indicated that the average sale price of house and apartments in Woodstock in 2015 was R1.6 million.[22] Based on affordability being measured as 30% of household income, a household in Woodstock would therefore have to earn at least R17,583 per month to be able afford the current average rental. Based on the demographic profile of the area, this, according to Ms Royston's evidence, would be out of reach for many, if not the majority, of the area's households. Increasingly high sales prices also prompted landlords to sell, refurbish or develop properties rather than continue leasing to their tenants of many years.[23]

24. The City in its initial affidavit sought to dispute the relationship drawn by Ms Royston between rising property prices, unaffordable rents and gentrification in the area and evictions and displacement of working-class residents in the area, referring to this as a "*bald statement*" and one "*too vague to provide any meaningful answer to*."[24] The evidence however demonstrates that the City later accepted the existence of a direct link between displacement of Woodstock &

[21] V2: p 284: para 30.
[22] V2: p 285: paras 31.
[23] V2: p 498: paras 32 – 33.
[24] V2: p 394: para 181

Salt River residents and the unaffordability of rising property prices and rentals.

25. This is clear from a speech delivered by the City's erstwhile Councillor Brett Herron on 18 July 2017, where he stated that *"..the City must also mitigate against the displacement of residents, especially tenants in rental properties, who have lived their entire lives in suburbs like Woodstock and Salt River where high-end developments are rising at a rapid pace because of the proximity to the Cape Town central business district (CBD)*."[25] The City's Woodstock, Salt River and Inner City Precinct Prospectus also records that "…*as property prices continue to rise many of the working class tenants that have been an established part of life in Woodstock and Salt River since its foundation in the colonial era are being displaced*."[26]

26. It is against this context that the issues arising in this appeal must be determined.

III FACTUAL BACKGROUND AND LITIGATION HISTORY

The Residents

27. The Residents of the Bromwell Street property consist of six families and two individuals, amounting to a total of approximately 25 persons (almost half being children). Most of them have lived on the property for their entire lives. The vast majority of the Residents are either unemployed, working in low pay employment or surviving from social grants. A number of them have been on the state housing waiting list for over a decade. Their personal lives, circumstances of their families and children and their stories are important and their actual situation must be taken account of.[27] As the Court has emphasized in *Grootboom*, human beings

[25] V8: p 1514.
[26] V9: p 1584.
[27] The personal circumstances of the Residents as at the date of the application are set out in V2: p 233 – p 268.

are required to be treated as human beings.[28]

Litigation history

28. The Residents previously occupied the property by virtue of lease agreements with the previous owners of the property, Reza and Erefaan Syms. The rental for each housing unit ranged from R300.00 to R2000.00 per month with the lease agreements being inter-generational in nature, the tenancies of the Residents being linked to previous lease agreements between their parents and grandparents and various owners of the property.

29. The Syms brothers were co-owners of the property. Reza Syms was responsible for the collection of rent from the lessees.[29] On 30 October 2013, Reza Syms entered into a sale agreement with the Second Respondent ('Woodstock Hub'). Transfer only took place on 4 March 2015.[30] The Residents only became aware of the sale agreement through a press statement released by the Woodstock Hub on 26 August 2016.[31]

30. The Residents continued to occupy the property after it was sold. Reza Syms collected rent on a monthly basis until early 2014.[32] During 2014, Reza Syms stopped collecting rent from the Residents. During June 2014, the Residents received letters of cancellation of their leases from attorneys acting on behalf of Woodstock Hub who were managing the property even though transfer of ownership had not yet occurred. The letters required the Residents to vacate the property.[33]

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[28] Grootboom at para 83.
[29] V1: p 132.
[30] V1: p 14: para 18.
[31] V4: p 646.
[32] V4: p 612: para 13.
[33] V1: p 8.

31. The Woodstock Hub instituted eviction proceedings against the Residents during July 2015. The applications were brought in terms of the provisions of the Prevention of Illegal Eviction and Unlawful Occupation of Land Act 19 of 1998 ("PIE"). The City was cited as respondent in each eviction application. No relief was sought against it.

32. The eviction applications were initially set down for hearing on 6 September 2015. The hearing was postponed to 22 September 2015 in order for the Residents to obtain legal representation and file answering affidavits. On 10 December 2015 Hlophe JP granted an order by agreement consolidating the eviction applications for hearing on 9 February 2016, providing for the filing of a schedule containing the details of the Residents of the property and setting out a time-table for the delivery of further affidavits.[34]

33. On 17 March 2016 Hlophe JP granted a further order, allegedly by agreement, in terms of which the Residents were directed to vacate the property by 31 July 2016.[35] According to the Residents, this order was taken by agreement pursuant to legal advice given to the Residents by their former attorney that the Residents had no legal defence to the eviction application. In the light of this legal advice, the Residents had requested their attorney to obtain an extension of time in order to vacate the property.[36] On 4 August 2016 the Residents brought an application seeking to vary the dates in the 17 March 2016 order by extending the deadline for them to vacate the property to 30 November 2016. The variation application

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[34] V1: p 8.

[35] It is unclear whether the Court satisfied itself that an eviction order was just and equitable notwithstanding that the eviction order was purportedly being sought by consent: Residents of Erven 87 and 88 Berea v De Wet N.O. and Another (; 2017 (8) BCLR 1015 (CC).

[36] V1: p 17: para 27 – 28

was dismissed by Weinkove AJ on 5 August 2016.[37]

34. During 3 September 2016 to 19 September 2016, a series of discussions took place between the Residents, their present attorneys, various City officials and the Executive Mayor concerning the availability of alternative accommodation for the Residents.[38] These discussions commenced on 3 September 2016 with a letter directed to the City by the Residents present attorneys which *inter-alia* alerted the City to the imminent eviction, set out the Residents' personal circumstances and sought the assistance of the City with regard to temporary emergency accommodation.[39]

35. The City responded on 5 September 2016 stating inter-alia that the eviction was a "*private eviction*" which was "*just and equitable*" without emergency accommodation being provided to the Residents. As the High Court pointed out, this stance was plainly wrong.[40] The letter stated that the City did not have emergency accommodation available for the applicant, but was willing to place the Residents on the waiting list for such emergency housing provided they apply and meet the criteria.[41]

36. On 7 September 2016, the then Executive Mayor De Lille, the local councilor and the Mayor's spokesperson met with the Residents at the property. The Mayor agreed to look into possible solutions "*including whether land could be made available for the relocation of the Occupiers*."[42] On 8 September 2016 the Residents' attorney responded to the Mayor's request that she be provided with information regarding the matter. The response from the Residents' attorney

[37] V1, p 18, para 33.
[38] V1, p 21 – p 30.
[39] V1, p 105.
[40] V10, Judgment p 1760 para 11.
[41] V1, p 108.
[42] V2 p 361, para 90.

provided the Mayor with detailed information relating to the details and circumstances of the Residents , background information relating to their occupation of the property and information confirming that a number of the Residents were on the City housing waiting list.[43] The Residents were informed by City officials that same day that the Woodstock Hub had agreed with the City not to proceed with the execution of the eviction order until 26 September 2016. The City officials proposed that the City would assist the Residents to apply for social housing and that the Residents would have "*first option*" to apply for units in the upcoming social housing developments in the Woodstock and Salt River areas once these had been developed in approximately 18 months.[44]

37. What then followed was a telephone call to the Residents' community representatives requesting their attendance at meeting "*to apply for housing*" on 12 September 2016 where their details would be updated and registered on the housing database.[45] On 12 September 2016 the Mayor issued a statement *inter-alia* recording that the City had been investigating the circumstances of "*each of the five tenants in order to ascertain whether they qualify for the basket of services that the City is allowed to offer in terms of policy and law*". The statement recorded that four families qualified for social housing opportunities and that the Bromwell families would be encouraged to apply for allocation in two new social housing developments to be built in the next 18 months.[46] Further correspondence was directed to the City by the Residents' attorneys on 15 and 16 September 2016. The latter correspondence placed the City on terms to provide by 19 September 2016 details of when it would provide temporary

[43] V2 p 113 – 166.
[44] V1, p 25, para 49.
[45] V1 p 26, para 58.
[46] V1, p 198.

emergency accommodation to the Residents failing which the Court would be approached for relief.[47] The City failed to respond to this letter save for a statement from its legal advisor that she would take instructions.

38. The application (for the relief as initially framed) was launched on 20 September 2016 after no further response from the City. On 23 September 2016 an order was granted by agreement postponing the application for hearing on 4 November 2016, setting time frames for the filing of further papers and heads of argument and suspending the 17 March 2016 and 19 August 2016 orders until 4 November 2016. The parties later agreed to the application being heard on 9 November 2016.[48]

39. At the hearing of the application on 9 November 2016, the parties agreed to an order postponing the application to 31 January 2016, an order providing for the Residents to apply for all social housing, GAP and FLISP subsidy housing opportunities within the City by 30 November 2016, the filing of reports and affidavits regarding the outcome of these applications and a time-table regulating the further conduct of the matter. The application was argued before Weinkove AJ on 31 January 2017 and 1 February 2017. Subsequent to the hearing and on 9 February 2017, Weinkove AJ requested the parties to provide further information on the issue of the transportation needs of the Residents.[49]

40. In the course of the hearing on 13 September 2017, the Court *a quo* raised certain questions regarding the use of erf 13814, Salt River for the purposes of a City owned transitional housing project. The Residents' attorney filed an

[47] V2, p 211.
[48] V2 p 373-378.
[49] The correspondence and information relating to the transportation issue is set out at V6, p 1131 – V7, p 1203 of the record.

affidavit setting out background information and City documents relating to the use of erf 13814 for transitional housing.[50] That same day, Mayor De Lille issued a media statement regarding the City's inner-City social housing initiative and the City's then Mayoral Committee Member for Transport and Urban Development, Councillor Brett Herron, made media statement on affordable housing on well-located City-owned land in the Woodstock and Salt River area.[51]

41. On 28 September 2017 the City issued its City Prospectus for Affordable Housing in Woodstock, Salt River and the Inner-City precinct.[52] On 20 December 2018 the City advised the Residents' attorneys that it had identified possible emergency accommodation for the Residents in Maitland and requested the Residents to indicate when they could view the accommodation.[53] The City responded to the request for further information on 19 February 2019, a month later. On 26 February 2019 the Residents' attorney sought further information from the City regarding the Maitland offer and provided dates when the Residents were available to visit the site. There was no response to this letter until 29 May 2019 when the City advised that they were "*in the process of engaging with the receiving community and ward Councillor in the area*" and that they were also *"in process of determining and finalizing the type of structure they would offer*."[54]

42. Two and a half months later, the City advised on 16 August 2019 that the offer of emergency accommodation in Maitland was no longer available as the receiving community had objected to the relocation of the Residents to the Maitland site.[55] In the same letter, the City advised that emergency

[50] V8, p 1501 – 1512.
[51] V9, p 1577 – 1615.
[52] V9, p 1746 – 1748.
[53] CB1, CB123, para 60.
[54] CB1, CB124: para 64.
[55] CB1, CB149.

accommodation could be made available to the Residents at a site called Kampies. On 27 August 2019 the Residents' attorneys requested further information from the City concerning the offer of emergency accommodation at Kampies.[56]

43. There was no response from the City to this letter until 12 February 2020, eight months later, when the City indicated that arrangements could be made for a site visit to Kampies.[57] The site visit to Kampies took place on 29 February 2020 and subsequent thereto the Residents' attorney requested further information regarding the proposed relocation of the Residents to the Kampies site. The City responded to the requests for information on 4 March 2020 and requested the Residents to indicate their acceptance or rejection of the Kampies offer by 7 April 2020.[58] On 6 April 2020 the Residents directed a letter to the City's attorneys providing detailed reasons for their rejection of the City's offer of emergency accommodation at Kampies.[59]

IV JUDICIAL EVALUATION OF THE REASONABLENESS OF SOCIO-ECONOMIC PROGRAMMES

44. In *Mazibuko*, O' Regan J said the following regarding the duty of an organ of state when dealing with a constitutional challenge to the reasonableness of a programme for the delivery of socio-economic rights:

> *"When challenged as to its policies relating to social and economic rights, the government agency <u>must explain why the policy is reasonable</u>. Government must disclose what it has done to formulate the policy: its investigation and research, the alternatives considered, and the reasons why the option underlying the policy was selected. Not only must government show that the policy it has selected is reasonable, it must*

[56] CB1, CB161 – CB164.
[57] CB1, CB127, para 75.
[58] CB2, CB191 – CB207.
[59] CB2, CB238 – CB240.

show that the policy is being reconsidered consistent with the obligation to "progressively realise" social and economic rights in mind.

A policy that is set in stone and never revisited is unlikely to be a policy that will result in the progressive realisation of rights consistently with the obligations imposed by the social and economic rights in our Constitution."[60]

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

45.1 it must be capable of facilitating the realization of the right;[61]

45.2 it must be comprehensive, coherent and co-ordinated;[62]

45.3 appropriate financial and human resources must be made available for the programme;[63]

45.4 it must be balanced and flexible and make provision for short, medium and long term needs;[64]

45.5 it must be reasonably conceived and implemented;[65]

45.6 it must be transparent and its contents made known effectively to the public;[66] and

45.7 it must make short term provision for those whose needs are urgent and who are living in intolerable conditions.[67]

46. The mere existence of a housing programme or a policy which addresses or is

[60] Mazibuko at para 61 – 62.
[61] Grootboom at para 41.
[62] Grootboom, para 41.
[63] Grootboom, para 39.
[64] Grootboom, para 43.
[65] Grootboom, para 40 – 43.
[66] Grootboom, para 4.
[67] Grootboom, para 99.

planned to address medium to long term housing needs at some point in the future, is not sufficient to meet the test of reasonableness. The state is required to respond rationally and apply its policies policy to the actual situation of the persons concerned. As Sachs J explained in *Port Elizabeth Municipality* in the context of eviction proceedings, a programme which works in theory is not enough and it is insufficient for a municipality merely to show that it has in place a programme that is designed to house the maximum number of homeless people over the shortest period of time in the most cost-effective way.[68] A municipality may therefore not adopt a "one size fits all" approach when responding to the emergency housing needs of persons facing potential homelessness. As our courts have repeatedly held, every eviction case is different.[69] The duty to take reasonable measures requires the City to seek out and implement concrete case specific solutions.[70]

47. Lastly, it is necessary to set out the principles which apply to the powers of the court when faced with a constitutional challenge to the reasonableness of a programme delivering socio-economic rights. In *TAC*, Chaskalson J said the following in response to an argument that the principle of separation of powers precluded a court from granting orders which have the effect of requiring the executive to pursue a particular policy:

> *"Where state policy is challenged as inconsistent with the Constitution, courts have to consider whether in formulating and implementing such policy the state has given effect to its constitutional obligations. If it should hold in any given case that the state has failed to do so, it is obliged by the Constitution to say so. In so far as that constitutes an intrusion into the domain of the executive, that is an intrusion mandated by the Constitution itself. A dispute concerning socio-economic rights is thus likely to require a court to evaluate state policy and to give judgment on*

[68] Port Elizabeth Municipality v Various Residents 2005 (1) 217 at para 29.
[69] Blue Moonlight Properties v Residents of Saratoga Avenue 2009 (1) SA 470 (W) at para 64.
[70] Port Elizabeth Municipality at para 31.

whether or not it is consistent with the Constitution. If it finds that policy is inconsistent with the Constitution it is obliged in terms of section 172(1)(a) to make a declaration to that effect."[71]

IV THE CITY'S EMERGENCY HOUSING PROGRAMME AND ITS IMPLEMENTATION IS UNREASONABLE

The City's overall housing programme

48. The City's housing delivery programme comprises of a number of different policies, guidelines and sub-programmes. According to the City's answering affidavits, these include the Integrated Human Settlements Framework ("IHSF")[72]; the Integrated Human Settlements: Five Year Plan, ("the Five Year Plan"),"[73]; the City's Integrated Development Plan ("IDP"); the Woodstock and Salt River Revitalization Framework; the Table Bay District Spatial Plan;[74] the Built Environment Performance Plan[75]I the Emergency Housing Plan through the development of Temporary Relocation Areas ("TRAs") and Incremental Development Areas ("IDAs");[76] and the Affordable Housing Prospectus for Woodstock, Salt River and the Inner City Precinct.[77]

49. In addition to the above, the City executes and implements various housing programmes as identified in the Housing Code.[78] The Five Year Plan records that the City aims to deliver a range of housing types over the full range of housing types supported by the National Department of Human Settlements' funding programmes. The City has a level 2 accreditation for all provincial and national housing programmes and thus has increased responsibility and control

[71] Minister of Health and Others v Treatment Action Campaign and Others (No 2) (2002 (10) BCLR 1033 (CC) at para 98 - 101
[72] V2: p 342, para 37
[73] V2: p 377 – 384.
[74] V2: p 597: para 206
[75] CB1, CB28 – CB29, para 30 – 32.
[76] CB1, CB33, para 30; CB1, CB35, para 42.
[77] V9, p 1577 – 1615.
[78] CB1, CB19: para 11.5

of housing delivery.[79]

50. The City's "Five-Year Plan" applied at the time that the application was brought and was first referred to by the City in its first answering affidavit. The City stated *"….the City has adopted the Integrated Human Settlements: Five Year Plan, ("the Five Year Plan"), which it reviews annually to ensure that it considers and responds to any significant changes in the micro and macro environments that may impact on delivery*."[80]The Five-Year Plan refers to three megaproject/catalytic projects, the profiles of which were identified by the City and submitted to the national Department of Human Settlements. In identifying these projects, the Five Year Plan confirms that the City considered various criteria determined by the national department of Human Settlements and the Housing Development Agency, one of which was to "…*affect and integrate the spatial environment as envisaged by the City of Cape Town spatial plan*."[81]

51. One of the catalytic projects identified by the City and recorded in the Five-Year Plan is Catalytic project 3: the Voortrekker Road corridor integration zone ("VRCIZ").[82] The Five-Year Plan records that it "…*will contribute to the City's achievement of some of the goals set in the National Development Plan, by transforming previous spatial inequalities in the location and design of major future housing developments as well as providing communities with a greater choice in housing solutions*."[83]

52. As demonstrated later in these heads, it is evident that the Five-Year Plan, as

[79] CB1, CB110: para 12.
[80] V2: p 342; para 38.
[81] V3: p 472 – 473.
[82] CB1 CB98.
[83] V3: p 516 – 517.

one of the City's foremost and principal planning mechanisms for the delivery of housing, makes no provision for the establishment of emergency housing in the inner City centre and its surrounds in order to meet the emergency housing needs of persons evicted and facing homelessness in the Woodstock and Salt River area. This notwithstanding that it professes to be a forward-looking planning policy, which in order to be reasonable, must be flexible and allow for meeting the short term housing needs of persons such as the Residents, who are in desperate housing need due to eviction from their homes.

Unreasonable planning and implementation

53. The Residents case in the Court *a quo* was that the formulation and implementation of the City's Housing Programme is deficient and inconsistent with the positive duties imposed on the City by section 26(2) of the Constitution, in the following respects:

53.1 Firstly, the City's housing programme does not provide for access to emergency or transitional accommodation in the immediate inner City centre and surrounds in order to meet the urgent emergency housing needs of 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;

53.2 Secondly, in the provision of transitional housing in the immediate inner City centre and surrounds, the City 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 Residents who have been evicted from their homes in the Woodstock / Salt River area and face imminent homelessness;

53.3 Thirdly, the implementation of the City's emergency housing programme in the immediate inner City and surrounds is unreasonable and irrational because it is arbitrary, contradictory and inconsistent with City's own public statements;

53.4 Fourthly, 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.

Failure of the City's housing programme to plan for and provide access to emergency accommodation in the immediate inner City area and surrounds

54. It is clear from the evidence that the City's approach to housing in the immediate inner City area and surrounds is exclusively focused on the provision of social housing and not emergency housing in these areas. The City's main answering affidavit stated that "*The City has targeted social housing development for the inner City and surrounds*"[84] and that "…*the developments referred to in Woodstock and Salt River would best serve the imperatives of social housing as opposed to general emergency housing*."[85] The City confirmed this to be the case in its first answering affidavit, in which it stated that "…*sites in the Woodstock and Salt River areas have indeed for allocated or reserved for social housing*."[86] The VRCIZ which had been identified by the City and put forward by the City to the national Department of Human Settlements as a catalytic project, also no

[84] CB1, CB17, para 11.2.
[85] CB1, CB40 -CB41, para 47.4.
[86] V2: p 390, para 163.

mention of planning for emergency housing in the inner City and its surrounds.

55. The City confirmed in its answering affidavit that there are no emergency housing developments in the immediate City centre and surrounds.[87] The delivery of emergency accommodation by the City takes place through temporary relocation areas ("TRAs") and Incremental Development Areas ("IDAs"). IDAs are parcels of land that have been developed for families in need of emergency housing.[88]

56. It is critically important to emphasis that according to the City, "…*Relocation can only occur to an established Incremental Development Area and not on an ad hoc basis to individual parcels of City land. Costs, planning, the regulatory framework as well as the prescripts of fairness do not allow for this to be done*."[89]

57. This professed position of the City is a classic case of arbitrariness because, as the evidence demonstrates, it is contradicted by the City's own public statements. As the High Court correctly pointed out, "…*in addition, contrary to what had been said by Cllr Herron in July and October 2017, the Director* [in her answering affidavit to the amended relief]. *indicated that the City was continuing to develop TRAs and IDAs, for families in need of emergency housing*."[90] This finding, which demonstrates conduct by the City which may euphemistically be described as the left hand not knowing what the right hand is doing, is unassailable on the evidence.

58. It is in any event common cause that there is no TRA or IDA available in close proximity to the City centre.[91] The IDAs developed by the City are listed in the Five Year Plan. The examples listed in the Five Year Plan are Masonwabe flats

[87] V2, p 354, para 66.2.
[88] V3, p 478 – 479.
[89] V4, p 775
[90] V10 Judgment p 1777-1778 para 76.
[91] V2, p 397, para 193.

in Gugulethu, Sir Lowrys Pass Village and Skandaalkamp and Rooidakkies which are located at the Vissershok landfill site.[92] The only other IDAs developed by the City and listed in the Five Year Plan are those located in Khayelitsha, Phillipi and Blaauwberg (Wolverivier).[93] In its answering affidavit dated 2 March 2020, the City referred to additional emergency housing sites within existing settlements and which are currently in the planning or construction phase. None of these sites are located in close proximity to the Woodstock / Salt River and inner City area.[94]

59. Notably, the City's latest Built Environment Performance Plan 2019/2020 ("BEPP"), which is stated to be an "*integral part of the municipal package of strategic and corporate plans*" records that "…*the City will continue developing Temporary Relocation Areas (TRAs), as well as Incremental Development Areas (IDAs) for families in need of emergency housing. Where possible this incremental approach to housing developments provides for one-on-one services.*"[95]

60. The evidence demonstrates that no provision is made in any of these planning instruments for the provision of emergency housing in the inner City area to persons such as the Residents who are facing imminent homelessness due to eviction from their homes in the Woodstock / Salt River area.

61. The City's Integrated Human Settlements Framework ("IHSF") sets out the City's principles for integrated human settlements. None of these include the provision of emergency housing in the inner City area to persons facing eviction and

[92] V3, p 480 – 481.
[93] V3, p 428 – 429.
[94] CB1, CB35, para 42.
[95] CB1, CB78 – CB79.

displacement from their homes in the inner City.[96] The Five Year Plan, insofar as it does refer to emergency housing developments through IDAs or TRAs, both in respect of projects which are being constructed or at the planning stage, makes no provision for the establishment of emergency housing initiatives in the inner city area.[97]

62. The City's IDP notes that "..*one of the City's challenges is to transform its spatial and social legacy into a more integrated and compact city*".[98] Objective 3.2 of the IDP, while dealing with land for housing in emergency circumstances, focuses on the provision of emergency housing through IDAs and records that "…*more such sites will be identified across the City*."[99] The City referred again to the IDP for 2017 to 2022 in its answering affidavit but made no reference to the IDP having identified sites for emergency housing in close proximity or in the inner City area.[100]

63. The Woodstock and Salt River Revitalization Framework ('WSRF') was adopted by the City in order to encourage inclusive redevelopment in Woodstock and Salt River.[101] It is one of the district policies for the Table Bay District.[102] Ms Royston notes that the proposed rehabilitation subsidies to convert and maintain buildings, as well as subsidies to ensure access to affordable accommodation - including interest rate subsidies for low-income groups. According to the City, the rehabilitation subsidies provided for in the WSRF need to be "*contextualised*".

[96] CB1, CB25.
[97] V3, p 528 – 529.
[98] V2, p 381.
[99] CB1, CB25
[100] V2, p 286, para 36
[101] V2, p 286, para 36.
[102] V2, p 384, para 38

64. The City explains that *"the incentive programme was aimed at encouraging the conversion of large vacant buildings on Albert Road* *to loft apartments and mixed use to accommodate the anticipated increase in demand for housing in the area as a result of the anticipated revitalization of the area*."[103] In her expert affidavit, Ms Royston observed that to the best of her knowledge, the City has only acted on the framework to improve aspects of the built environment and some public facilities and has not implemented the substantive housing solutions and social programmes provided for in the framework.[104] The City admits that the WSRF has been used to improve aspects of the built environment and some public facilities, as stated by Royston.[105] Its contention is that "*it is not correct that housing solutions and social programmes have been excluded under the programme*."[106] There is no evidence however that the City's implementation of the WSRF has been directed at providing emergency housing solutions in Woodstock and Salt River area for persons facing imminent homelessness due to eviction from their homes in the area.

The effect of the City's focus on social housing in the inner city

65. As pointed out earlier in these heads, the City has taken a policy decision to implement social housing not emergency housing in the inner-city area. City owned parcels of land in the Woodstock / Salt River area are reserved and allocated for social housing. According to the City, its Social Housing Programme is "…*aimed at developing affordable rental in areas where bulk infrastructure (sanitation, water, transport) may be underutilized, therefore improving urban efficiency. Income levels of between R 1500 and R 7500 (depending on the*

[103] V2, p 388 – 389.
[104] V2, p 287, para 162. 8.
[105] V2, p 390, para 162.
[106] V2, p 390, para 162.

particular development) are required in order to qualify."[107] Social housing units within the City include Steenberg; Brooklyn; Bothasig; Scottsdene and a further development at Belhar which was stated to become available in March 2017. The Belhar development required a gross income ranging from R2800 to R7500 with rentals ranging from R720 to R2150.[108]

66. The record in this appeal, over a span of some 300 pages[109], demonstrates the exhaustive, prolonged and frankly laborious process insisted upon and required by the City of Residents with regard to them applying for social housing. The City's professed position in this regard was that none of the Residents would be considered for emergency housing until such time as they had applied for social housing and the outcomes of those applications became known. The Residents therefore applied for social housing to various social housing institutions subsequent to an order granted on 9 November 2016. These included Madullammolo Housing Association, Communicare NPC and, SOHCO Property Investments NPC. The City confirmed that the Residents "…*do not qualify for any of the permanent housing assistance measures, for example, social housing solutions*."[110]

67. It is furthermore unlikely that the Residents would in future qualify for allocation of social housing at the sites identified in the Prospectus. The definition of "affordable housing" in the Prospectus refers to household incomes of R3500 to R18000 per month.[111]

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[107] V2, p 346, para 51.
[108] V2, p 347, para 52.
[109] V4 -V6 p 704 – p 1039
[110] V8, p 1574.
[111] CB1, CB48.

68. The effect, it is submitted, of the City's implementation of social housing as its exclusive and primary housing delivery mechanism in the Woodstock, Salt River and inner-city area, is to exclude the Bromwell Residents and similarly situated persons from access to public housing in the inner city area solely on the basis of their income. In contrast, the Emergency Housing Programme, which is aimed at providing assistance to persons who are evicted or threatened with imminent eviction from land or from unsafe buildings[112], applies to households that comply with the Housing Subsidy Scheme qualification criteria (household income of less than R3500 per month) as well as households with a monthly income exceeding this maximum income limit.[113]

69. The City's overall housing programme does not only fail to make provision for the emergency housing needs of the Residents and persons similarly situated in the Woodstock / Salt River area who are being displaced from their homes. The implementation of the programme by way of social housing in the area excludes persons such as the Residents who do not meet the income qualification criteria for social housing. This exclusion of the Residents and persons similarly situated runs counter to the injunction expressed in *Grootboom* regarding the exclusion of the housing needs of those persons who are in desperate and urgent housing need. The Court said the following in this regard:

> "*To be reasonable, measures cannot leave out of account the degree and extent of the denial of the right they endeavour to realise. Those whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril, must not be ignored by the measures aimed at achieving realisation of the right. It may not be sufficient to meet the test of reasonableness to show that the measures are capable of achieving a statistical advance in the realisation of the right. Furthermore, the Constitution requires that everyone must be treated with care and concern. If the measures, though statistically successful, fail to respond to the needs of those most desperate, they may not pass the test.*"[114]

[112] V1, p 36 – 37.
[113] Section 2.4 of the Emergency Housing Programme
[114] Grootboom at para 44.

Unreasonable and irrational differentiation

70. On 16 January 2017 and in response to a letter from the Residents' attorneys which had outlined various parcels of City owned land which were vacant and which the Residents maintained were suitable for emergency housing, one of which was erf 13814 Woodstock, the City's attorneys advised that "…*This property was already allocated as a transition area for those who need to be relocated from a site to be developed for housing. It has therefore already been designated for a category of housing beneficiaries which do not include the Bromwell Residents and has no further capacity to accommodate any further occupiers*."[115]

71. On 18 July 2017 the City's then Councillor Herron issued a media statement recording that the City intended developing its first transitional housing project in Salt River and that "*more transitional housing projects were in the pipeline in Salt River as well as other areas of Cape Town*."[116] The following week, on 25 July 2017, then Executive Mayor De Lille approved a recommendation from the City's Transport and Urban Development Portfolio Committee for the implementation of the proposed Salt River transitional housing project referred to in Councillor Herron's speech on 18 July 2017.[117]

72. On 28 September 2017 the City released the Prospectus. The Prospectus included a definition of the term "transitional housing", which was defined as "…*accommodation for individuals or families who have to be relocated as a result of eviction or temporarily moved as a result of the upgrading of sites on which they lived. This accommodation is an intermediate solution until such time as*

[115] V4: p 749.
[116] V8: p 1506.
[117] V8: p 1508 - 1509

individuals or families can move into permanent accommodation."[118] It should be noted in this regard that the Prospectus also identified the St James Transitional Housing site (to be used to relocate persons living in the Salt River Market settlement) which the Residents had previously identified and had requested the City to consider for emergency housing, which request was denied.[119]

73. On 1 November 2017 Mr Pogiso Molapo deposed to an affidavit on behalf of the City. Firstly, Mr Molapo confirmed that "*…as regards the Residents of the 19 structures that require relocation from Pine Road, the City is presently engaged in a consultative exercise with these residents to ascertain whether they would qualify for other social housing units elsewhere, GAP housing, BNG, CRUs or other housing opportunities alternatively emergency housing at Wolwerivier*."[120]Secondly, Mr Molapo stated "…*the remaining units [in the Pickwick Transitional Site] will be <u>used for other emergency housing needs</u> and for the transitional relocation of persons on the Salt River Market site because the St James Transitional Housing site, may take longer to develop*."[121] Notably, neither Mr Molapo nor any other deponent to the City's affidavits have coherently explained what "*other emergency housing needs*" the remaining units in the Pickwick site would be used for and why none could be made available to the Residents.

74. The differentiation in the City's approach to the Residents of the Pine Road site and the Bromwell Residents is striking. It is clear that while the City claims that it was engaged in a "*consultative exercise*" with these Residents regarding other housing options, unlike the Bromwell Residents, the City was prepared to

[118] V9: p 1581.
[119] V9: p 1620 – 1629.
[120] V8: p 1569: para 18.
[121] V8: p 1568: para 17.

consider allocating the Pine Road Residents transitional housing at the Pickwick site in the immediate vicinity of their former homes, which they were required to vacate for the purposes of social housing on this sites. As the City's answering affidavit makes clear, this is in fact exactly what happened. The 42 rooms constructed for the Pickwick Transitional site were all allocated to and are occupied by the residents of the informal settlement on Pine Road and the facility has no further capacity.[122]

75. The High Court held that "…*the City clearly did not consider itself bound to apply the selfsame policy/policies which it claims were applicable to persons rendered homeless as 'evictees' in the City. It has given no reason for why it was not bound to apply its own policy/policies and could either disregard them, or choose selectively when to apply them."*[123] It is submitted that these findings are unassailable on the evidence. The differential treatment afforded by the City to the Pine Road Residents as opposed to the Residents was, as the Court *a quo* correctly found, unreasonable, irrational and bore no rational connection to the City's legitimate purpose of providing emergency transitional housing to those who are vulnerable and most in need. The Pine Road Residents and the Bromwell Residents both had emergency housing needs but had been treated differently.

76. The principle that inflexible, rigid differentiation between emergency housing needs is unreasonable is of direct application in this case. As Van Der Westhuizen J explained in *Blue Moonlight* in the context of differential treatment of persons evicted by a municipality as opposed to persons evicted by private

[122] CB1 CB49 para 54.2
[123] V10, Judgment, p 1798-1799 para 151.

landowners, such differentiation is impermissible and unconstitutional.[124]

Failure to demonstrate reasonableness

77. The City bore the onus of showing that it had a reasonable plan for addressing emergency housing needs and that it was implementing that plan reasonably.

78. The justifications advanced by the City essentially amounted to a claim of resources constraints. Short of merely asserting resources constraints and making references to delivery of housing in the inner city being "significantly more costly", "economies of scale in respect of building costs", "high rates of rates and taxes" and "inadequacy" of national government subsidies, very little of substance was put up by the City by way of actual factual evidence to support these assertions. It is submitted that the Court *a quo*' s finding that "…[the City] *put forward very little by way of substance, in support of its claim of financial constraints*" was a justifiable and correct finding on the facts and evidence before the High Court.

79. *Mazibuko* makes it clear that in justifying the reasonableness of its conduct and in asserting resources constraints, the City has to disclose what it had done to formulate its policy not to provide emergency accommodation in the inner City, its investigation and research, the alternatives considered, and the reasons why it had decided on this the option. The record demonstrates, it is submitted demonstrates that the City failed to present acceptable and comprehensive evidence in this regard.

[124] City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another (2012 (2) SA 104 (CC) at para 92 - 95

80. It is worth noting in this regard, that in an answering affidavit by the City running to some 140 pages, a single paragraph[125] addresses the reasons why the City is unable to develop emergency housing sites in the inner City of Cape Town. As Professor Liebenberg points out, a failure to present evidence in relation to reasonableness should at the very least lead to negative inferences being drawn regarding the reasonableness of the State's conduct.[126]

V THE CITY'S ARGUMENTS

81. It is necessary to address a new argument advanced by the City which was not expressly advanced in the High Court. The City in its heads[127] contends that it is the Pickwick street families are not a party to this litigation and that they and other families waiting for housing are essentially prejudiced by the High Court's order. An argument in similar terms was advanced and dealt with by Cameron J in *Dladla*. The learned Judge addressed it thus, and it is submitted that his observations hold equal force in this case:

> *"The comparative welfare argument is more difficult. It, too, has punch. Why should we countenance the residents' complaints about what the City is doing for them when others, who do not have what they have, are much worse off and would want it?*
>
> *The question is hard. It can only be answered by moving back from the abstract. These litigants are before us now. They make a claim to concern, respect and dignified treatment that cannot be waved away by the fact that others, who are worse off than they, may also have claims. The reasonableness of public treatment of the vulnerable cannot depend only on the fact that what they are getting is better than that of others who are worse off. The question is not whether others are worse off, but whether these measures the City is taking here, now, with this vulnerable group, affords them sufficient care, respect and dignity. That question must be answered each time in concrete terms, within the framework the Bill of Rights sets, including available resources.*

[125] V6 p 1111 para 10
[126] Sandra Liebenberg, "Socio-economic rights: adjudication under a transformative Constitution.", Juta, 2010 at p 203.
[127] City's Heads: para 68

A court should not have to determine in the abstract who are the worst-off. A court is obliged to adjudge the claims of those who are before it on their own merits. If the comparative welfare of others, or their lack of it, could without more justify deprivation of benefits, this could imply a race to the bottom, where the hierarchy of the worse-off determines who is entitled to dignity. This could lead to infinite regressions of impoverishment and misery."[128]

VI REMEDY AND CONCLUSION

82. For the reasons set out above, it is submitted that the City's appeal is without merit and that the High Court correctly found, on the evidence before it, that the City's emergency housing programme and its implementation is unreasonable, and unconstitutional in that its discriminatory, inflexible formulation and implementation fails to respond to the short term emergency housing needs of the Residents in the inner city from which they have been evicted and face homelessness.

83. The High Court was obliged under section 172(1)(a) of the Constitution to grant a declaratory order declaring the City's emergency housing programme and its conduct in implementing it, inconsistent with the Constitution invalid to the extent of the inconsistency.[129]

84. In *Corruption Watch NPC and Others v President of the Republic of South Africa and Others*,[130] Madlanga J, writing for the majority, explained the breadth of the Court's power to vindicate the rule of law in formulating appropriate relief under section 172(1)(b) of the Constitution. Madlanga J stated:

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[128] Dladla and Another v City of Johannesburg and Others 2018 (2) SA 327 (CC) at 87 – 88.

[129] Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others 2011 (4) SA 113 (CC) paras 81-85; AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others 2014 (1) SA 604 (CC) para 25.

[130] Corruption Watch NPC and Others v President of the Republic of South Africa and Others 2018 (1) BCLR 1179 (CC); 2018 (2) SACR 442 (CC) at paras 68-75.

> *"[68] In terms of section 172(1)(b) of the Constitution we may make <u>any</u> order that is just and equitable. The operative word "any" is as wide as it sounds. Wide though this jurisdiction may be, it is not unbridled. It is bounded by the very two factors stipulated in the section – justice and equity …*
>
> *[69] What must be paramount in the relief that a court grants is the vindication of the rule of law. The effect of that is the reversal of the consequences of constitutionally invalid conduct…."*

85. It is therefore submitted that the appeal falls to be dismissed with costs.

SHELDON MAGARDIE

Counsel for the Residents

Chambers

Cape Town

7 July 2022