

**IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA
HELD AT BRAAMFONTEIN**

**SCA Case No: 1303/2021
CCT Case no. 49/23**

In the matter between:

CHARNELL COMMANDO AND OTHERS Appellants
(First to Twenty-Sixth Respondents in the SCA)

and

CITY OF CAPE TOWN First Respondent
(Appellant in the SCA)

WOODSTOCK HUB (PTY) LTD Second Respondent
(Twenty-Seventh Respondent in the SCA)

HEADS OF ARGUMENT
on behalf of the First Respondent (the City)

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INTRODUCTION

1. This case presents the following issues for determination:
 - 1.1. First, whether First Respondent (**‘the City’**) has a constitutional obligation to deliver emergency housing (which is a form of temporary housing) in a particular location (in this case, in Woodstock, Salt River or the Inner-City Precinct (**‘the inner city’**)).
 - 1.2. Second, whether the City has acted unreasonably and/or unconstitutionally in not delivering emergency housing in the inner city and in having prioritised the delivery of social housing (a form of State assisted permanent housing) in these areas.
2. We emphasise at the outset: (a) the underlying objective of emergency housing is to avoid homelessness and, as such, it demands an immediate intervention by the City; and (b) emergency housing is not allocated on the basis of a waiting list and nor is it subject to the same criteria as other State assisted housing measures.
3. If the Applicants/ Appellants (**‘the Bromwell residents’**) are to succeed in this appeal, it would have the following significant implications for the delivery of housing by municipalities:
 - 3.1. Beneficiaries of emergency housing (who are not allocated housing based on a waiting list) would be the beneficiaries of housing in the inner city, which is a scarce commodity in terms of land availability and resources.
 - 3.2. Given the finite and limited availability of land in the inner city, the City would, of necessity have to reduce, alternatively, cease delivering certain permanent housing in the inner city and replace those developments with emergency housing.
 - 3.3. The demand for emergency housing in the inner city would escalate given that: (a) it is not subject to the same criteria as other State assisted housing; (b) such housing

is subject to immediate delivery by the State; and (c) the location of such housing would be preferable to many of the areas in which permanent housing is being delivered.

3.4. At worst, it may have the effect of substituting the City's carefully calibrated permanent housing programme in the inner city with the provision of emergency housing there. This, in circumstances where millions of people are living in deplorable conditions and are patiently awaiting their turn for State assisted permanent housing development.

4. This case is not about:

4.1. First, whether the location of permanent housing is a relevant consideration in the discharge of the State's obligations under s 26(2) of the Constitution. It undoubtedly is. The Housing Act No 107 of 1997 (**'the Housing Act'**) recognises this in its definition of 'housing development' *viz*:

'the 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.'

As regards case law, some two and a half decades ago, this Court observed in **Government of the Republic of South Africa and Others v Grootboom and Others** 2001 (1) SA 46 (CC):

[52] The definition of housing development as well as the general principles that are set out do not contemplate the provision of housing that falls short of the definition of housing development

in the 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.'

- 4.2. Second, whether the City bears an obligation to make emergency accommodation available to persons in the position of the Bromwell residents who are facing homelessness as a result of an eviction by a private landlord. The City accepts that it bears such an obligation and has accordingly made certain offers of emergency accommodation to the Bromwell residents.
- 4.3. Third, whether the emergency housing that the City makes available to the Bromwell residents or other similarly placed persons must provide a reasonable measure of protection from the elements; must provide reasonable access to certain basic services; and must allow for the beneficiary to reside in such housing with dignity. The City accepts that emergency housing must meet these requirements and has made offers to the Bromwell residents which meet them.
- 4.4. Fourth, whether the City bears an obligation to provide emergency accommodation to the Bromwell residents in a location as near as possible to the area from where they were evicted. The City accepts that orders, *inter alia*, from this Court (and the SCA in the present matter) have provided for such a duty on the part of the City. The City accepts that such orders are competent and appropriate. In this case (and before the determination of the matter by the High Court), the City offered the Bromwell residents emergency housing at a location

that is some 15 km away from the property in Woodstock from which they had been evicted (**the property**). The offer was rejected.

4.5. Fifth, whether the emergency housing that the City makes available must provide reasonable physical accessibility to economic opportunities, and to health, educational and social amenities. It is notable that the inner city is not the only area that provides physical accessibility to these opportunities and amenities.

4.6. Sixth, whether the City has complied with its obligations under the Emergency Housing Programme. There is no suggestion by the Bromwell residents that the City has failed to comply with its obligations in terms of the Emergency Housing Programme (which does not oblige municipalities to provide emergency housing in particular areas).

5. The remainder of these heads of argument are structured in accordance with the table of contents.

THE BACKGROUND

6. This matter commenced some eight years ago. In the period since then, despite offers of alternative accommodation made by the City and certain shifts in the City's approach, the parties have not been able to find common ground. The Bromwell residents claim a right to emergency housing in the inner city and argue that any other offer that the City has made (including emergency housing some 15km away) is unconstitutional.

7. The question whether the City has acted unconstitutionally arises in the context of events following an order granted by Hlophe JP on 17 March 2016 for the eviction of the Bromwell residents from the property with no provision being made for alternative accommodation.¹ After the eviction order had been granted, the Bromwell residents

¹ FA Vol 1 pp 14-15 par 18; FA Vol 1 p 16 para 24; City AA Vol 4 pp 329-331 para 15; City AA Vol 4 pp 408-409; City AA Vol 4 p 332 para 18; FA **CC2** Vol 1 pp 45-47. The second respondent ('the Woodstock Hub') alleged in the

approached the City to provide them with emergency accommodation on the basis that they would be rendered homeless by the eviction, and there followed a protracted process of engagement between the City and the Bromwell residents which began informally, and then became formalised after the Bromwell residents brought the application under the present case number on 20 September 2016.²

8. The original relief sought by the Bromwell residents was a declaratory order that the City was under a constitutional duty to provide them with temporary emergency accommodation in a location ‘as near as possible to [the property]’, and an order directing the City to make available such accommodation within three months of the order.³ The wording of the relief sought was the standard wording used by the courts in granting just and equitable relief pursuant to eviction orders which would otherwise result in homelessness.
9. After the application had been instituted, the City continued to engage with the Bromwell residents. By 8 December 2016, the City had offered social housing units to 3 of the 10 family units (family units 4, 6 and 9) and there were 27 people remaining who required emergency housing.⁴ By 18 January 2017, the City had offered the remaining families emergency housing at Wolwerivier (some 29km from the property) despite the fact that several of them potentially qualified for home loans.⁵
10. Before the original application could be heard however, the Bromwell residents became aware, in part through the sustained and detailed engagement between them and the City,

founding affidavits in the eviction proceedings that the Bromwell residents were paying rental and would not have difficulty finding alternative accommodation. This allegation remained unanswered, and the eviction order was granted by agreement between the Woodstock Hub and the Bromwell residents without any involvement on the part of the City.

² Even as the application ran its course, the parties continued to engage.

³ NoM Vol 1 p 4 paras 2 and 3.

⁴ Bromwell residents’ report **DG23** Vol 10 pp 1014-1015 and Bromwell residents’ Schedule Vol 7 pp 728, 730 and 733.

⁵ City 2nd further affidavit Vol 11 pp 1048-1053.

that the City intended to develop two transitional housing sites in Salt River (Pickwick Road and St James Street) to enable two social housing developments, one in Woodstock (**‘the Pine Road site’**) and one in Salt River (**‘the Salt River Market site’**). Social housing is a form of permanent housing which is aimed, *inter alia*, at addressing spatial inequality. The transitional sites were to be used to accommodate people living in informal settlements on the Pine Road and Salt River Market sites so that they could be developed for social housing (**‘the Pine Road and Salt River Market occupiers’**).

11. The applicants accordingly applied for and were granted (on 13 August 2018) an order by Sher AJ, as he then was, allowing them to amend their notice of motion to seek materially different relief to that which had been sought originally.
12. Instead of temporary emergency accommodation in a location as near as possible to the property, they sought emergency accommodation in the ‘Woodstock, Salt River and inner city precinct ...’⁶. A declaratory order was also sought that the City’s housing programme and its implementation in terms of one of the City’s planning instruments⁷ was inconsistent with the City’s constitutional and statutory obligations to the extent that it failed to provide the Bromwell residents and people living in Woodstock and Salt River who are at risk of homelessness due to eviction from their homes, with access to transitional housing or temporary emergency accommodation in ‘the immediate City centre and surrounds’.
13. The Bromwell residents did not file an affidavit in support of the amended relief sought by them.
14. On 16 August 2019, the City offered the Bromwell residents emergency housing that had become available at Kampies in Philippi about 15 km from Woodstock. The offer was also

⁶ The description in full was ‘the 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 [City] on 28 September 2017’

⁷ The City of Cape Town Integrated Human Settlements: Five Year Plan.

rejected, at least in part because it was not in the area identified by the Bromwell residents as being where they wished to remain.⁸

15. On 6 September 2021 the High Court:

15.1. Granted a declaratory order (together with mandatory relief and a supervisory interdict) that the City's emergency housing programme and its implementation, in relation to persons who may be rendered homeless pursuant to their eviction in the inner city and its surrounds, and in Woodstock and Salt River in particular, is unconstitutional ('the declaratory order').

15.2. Directed the City to provide the Bromwell residents and their dependants living with them at the time *'with 'temporary emergency accommodation or 'transitional' housing in Woodstock, Salt River or the inner city (as defined in the Affordable Housing Prospectus for the Woodstock, Salt River and Inner-City Precinct which was issued on 28 September 2017), in a location which is as near as feasibly possible to where the applicants are currently residing at erf 10626, Bromwell Street, Woodstock, within 12 months of the date of this Order.'*⁹ (emphasis provided)

16. The High Court did not declare the City's emergency housing programme (the emergency housing programme in any event being a national housing programme), or any aspect of its implementation, to be invalid, despite being enjoined to by s 172 of the Constitution, having made a finding of unconstitutionality. Nor did it impugn the implementation by the City of the social housing programme. The Court did not direct the City to adopt a new housing programme or policy to give effect to its constitutional housing obligations.

⁸ This offer was however rejected by the Bromwell residents ostensibly because the City had failed to respond to certain of the Bromwell residents' questions, including as regards the cost to the City of housing the applicants at Kampies as opposed to in the inner city; relocation to Kampies would compound the applicants' vulnerability; Covid 19 presented a greater risk to people at Kampies and several of the Bromwell residents had comorbidities; and they were of the view that the offer of Kampies did not fulfil the City's constitutional and statutory obligations (RA Vol 20 CCR15 pp 1986-1987).

⁹ High Court judgment Vol 21 p 2066 para 169.1 and 169.2.

17. Instead, the Court simply directed the City to provide the Bromwell residents with emergency housing in the inner city. The true concern of the Court was to come to the aid of the Bromwell residents regardless of the existence or otherwise of any constitutional breach.
18. In finding that the Bromwell residents (and others like them) ought to be granted emergency housing in the inner city, the High Court expressly rejected the City's answer that it had identified social housing as being the most appropriate form of housing for the inner city and that it was in the process of giving effect to that policy.¹⁰
19. The High Court was of the view that the City should be allocating and spending its housing budget differently.
20. The High Court accordingly ventured into what this Court has termed '*the heartland of executive-government function and domain*', namely '*the ordering of public resources, over which the executive government disposes and for which it, and it alone, has the public responsibility*'.¹¹ Jurisprudentially the reasons why the ordering of public resources is a competency of the executive government are well known: courts generally lack the expertise and the electoral legitimacy necessary for deciding how public resources should be spent.¹² Constitutionally, our courts have recognised that this limitation on what they are able to do is fundamental to the separation of powers.¹³
21. The Supreme Court of Appeal overturned the judgment and order on appeal.¹⁴

¹⁰ High Court judgment Vol 21 p 2063 para 158.

¹¹ *National Treasury and others v Opposition to Urban Tolling Alliance and others* 2012 (6) SA 223 (CC) para 67.

¹² *Du Plessis and others v De Klerk and another* 1996 (3) 850 (CC) para 180; *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and others* 2004 (4) SA 490 (CC) para 46.

¹³ *Bato Star supra* para 48; *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* 2012 (4) SA 618 (CC) para 95; *Tshwane City and others v Nambiti Technologies (Pty) Ltd* 2016 (2) SA 494 (SCA) para 43. The problematic nature of what the Court a quo did is illustrated by the fact that in a previous case in the same Division, where the applicants were also supported by Ndifuna Ukwazi ('NU'), it was determined by the Court that the City should provide more social housing in the inner city (*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* [2021] 4 All SA 69 (WCC) (31 August 2020)). This matter is presently on appeal to the SCA. Argument has been presented and judgment is awaited.

¹⁴ SCA judgment and order Vol 22 pp 2153 to 2189

THE CONSTITUTIONAL FRAMEWORK FOR THE REALISATION OF HOUSING RIGHTS

Identifying the source of the claim

22. The Bromwell residents assert in their heads of argument that the SCA misdirected itself when it held that the central issue in the appeal is whether the constitutional obligation in section 26 of the Constitution extends to making temporary emergency accommodation available at a specific location.¹⁵
23. They say that the question should not be framed in such general terms - the question is instead context and fact specific.¹⁶ The SCA, say the Bromwell residents, failed to review the City's housing programmes and their implementation in relation to the Bromwell families according to the constitutional standard of reasonableness (emphasis provided).
24. But, the starting point must always be to identify what the source of the right relied upon is. Relief of the nature sought must be founded upon a constitutional or statutory right. Without a right, there is no corresponding duty.¹⁷
25. The constitutionality of the implementation by the City of the national emergency housing programme,¹⁸ and the reasonableness of the City's conduct in relation to the Bromwell residents specifically, must be determined with reference to s 26 of the Constitution and the established jurisprudence.

¹⁵ Appellants' heads dated 2 February 2024 paras 60-64.

¹⁶ Appellants' heads para 64.

¹⁷ That is different to saying that the Constitution must set out all the facets and nuances of a right, for it to be available in any given set of circumstances. The City's reason for denying that it has a duty to make temporary emergency accommodation available in a specific location, is not because the Constitution does not say so in terms. It is the City's case that constitutional rights and obligations must be sourced in the Constitution as it has been interpreted by the courts, including by this Court. The SCA held correctly that a source of the duty contended for had to be identified (SCA judgment Vol 22 p 2178 paras 52-53).

¹⁸ It is important to note that the City implements a national Emergency Housing Programme, as we elaborate upon below. It is therefore not correct to refer, as the High Court did, to the City's emergency housing programme (High Court order Vol 21 p 2066 para 169.1)

The defining features of section 26 of the Constitution

26. Sections 26(1) and (2) of the Constitution provide:

- (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 realisation of this right.’

27. Several defining features of the right of access to adequate housing have emerged from the jurisprudence of this Court. Most importantly, for present purposes, this Court has held:

27.1. Section 26(1) requires a comprehensive and workable national housing programme for which each sphere of government must accept responsibility, which provides access to adequate housing for people at all economic levels of society.¹⁹

27.2. Measures aimed at giving effect to the right must be reasonable both in conception and implementation. They must be balanced and flexible; must make appropriate provision for attention to housing crises and to short-, medium- and long-term needs; and must be continuously reviewed.²⁰

27.3. The right of access to adequate housing must be realised progressively, by which is meant that the right cannot be realised immediately, but the State must take steps to make housing more accessible to a larger number and wider range of people as time progresses.²¹

27.4. The State’s obligation does not require it to do more than its available resources permit. This means that both the content of the obligation in relation to the rate at which it is achieved as well as the reasonableness of the measures employed to

¹⁹ *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) paras 39 to 41.

²⁰ Para 43.

²¹ Para 45.

achieve the result are governed by the availability of resources. Section 26 does not expect more of the State than is achievable within its available resources.²²

27.5. The measures must be calculated to attain the goal expeditiously and effectively, but the availability of resources is an important factor in determining what is reasonable.²³

27.6. The Constitution does not guarantee a person a right to state subsidised housing at the locality of his or her choice.²⁴ Although regard must be had to the distance of the location from peoples' places of employment, locality is determined by several factors, including the availability of land.²⁵ Nothing in the judgment of this Court in **Thubakgale v Ekurhuleni Metropolitan Municipality** 2021 JDR 3200 (CC), upon which the Bromwell residents rely²⁶, undermines this principle. Majiedt J writing for the minority in that case pointed out that what constitutes 'adequate housing' must be interpreted in light of the primary purpose of socio-economic rights, which is to promote substantive equality and human dignity, and that adequate housing must serve a purpose that is both remedial and transformative.²⁷ But while the Constitution requires that the state address spatial and other inequality, it does not dictate to government how to do that. It does not require that all housing programmes, regardless of their purpose, must be directed at housing people in the inner city.

27.7. The ultimate goal is access by all people to permanent residential structures, with secure tenure, and convenient access to economic opportunities and health,

²² Para 46.

²³ Para 46.

²⁴ The fact that the Courts have required in individual cases that emergency housing must be provided as near as feasibly possible to where people are when the emergency arises does not detract from this principle.

²⁵ *Grobler v Phillips and Others* 2023 (1) SA 321 (CC) para 36; *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) para 254.

²⁶ See Bromwell residents' heads of argument para 14.

²⁷ Paras 106-110.

educational and social amenities,²⁸ but because this will take time, provision must also be made for those in desperate need.²⁹

28. The central finding in **Government of the Republic of South Africa and Others v Grootboom and Others** 2001 (1) SA 46 (CC) gave rise to the adoption by the national government of the national Emergency Housing Programme which is Part 3 of the Housing Code.³⁰ It is this Programme which the City implements to give effect to the right of the most desperate to emergency housing.

THE STANDARD OF REASONABLENESS

The law

29. The ultimate constitutional threshold for assessing the constitutionality of the State's actions in the realization of the right of access to adequate housing is that of reasonableness. Defining features of this threshold are set out below.

- 29.1. In **City of Johannesburg Metropolitan Municipality Blue Moonlight Properties 39 (Pty) Ltd and Another** 2012 (2) SA 104 (CC) this Court held:

[88] In the area of the right of access to adequate housing, of which the provision of temporary or emergency accommodation is a part, the question is essentially one of reasonableness. The availability of resources is an important factor in determining the reasonableness of the measures employed to achieve the progressive realisation of the right. This does not mean that the State may arbitrarily decide which measures to implement. The measures taken must be reasonable. While there will be a range of possible measures that may be reasonable and the court will not set aside a policy for the mere reason that other measures may have been more desirable or favourable, the enquiry must still take place.

²⁸ These are the factors envisaged by the term 'housing development' in the Housing Act.

²⁹ Paras 48 to 65.

³⁰ The Housing Code contains the national housing policy and sets out the principles, guidelines and standards that are to apply to the various housing programmes to be implemented by the State.

- 29.2. A policy that differentiates between general housing needs and emergency situations might well be understandable.³¹
- 29.3. The programme that the State adopts must be capable of facilitating the realisation of the right. However, the precise contours and content of the measures to be adopted are primarily a matter for the legislature and the executive - they must, however, ensure that the measures they adopt are reasonable.³²
- 29.4. In any challenge based on s 26 in which it is argued that the State has failed to meet the positive obligations imposed upon it by s 26(2), the question will be whether the legislative and other measures taken by the State are reasonable.³³
- 29.5. A court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent. The question would be whether measures that have been adopted are reasonable.^{34 35}
- 29.6. It is necessary to recognise that a wide range of possible measures could be adopted by the State to meet its obligations. Many of these would meet the requirement of reasonableness. Once it is shown that the measures do so, this requirement is met.³⁶
30. A central theme emerges from the jurisprudence on reasonableness: 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.³⁷

³¹ *City of Johannesburg Metropolitan Municipality Blue Moonlight Properties 39 (Pty) Ltd and Another* 2012 (2) SA 104 (CC) at par 89.

³² *Grootboom* at para 41.

³³ *Grootboom* at para 41.

³⁴ *Grootboom* at para 41.

³⁵ *Blue Moonlight Properties* para 88.

³⁶ *Grootboom* para 41. *Khosa and others v Minister of Social Development and others; Mablaule and others v Minister of Social Development and others* 2004 (6) SA 505 (CC) para 48.

³⁷ *Minister of Home Affairs and others v Scalabrini Centre and others* 2013 (6) SA 421 (SCA) para 59. [consider Du Plessis].

31. The Constitution requires courts to ensure that all branches of government act within the law. However, courts in turn must refrain from entering the exclusive terrain of the executive and the legislative branches of government unless the intrusion is mandated by the Constitution itself.
32. Thus:
- ‘Where the Constitution or valid legislation has entrusted specific powers and functions to a particular branch of government, courts may not usurp that power or function by making a decision of their preference. That would frustrate the balance of power implied in the principle of separation of powers. The primary responsibility of a court is not to make decisions reserved for or within the domain of other branches of government, but rather to ensure that the concerned branches of government exercise their authority within the bounds of the Constitution. This would especially be so where the decision in issue is policy-laden as well as polycentric.’³⁸
33. This Court has also said that ‘*the duty of determining how public resources are to be drawn upon and reordered lies in the heartland of executive-government function and domain*’.³⁹ It has pointed out that such decisions call for policy-laden and polycentric decision-making,⁴⁰ thereby using the language of a line of cases of both the Supreme Court of Appeal and this Court which have expressed the importance of deferring to organs of state in regard to decisions of this kind.⁴¹ Courts recognise the fact that government, in its various spheres, is required to do much with little.⁴²
34. Specifically in the context of housing, the way in which the budget is allocated among long-term objectives, short-term objectives, and those in desperate need is a decision to be made by government, not by the courts (subject only to the requirement that a reasonable part

³⁸ *National Treasury supra* para 63.

³⁹ *National Treasury supra* para 67. See also *SANRAL supra* para 7.

⁴⁰ *National Treasury supra* para 68.

⁴¹ The principle was reaffirmed in *South African National Roads Agency Ltd v Cape Town City* 2017 (1) SA 468 (SCA) para 7.

⁴² See for instance *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC) paras 11, 29 and 31; *Tshwane City supra* para 43.

of the budget go to addressing desperate need).⁴³

35. In conclusion under this head, the City cannot be said to have acted unreasonably in adopting the specific measures which it has in respect of emergency housing. The City has not acted outside its constitutional mandate by prioritising the development of permanent social housing in the inner city, as opposed to temporary emergency housing.

What is reasonable in the context of permanent housing differs from what is reasonable in the context of emergency housing

36. There are fundamental differences between emergency housing and permanent housing. More particularly:

36.1. First, as stated, emergency housing is aimed at an immediate State intervention which has, as its central objective, the avoidance of homelessness. It is therefore not targeted at persons who already have housing (no matter how meagre) and are on a housing waiting list, but rather at persons in crisis situations who will be homeless unless the State comes to their assistance.

36.2. Second, as this Court held in *Grootboom*, emergency housing may fall short of housing which fulfils the requisite standards of durability, habitability and stability encompassed by the definition of 'housing development' in the Housing Act.⁴⁴ To this may be added the requisite standard of locality. This is acceptable, because such housing is provided pending the acquisition of alternative permanent housing. The apparent harshness of this has to be seen against the realities imposed by the vast

⁴³ *Grootboom supra* 2001 (1) SA 46 (CC) para 66.

⁴⁴ *Grootboom* at para 52.

scale of the housing backlogs which the State, in general, and the City, in particular, must address.⁴⁵ This was accepted by the SCA in this matter.⁴⁶

36.3. Third, that is not to say that these factors become irrelevant when it comes to emergency housing. They remain of paramount importance. The extent to which emergency housing may be allowed to fall short of this standard must be informed by the striking of a reasonable balance between available resources and the extent of the overall demands on those resources – the allocation of resources must be proportionate so that emergency housing demands do not become an undue impediment to the State’s ability to progressively provide permanent housing to those in need.⁴⁷

36.4. This is an important consideration. Were emergency housing to be provided in the inner city for all persons who may be rendered homeless pursuant to their eviction ‘in the inner City and its surrounds, and in Woodstock and Salt River in particular’⁴⁸, that would necessarily be at the cost of the development of permanent housing in the inner city. Land and resources are finite.

36.5. Fourth, just as in the case of permanent housing, the Constitution does not guarantee a person a right to emergency accommodation at the locality of his or her choice. As in the case of permanent housing, regard must be had to the

⁴⁵ *City of Johannesburg v Dladla and Others* 2016 (6) SA 377 (SCA) para 20. More recently in *Baron and others v Claytile (Pty) Limited and Another* 2017 (5) SA 329 (CC), where the applicants rejected an offer by the City of alternative accommodation at Wolwerivier based on distance from their places of employment and school and the inadequacy of the structures, the Constitutional Court held that the structures qualified as suitable alternative accommodation provided by the City within its available resources. Whereas the City in that case offered the applicants transport, and in the present case it did not (having done a detailed costs analysis), as soon as it became available, the City offered the applicants alternative accommodation at Kampies in Philippi, which is much closer to the property.

⁴⁶ SCA judgment Vol 22 paras 61-62.

⁴⁷ 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 para 9. Followed by the SCA in this case (SCA judgment Vol 22 p 2183 para 62).

⁴⁸ To use the wording of the High Court order Vol 21 p 2066 para 169.1.

distance of the location from peoples' places of employment. But locality will be determined by a number of factors, including the availability of land.

- 36.6. Fifth, it will also be determined by the policy choices taken by a municipality in giving effect to the right to housing and other constitutional imperatives. One such policy choice may be to address social injustice (which is a constitutional imperative) by developing permanent housing in the inner city rather than by developing emergency housing in the inner city.
- 36.7. Finally, this Court has recognised expressly that differentiation between those with general housing needs and those with emergency housing needs may well be reasonable.⁴⁹ What the State may not do is differentiate within a category of housing to exclude a class of persons where there is no rational reason for doing so.⁵⁰ In *Blue Moonlight Properties* the City of Johannesburg's emergency housing policy did not apply to persons evicted by private owners. The differentiation between those evicted by the State and those evicted by private owners bore no rational connection to the City's legitimate purpose of providing temporary accommodation to those who are vulnerable and most in need.

REASONABLENESS: IN THE CONCEPTION OF LEGISLATION AND POLICIES PERTAINING TO THE REALISATION OF HOUSING RIGHTS

37. This Court has held⁵¹:

- 37.1. The State is required to take reasonable legislative and other measures.
- 37.2. Legislative measures by themselves are not likely to constitute constitutional compliance. Mere legislation is not enough.

⁴⁹ *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Ltd) and Another* 2012 (2) SA 104 (CC) paras 86, 89 and 95.

⁵⁰ *Blue Moonlight Properties* paras 84, 89, 95 and 97.

⁵¹ *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) at para 42.

37.3. The State is obliged to act to achieve the intended result, and the legislative measures will invariably have to be supported by appropriate, well-directed policies and programs implemented by the Executive.

37.4. These policies and programs must be reasonable both in their conception and their implementation.

Legislation

38. The Housing Act is the primary national legislative instrument aimed at giving effect to the right of access to adequate housing. We have already referred to the definition of ‘housing development’ in the Housing Act. Furthermore, the Housing Act:

38.1. Sets out the general principles applicable to housing development.⁵²

38.2. Requires that the Minister publish a code called the National Housing Code (**‘the Housing Code’**), which must contain the national housing policy.⁵³ The national housing policy is defined to include, national norms and standards, in respect of housing development.⁵⁴ The Housing Code is binding on the provincial and local spheres of government.⁵⁵

38.3. Sets out the functions of provincial government.⁵⁶

38.4. Sets out the functions of local government which includes, as part of its integrated development planning, the taking of all reasonable and necessary steps within the framework of national and provincial housing legislation and policy to, amongst other things ensure that: (a) the inhabitants of its area of jurisdiction have access to adequate housing on a progressive basis; (b) conditions not conducive to the health

⁵² S 2.

⁵³ S 4(1) and 4(2).

⁵⁴ S 1 read with s 3(2)(a).

⁵⁵ S 4(6).

⁵⁶ S 7.

and safety of the inhabitants of its area of jurisdiction are prevented or removed; (c) identify and designate land for housing development; (d) create and maintain a public environment conducive to housing development which is financially and socially viable; (e) initiate plan, co-ordinate, facilitate, promote and enable appropriate housing development in its area of jurisdiction; (f) plan and manage land use and development.⁵⁷ Any municipality may apply in writing to the MEC for the purposes of administering one or more national housing programmes, which the MEC may grant accreditation for.⁵⁸

39. The Western Cape Housing Development Act No 6 of 1999 (**‘the WC Housing Act’**) is the primary provincial legislative instrument aimed at giving effect to the right of access to adequate housing. Many of the relevant provisions mirror the Housing Act.
40. Neither the Housing Act nor the WC Housing Act provide for emergency housing to be provided in a particular location. Yet, neither of these instruments are the subject of challenge by the Bromwell residents.

Policy: the National Housing Code

41. It is clear from the Housing Act that the Housing Code is binding on the City. The Housing Code includes the Emergency Housing Programme.
42. This Court, has in the past said the following about the National Housing Code⁵⁹:
 - 42.1. The National Housing Code was enacted under s 4 of the Housing Act. It contains the national housing policy and sets out the principles, guidelines and standards that apply to the various programmes effected by the State in relation to housing.
 - 42.2. Chapter 12 of the Code was introduced after the decision of this court in

⁵⁷ S 9(1).

⁵⁸ S 10.

⁵⁹ *Blue Moonlight* at para 27.

Grootboom. It is entitled 'Housing assistance in emergency housing circumstances' and provides for assistance to people who find themselves in a housing emergency for reasons beyond their control.

43. As regards Chapter 12 specifically, this Court has previously held:

43.1. Chapter 12 provides for assistance to people who find themselves in need of emergency housing for reasons beyond their control. Included in the definition of an emergency is the situation where people are 'evicted or threatened with imminent eviction from land or from unsafe buildings, or situations where proactive steps ought to be taken to forestall such consequences'.⁶⁰

43.2. At the time of **Grootboom** there was 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'. Therefore, the essential question was — 'whether the nationwide housing programme is sufficiently flexible to respond to those in desperate need in our society and to cater appropriately for immediate and short-term requirements'.⁶¹

44. The following aspects of Chapter 12 of the Housing Code warrant reference:

⁶⁰ *City of Jhb Metro Municipality v Blue Moonlight Prop 39 (Pty) Ltd* 2012 (2) SA 104 (CC) at para 47.

⁶¹ *City of Jhb Metro Municipality v Blue Moonlight Prop 39 (Pty) Ltd* 2012 (2) SA 104 (CC) at para 55.

- 44.1. The main objective of the Emergency Housing Programme is to provide temporary assistance in the form of secure access to land and all basic municipal engineering services and/or shelter in a wide range of emergency situations of exceptional housing need through the allocation of grants to municipalities in order to achieve the following policy objectives: (a) to expedite action in order to relieve the plight of persons in emergency situations with exceptional housing needs; (b) to provide for special arrangements in terms of which the housing programme will address the diversity of needs of households in emergency housing situations; and (c) in order to maximise the effect of projects through this programme, to ensure that funds are effectively extended and services provided could be converted for permanent residential development use.⁶²
- 44.2. The Emergency Housing Programme is limited to providing for temporary aid which is of a temporary nature. The assistance provided under it is limited to ‘*absolute essentials*’.⁶³
- 44.3. Assistance under the Emergency Housing Programme should, whenever possible, represent an initial phase towards a permanent housing solution. Where this is not possible, housing assistance under this programme can be provided through the development of a temporary settlement area where feasible or practicable, while steps are being taken to prepare and develop land for permanent settlement purposes in terms of the approved municipal IDP and development priorities.⁶⁴
- 44.4. Included in the definition of emergency housing circumstances are people 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.⁶⁵

⁶² Clause 2.1, p 13.

- 44.5. The programme benefits all affected persons who are not in a position to address their housing emergency from their own resources or from other sources. It includes an exceedingly wide range of people, such as: (a) persons or households with a monthly income in excess of the maximum income limit as approved by the Minister; (b) households headed by minors; (c) persons without dependents; (d) persons who are not first-time owners; (e) persons classified as aged persons; (f) persons who have previously received housing assistance and who have previously owned and/or currently own a residential property; (g) illegal immigrants on the conditions prescribed by the Department of Home affairs on a case-by-case basis.⁶⁶
45. Whereas the national Emergency Housing Programme establishes certain principles and sets out the broad responsibilities of municipalities, it does not dictate to municipalities how they must go about giving effect to their emergency housing obligations. The flexibility afforded municipalities is appropriate given that each municipality will have its own physical and budgetary constraints, and range and level of housing needs.
46. The Housing Code does not provide for emergency housing to be provided in a particular location. Yet, it is not challenged by the Bromwell residents.

The City has no separate Emergency Housing Programme

47. The City applies and implements the national Emergency Housing Programme. It has no self-standing Emergency Housing Programme. For this reason, the Bromwell residents may not challenge a specific Emergency Housing Programme of the City.
48. The City delivers on the Emergency Housing Programme by creating incremental

⁶³ Clause 2.2, p 13.

⁶⁴ Clause 2.2, p 14.

⁶⁵ Clause 2.3.1, p 15.

⁶⁶ Clause 2.4, p 16.

development areas⁶⁷, and temporary relocation areas.⁶⁸ More recently, the City has begun to develop emergency housing within existing settlements.⁶⁹

REASONABLENESS: IN THE IMPLEMENTATION OF LEGISLATION AND POLICIES PERTAINING TO THE REALISATION OF HOUSING RIGHTS

Housing programmes that do give beneficiaries a measure of choice in location

49. It is clear from the submissions made in the previous section that there is no legislation, policy or programme that requires the City (or any other organ of state) to deliver housing in a particular area. It follows, we submit, that it cannot be argued that the City, by not providing emergency housing in the inner city, has not reasonably implemented any legislation, policy or programme. That, we submit ought to be the end of the constitutional challenge.

50. But in any event, we submit that when assessing the reasonableness of the City's conduct in relation to housing, regard must be had to the range of housing programmes that the City does deliver on (which allows or facilitates access to housing in a location of choice). By way of example⁷⁰:

50.1. GAP housing, which is aimed at persons who earn more than R6000 per month, with a preference given to persons who earn more than R7 500 per month. The

⁶⁷ These areas are incrementally upgraded to provide for permanent housing.

⁶⁸ City AA Vol 4 pp 343-344 para 44. As at 25 October 2016, the City had emergency housing projects at Mfuleni, Happy Valley, Blikkisdorp, Wolwerivier, Sir Lowry's Pass and Bardale; TRA units at OR Tambo, Hangberg and Masonwale in Gugulethu (City AA Vol 4 p 344 para 45); and incremental development areas planned for Bloekombos Ext 3, Strandfontein East, Pelican Park South, Atlantis South, Macassar, Mfuleni Ext 2 (being built), Vlakteplaas, Sweet Homes IDA, Aloe Ridge IDA, Nooiensfontein IDA (City AA Vol 4 pp 344-345 para 46).

⁶⁹ As at 2 March 2020 the City was constructing these at Kalkfontein UISP (in Kuilsrivier), Bosasa IDA (in Blue Downs), Wallacedene (in Kraaifontein), Kampies (in Philippi), Eagle Bar (in Strand) and OR Tambo TRA in Khayelitsha; and had several more in the planning phase, being Mfuleni Ext 1 (in Mfuleni), Riemvasmaak Extension (South Peninsula), Racepark TRA (in Du Noon), AAA-Land (in Khayelitsha), BBB-Land (in Macassar), CCC-Land (in Macassar), DDD-Land (in Strandfontein), EEE-Land (in Kraaifontein) and FFF-Land (in Atlantis) (City AA to amended relief Vol 18 pp 1783-1785 para 42).

⁷⁰ The income ranges in this paragraph were applicable as at 25 October 2016.

beneficiary obtains ownership of the property subject to payment of the purchase price in monthly instalments, or units may be available for rental.⁷¹

50.2. Finance Linked Individual Subsidy housing, which is aimed at households that earn between R3 500 and R15 000 per month. The beneficiary may qualify for a bond for the purchase of the property and repayments are determined according to income.⁷²

50.3. Institutional housing, in terms of which the beneficiary acquires a subsidy which he or she may supplement with own income to acquire a superior housing structure than would be the case under the Breaking New Ground Programme.⁷³

50.4. The social housing programme which is aimed at developing affordable rental stock for people with income levels of between R1 500 and R7 500 per month (as at 25 October 2016).⁷⁴

51. As regards social housing specifically:

51.1. The purpose of the social housing programme is to provide permanent housing opportunities for lower-income households on well-located land, close to places of employment and social amenities.⁷⁵

51.2. It is the City's policy in instances where there is land available in the inner city and surrounds to develop such sites for social housing.⁷⁶

51.3. The City has determined that social housing projects are best accommodated in these areas in light of the funding model for social housing and with due regard to

⁷¹ City AA Vol 4 p 348 paras 54-55. As at 25 October 2016, there were GAP housing opportunities at Maitland, private sector stock in Woodstock and Salt River and the De Waal Drive flats administered by the Province.

⁷² City AA Vol 4 p 348 paras 56-58.

⁷³ City AA Vol 4 p 348-349 paras 59.

⁷⁴ City AA Vol 4 p 346 para 49.

⁷⁵ As at 25 October 2016, there were social housing units in Steenberg, Brooklyn, Bothasig and Scottsdene (City AA Vol 4 p 346 para 51).

⁷⁶ City AA to amended relief Vol 18 p 1798 para 54.8.1.

the high land costs in the inner city and surrounds. The City is developing social housing on five sites in Salt River and Woodstock, apart from the Pine Road and Salt River Market sites, to which we return below.⁷⁷

51.4. The City's social housing programme plays an indispensable role in addressing the legacy of spatial apartheid in Cape Town.

There is a limited and finite amount of land available in the inner city

52. Land is a scarce commodity in the inner city and surrounds and it is therefore not possible for the City to deliver on every housing programme in that area.⁷⁸ It has also provided some detail of the sites that have been identified for social housing in the Salt River and Woodstock areas.⁷⁹

53. The Bromwell residents identified 45 parcels of vacant state-owned land within 5 kilometres of the property which they submit are suitable for development for at the very least temporary emergency accommodation.⁸⁰

54. 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 for the Occupiers.⁸¹

55. As regards the question of identifying land, the City has explained that a land disposal committee meets twice a year, or more often if required. It 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

⁷⁷ City AA to amended relief Vol 18 pp 1794-1795 para 50.

⁷⁸ City AA to amended relief Vol 18 p 1793 para 49.2.8.

⁷⁹ City AA to amended relief Vol 18 p 1794 para 50.

⁸⁰ FA Vol 1 p 33 para 76.

⁸¹ City AA Vol 2 p 369 to 372 para 124 to 126.

transfer. The City has explained that a few transfers have taken place but many large parcels are as yet not released.⁸²

56. The City has also said why none of the land parcels identified by the Occupiers (and in respect of which the City is alleged to be the owner) can be used as emergency accommodation for them.⁸³ The City has specifically dealt with each of the identified erven in this regard.⁸⁴

57. In this regard, the City has explained that: (a) many of these land parcels are too small for a housing development; (b) the City is not in a position to provide individual tracts of land to beneficiaries because, to do so is unaffordable (the costs of individual provision by far exceeding the costs of a development); (c) it would also create a great unfairness amongst different beneficiaries of State assisted housing.⁸⁵ None of these allegations are seriously placed in dispute in reply, with the Occupiers stating only that the City '*merely states that they [the land parcels] are too small for a viable housing project.*'⁸⁶

The City has committed to development principles and projects aimed at ensuring that State assisted housing is provided in well-located areas and/or with access to public transport

58. The City recognises that many beneficiaries of State assisted housing would like to reside in the inner city. However, land in the inner city is limited, expensive and finite. As such, limited state assisted housing may occur in the inner city.

59. In light of this, the City has adopted a range of development principles and projects, ultimately aimed at ensuring that State assisted housing is provided in well-located areas and/or with access to public transport. While only a few targeted projects fall within the

⁸² City AA Vol 2 p 369 para 124.

⁸³ City AA Vol 2 p 369 para 124.

⁸⁴ City AA Vol 2 p 369 para 125.

⁸⁵ City AA Vol 2 p 370 para 125.

⁸⁶ RA Vol 4 p 627 par 75.

inner city, it has developed and applies the following development principles and plans, among others:

- 59.1. The principle of transit-oriented development, which means, among other things, that that new development must be located around existing and planned public transport.⁸⁷
- 59.2. Catalytic land development programmes where residential land use caters for people across various income bands and at increased densities that better support the viability of public transport systems.⁸⁸
- 59.3. The creation of integrated zones which link concentrations of economic opportunity and mono-use settlements.⁸⁹
- 59.4. The implementation of national priority catalytic projects.⁹⁰
- 59.5. The development of smaller inner-city areas such as Bellville, Parow, Khayelitsha, Claremont, Mitchells Plain, Wynberg and Plumstead.⁹¹

There are compelling reasons as to why the City does not deliver emergency housing in the inner city

60. As stated, the City does not generally provide emergency housing in the inner city.⁹²
61. The reasons for that include⁹³:

⁸⁷ City AA to amended relief Vol 18 pp 1774-1776 paras 27-28.

⁸⁸ City AA to amended relief Vol 18 pp 1777-1779 paras 33-36. This is part of the Built Environment Performance Plan (‘BEPP’) for 2019/2020 outlined in City AA to amended relief Vol 18 pp 1776-1777 paras 30-31.

⁸⁹ City AA to amended relief Vol 18 pp 1779-1780 para 37. These include Blue Downs IZ involving a rail link extension between Khayelitsha and Bellville; the Metro-South-East IZ aimed at linking Mitchells Plain and Khayelitsha with the Cape Town CBD; and the Voortrekker Road Corridor IZ which links Cape Town CBD with Bellville and can be used to increase the supply of affordable rental stock. This is a second component of the BEPP.

⁹⁰ Including upgrading the living conditions in 27 informal settlements close to the N2; and developing a combination of mixed housing types across 12 greenfield land parcels within 5km of each other close to the N1 and Fisantekraal and Kraaifontein railway stations. City AA to amended relief Vol 18 pp 1781-1783 para 40. This is a third component of the BEPP.

⁹¹ City AA to amended relief Vol 18 p 1783 para 41. This is a fourth component of the BEPP.

⁹² City AA Vol 4 p 354 para 66.1 and 66.2.

⁹³ City AA Vol 4 p 354 para 66.3. These are not placed in dispute by the applicants. See too: City AA to amended relief Vol 18 p 1790 par 49.2.

- 61.1. The excessively high costs of developing emergency housing in the City - costs in this regard are at least three-fold what they would be in areas further afield;
- 61.2. The very high rates on properties in the city centre;
- 61.3. The scarcity of land in the immediate surrounds of the city and the competing demands on such land; and
- 61.4. The fact that there are other housing programmes in which the immediate surrounds of the city are being targeted. These are aimed at creating affordable inner-city housing and temporary housing projects to facilitate the provision of such housing.
62. As explained, national assistance under the Emergency Housing Programme takes the form of grants to municipalities to enable them to respond rapidly to emergencies by way of the provision of land, engineering services and shelter. But, the value of the grants is insufficient for emergency housing to be provided in the inner city.⁹⁴ Since the affidavits in this matter have been filed, the issue of funding has become even more dire in that national government no longer provides assistance to municipalities for emergency housing generally, save for natural disasters.
63. The High Court took issue with the City's position that emergency housing in the inner city is expensive because the City *'in pleading poverty...provided scant detail, with reference to hard and actual numbers, of its financial position in regard to the provision of emergency housing'*.⁹⁵
64. But it is the relative cost of providing emergency housing in the inner city as opposed to elsewhere which is in issue. It is also the opportunity cost of providing emergency housing in the inner city as opposed to other housing, which is important. For every emergency housing unit provided in the inner city, the City forfeits providing more than one

⁹⁴ City AA to amended relief Vol 18 p 1791 para 49.2.3 and p 1792 paras 49.2.5-49.2.6.

⁹⁵ High Court judgment Vol 21 pp 2058-2059 paras 146-148.

emergency housing unit for the same price somewhere elsewhere (up to three on the City's evidence)⁹⁶. For every temporary emergency housing unit provided in the inner city, the City forfeits providing a permanent social housing unit there.

65. Finally, it is noteworthy that although the Bromwell residents take issue with where the City's emergency housing is located, it is noteworthy that social housing such as that planned for the Woodstock Salt River precinct is precisely what the Bromwell residents' expert, Ms Royston, identifies as being vital. Although Ms Royston, like the Bromwell residents, would like in addition to see temporary emergency housing being centrally located, it is for the City, as democratically elected government, to make these choices.

THE CORRECT QUESTION ACCORDING TO THE BROMWELL RESIDENTS: DID THE CITY ACT REASONABLY IN ITS DETERMINATION OF THE LOCALITY OF THE EMERGENCY ACCOMMODATION OFFERED TO THE BROMWELL RESIDENTS AND DID THE CITY ACT REASONABLY IN EXCLUDING EMERGENCY ACCOMODATION ENTIRELY AS A HOUSING OPTION IN THE INNER CITY?

66. The Bromwell residents assert that the correct questions are whether the City acted reasonably in its determination of the locality of the emergency accommodation offered to the Bromwell residents; and whether the City acted reasonably in excluding emergency accommodation entirely as a housing option in the inner city. We have already made submissions as to the second question.

67. As regards the first question, namely whether the City acted reasonably in determining the locality of the emergency accommodation offered to the Bromwell residents, we make the following four points:

67.1. First, this question did not constitute the basis for the relief sought on the pleaded case.

⁹⁶ City AA Vol 4 p 354 para 66.3.

- 67.2. Second, while unfortunate, the position of the Bromwell residents is not unique.
- 67.3. Third, there was no differential treatment of the Bromwell residents that was unconstitutional and/or unreasonable.
- 67.4. Finally, on the evidence, it is clear that the City considered the position of the Bromwell residents, engaged with them and made offers of alternative accommodation that were rejected.

The pleadings and the ‘correct question’

68. As we have explained, the original relief sought by the Bromwell residents was a declaratory order that the City was under a constitutional duty to provide them with temporary emergency accommodation in a location ‘as near as possible to [the property]’, and an order directing the City to make available such accommodation within three months of the order.⁹⁷
69. The relief sought did not specify where such accommodation should be located and followed the wording of other orders granted in similar circumstances. The relief was also limited to providing the Bromwell residents and their dependents with relief, and contained no order declaring any aspect of the City’s implementation of the Housing Act or Housing Code as being unconstitutional.
70. On 13 September 2018, after the City had facilitated the making of offers for social housing to those of the residents who qualified, and had offered the remaining residents emergency housing at Wolwerivier, which was the nearest emergency housing at that time, the Bromwell residents amended their relief.
71. As stated, the amended relief was for the City to provide them with temporary emergency accommodation or transitional housing ‘in the Woodstock, Salt River and inner city

⁹⁷NoM Vol 1 p 4 paras 2 and 3.

precinct as identified in the Prospectus for Affordable Housing in the Woodstock and Salt River Precinct issued by [the City] on 28 September 2017’ (emphasis provided).⁹⁸

72. The Bromwell residents also sought a declaratory order that the City’s ‘housing programme ...and its implementation in terms of the City of Cape Town Integrated Human Settlements: Five Year Plan [was] inconsistent with the [City’s] constitutional and statutory obligations to the extent that it fail[ed] to provide [the Bromwell residents] and people living in Woodstock and Salt River who are at risk of homelessness ...due to eviction from their homes with access to transitional housing or temporary emergency accommodation in the immediate City centre and surrounds’.
73. Despite the material shift in the relief sought by the Bromwell residents, they did not file a further affidavit in which they pleaded the basis for such relief. Although they had already filed affidavits, including an affidavit by their expert Ms Royston which they have subsequently relied upon to make out the new case, this was not the case which the City had been called upon to meet.
74. This Court has explained that ‘*[h]olding parties to pleadings is not pedantry. It is an integral part of the principle of legal certainty which is an element of the rule of law, one of the values on which our Constitution is founded.*’⁹⁹
75. In *Damons*¹⁰⁰, this Court held that pleadings fulfil an essential role in determining disputes in a court of law including in matters relating to the exercise and protection of constitutional rights.
76. The Bromwell residents themselves say that they would have liked to have pleaded the amended case more fully.¹⁰¹ (Indeed, they have purported to do so impermissibly in their

⁹⁸ Amended NoM Vol 17 p 1751 paras 2.1 and 3.

⁹⁹ *South African Transport and Allied Workers Union v Garvas* 2013 (1) SA 83 (CC) para 114.

¹⁰⁰ *Damons v City of Cape Town* 2022 (10) BCLR 1202 (CC) (30 March 2022) paras 117-118.

¹⁰¹ Application for leave to appeal Vol 22 paras 70 and 71.

heads of argument).

77. Whatever the reason for their failure to file an affidavit in support of the relief sought¹⁰², the fact is that the amended case was not as fully pleaded as it could have been, and this is a further factor which weighs against this Court interfering with the SCA's order and in effect resurrecting the far-reaching and novel order of the High Court.
78. While the precise form of relief to be granted could be crafted by this Court to avoid these problems, this is not a case in which that is warranted.

The position of the Bromwell residents is unfortunate but not unique

79. The approach adopted expressly by the Bromwell residents from the time of the amended notice of motion onwards¹⁰³, is that their position is different to that of other people who are evicted and may find themselves homeless.
80. Their case is that the City should have developed a policy or practice of providing people who face eviction in Woodstock and Salt River specifically¹⁰⁴ with emergency housing in the nearby vicinity because of the unique history of these areas; the peoples' generational attachment to and association with these areas; the phenomenon of gentrification in these areas; and because of the state's duty to address spatial apartheid.¹⁰⁵ Alternatively, the suggestion appears to be that the City should have taken the Bromwell residents' unique circumstances into account in any offer of emergency accommodation.
81. The former suggestion gives rise to an extremely complex set of questions including: how to identify the areas should receive such priority – they could not surely be limited to

¹⁰² In this regard, it is not useful to lay the blame at the City's door for having refused to agree to the filing by the applicants of an affidavit in support of the amended relief sought (as the applicants seek to do in paras 70 to 71 of the application for leave to appeal). It was within the City's rights to resist the filing of a further affidavit and it would have been open to the applicants to bring an application in terms of uniform rule 6(5)(e) for leave to file a further affidavit. In any event, a deliberate decision was taken on behalf of the Bromwell residents when they sought an amendment to the relief that they would not file further affidavits in support of it.

¹⁰³ Amended NoM Vol 17 pp 1749-1754.

¹⁰⁴ Amended NoM Vol 17 p 1750 para 1.1.

¹⁰⁵ RA in amended relief p 1857 para 9.

Woodstock and Salt River¹⁰⁶; whether the singling out of areas like Woodstock and Salt River might not have the effect of preferring so-called coloured people at the expense of so-called black people thereby giving rise to substantive inequality; how one would go about assessing which individuals from those areas would qualify; and whether a policy such as this should take precedence over the City's broader social housing aims.

82. These are questions which, apart from not having been pleaded properly, do not lie within the ambit of what this Court may be expected to consider.
83. But the latter suggestion, namely an approach that the City must take into account the unique circumstances of the people who find themselves in need of emergency housing when they are being evicted from areas which are being gentrified, including that such accommodation must be as near as possible to the places from which they are being is evicted, is precisely what the City did do in this case, as we shall show in Part E below.

There was no differential treatment of the Bromwell residents which was unreasonable

84. Realising perhaps that the City cannot be said to have acted unconstitutionally in failing to provide the Bromwell residents with emergency housing in the inner city *per se* (there being no such right or duty), the High Court found that the City has acted arbitrarily and unreasonably in its treatment of the Bromwell residents (and others like them) specifically.
85. As a point of departure, the following key aspects of the judgment of the Constitutional Court in *Blue Moonlight* warrant reference:

85.1. First, the judgment recognised that differentiation and prioritisation must take place, stating: *'In considering these submissions, it must be accepted that State resources for housing in any country — and particularly in South Africa — are limited. Section 26(2) recognises this by stating that reasonable legislative and other measures must be taken within*

¹⁰⁶ The Court may take judicial notice of the fact that there are other similar places such as the Bo-Kaap.

*available resources. Because the demand necessarily exceeds the availability of resources, any housing policy will have to differentiate between categories of people and prioritise. The differentiation needs to be scrutinised though.*¹⁰⁷

85.2. Second, the judgment emphasised that the availability of resources is an important factor in determining the reasonableness of the measures employed to achieve the progressive realisation of the right. This, according to this Court, does not mean that the State may arbitrarily decide which measures to implement. The measures taken must be reasonable.¹⁰⁸

85.3. Third, a policy that, for example, differentiates between general housing needs and emergency situations might well be understandable. The question in that matter however, was whether it was reasonable to differentiate within the category of emergencies between people relocated by the City and those evicted by private landowners and inflexibly to include the first but exclude the second group.¹⁰⁹

86. It is clear from the foregoing that the facts in *Blue Moonlight* are distinguishable from those in this case. To emphasise, *Blue Moonlight* involved a class of people for whom emergency housing was not made available at all. By way of contrast, the City provides emergency housing across the board, to all people who find themselves in need – which is what s 26 requires. Furthermore, the Court in *Blue Moonlight* found that there was no legitimate government purpose served by differentiating between this class on the one hand, and the class of people evicted from public property who would also be rendered homeless on the other. Both classes of people were equally in need.

87. In the present case, the government purpose which was sought to be achieved by offering the Pine Road and Salt River Market occupiers transitional housing nearby, was to make

¹⁰⁷ Para 86.

¹⁰⁸ Para 88.

¹⁰⁹ Para 89.

space available for permanent social housing in the inner city.

88. As regards the City's evidence on its transitional housing, it has explained:

88.1. Two sites in Salt River have been identified for transitional housing: (a) Pickwick Road; and (b) St James Street.¹¹⁰

88.2. The transitional housing on Pickwick Road has yielded a total of 42 rooms, all 42 of which have been taken up by the Pine Road occupiers (this having been the purpose of the Pickwick Road transitional housing).¹¹¹ There is accordingly no further capacity at the Pickwick transitional site¹¹² (This remains the case at the time of these heads of argument).

88.3. Construction of the transitional housing at St James Street has not commenced (as at the date of these heads of argument, that remained true) – this housing is intended to accommodate the Salt River Market occupiers. Construction has been delayed by the need to obtain planning approvals. Depending on when the current occupants of the Pickwick transitional housing vacate those structures and when transitional housing for the Salt River Market occupiers becomes required, the City may have to use the Pickwick transitional housing for the Salt River Market occupiers.¹¹³

88.4. The St James transitional housing is therefore also not available to the Bromwell residents.¹¹⁴

88.5. Save for both the above-mentioned sites, there are no other sites for emergency or transitional housing in the inner city and surrounds.¹¹⁵

¹¹⁰ City AA to amended relief Vol 18 p 1796 para 53.

¹¹¹ City AA to amended relief Vol 18 p 1797 paras 54.1-54.2.

¹¹² City AA to amended relief Vol 18 p 1797 para 54.3.

¹¹³ City AA to amended relief Vol 18 p 1797 para 54.5.

¹¹⁴ City AA to amended relief Vol 18 p 1798 para 54.6.

¹¹⁵ City AA to amended relief Vol 18 p 1798 para 54.7.

- 88.6. To date, a significant impediment to the delivery of social housing has been that the land parcels in question are occupied unlawfully. It is for this reason that the City committed to transitional housing, namely to ensure that vacant occupation could be obtained on certain sites in order for social housing to be developed.¹¹⁶
- 88.7. If the transitional housing in Salt River were to be used for the Bromwell residents, it would not be available for the intended purpose. This would mean that vacant occupation of the social housing sites would not be obtained, and ultimately, the social housing developments would not be able to proceed.¹¹⁷
- 88.8. It must therefore be emphasised that the consequence of the Bromwell residents' demands for transitional or emergency housing in the inner city is that the identified social housing developments would be undermined. If the orders granted by the High Court were to stand, they would impede the realisation of housing rights.¹¹⁸
- 88.9. Finally, 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 entirely premature to do so at this stage for the reasons already given.¹¹⁹
89. In conclusion, the Bromwell residents have not shown that the City has adopted a policy which differentiates between two classes of people to deprive one class of its constitutional housing rights. Nor have they shown that the City acted unreasonably in treating the Bromwell residents differently to the way in which it treated the Pine Road and Salt River Market occupiers.

¹¹⁶ City AA to amended relief Vol 18 p 1799 para 54.8.2.

¹¹⁷ City AA to amended relief Vol 18 p 1799 para 54.8.3.

¹¹⁸ City AA to amended relief Vol 18 p 1799 para 54.8.4.

¹¹⁹ City AA to amended relief Vol 18 p 1799 para 55.

The City considered the position of the Bromwell residents, engaged with the Bromwell residents and made offers of alternative accommodation which were rejected

90. It must be stated at the outset that at no point in the City's engagement with the Bromwell residents did it offer emergency housing in the inner city. It did not do so because, for reasons addressed, it did not and does not have emergency housing available in the inner city. This is because the City does not develop emergency housing in the inner city. Instead, the City made an offer of alternative housing at Wolwerivier (29kms away); and at Kampies (15 kms away). Both these offers were rejected by the Bromwell residents, because, on their approach, there is a single, reasonable response by the City to their predicament: it is emergency housing in the inner city and nothing else!

91. The Bromwell residents adopt this position notwithstanding this Court having found as follows in **Baron v Claytile (Pty) Ltd** 2017 (5) SA 329 (CC):

'[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. This court has to dismiss the appeal.'

92. The City's actions as regards the Bromwell residents exceeded the standard of reasonableness.

93. As appears below, the then Mayor herself engaged on behalf of the residents with the property owner to defer the eviction date; the City's officials began immediately to assess which of the Bromwell residents qualified for housing under the permanent housing programmes and to make offers in this regard; the City arranged site visits, provided detailed information, and engaged meaningfully and consistently with the attorneys representing the Bromwell residents. The residents who did not qualify for permanent housing were offered emergency housing first at Wolwerivier; then Maitland (which fell

through because of circumstances beyond the City's control) and then Kampies.

94. In heads of argument in this Court, the Bromwell residents introduce an argument that the City did not consider the close-knit nature of the relationship between the residents as a whole and, in finding and offering solutions for permanent housing, split them up into family units.¹²⁰ But this is a complaint which has not been pleaded. It is also ill-founded, since the Bromwell residents themselves accepted that solutions to their housing problems should be found based on the programmes available to each family unit, depending on levels of income and specific housing requirements.¹²¹

95. The pertinent facts as they emerge on an application of the **Plascon-Evans** rule are the following:

95.1. On 17 March 2016, the Honourable Judge President Hlophe granted an order by agreement between the parties (without any involvement of the City) in which he directed the Bromwell residents to vacate the property on or before 31 July 2016 ('the March eviction order').¹²²

95.2. This followed the consolidation of five individual eviction applications in which the founding affidavits had alleged that the Bromwell residents were paying rental and would have no difficulty finding alternative accommodation. Although the City had been cited as a party in the individual eviction applications, no relief had been sought against it and no answering affidavits had been filed by the Bromwell residents.¹²³ The March eviction order appears not to have been served on the

¹²⁰ Bromwell residents' heads of argument paras 17-18 and 68-70.

¹²¹ From the first supplementary founding affidavit onwards, the residents introduced family units as being the appropriate organising principle for the assessment of the housing opportunities available to them (SFA Vol 3 p 232-233 para 6).

¹²² City AA Vol 4 p 332 para 19.1; FA **CC2** Vol 1 pp 45-47.

¹²³ FA Vol 1 pp 14-15 para 18; FA Vol 1 p 16 para 24; City AA Vol 4 pp 329-331 para 15. After the individual eviction applications had been launched and before they were consolidated, the Bromwell residents became represented by attorneys on 18 September 2015. The consolidation order was made on 10 December 2015 and provision was made for the filing of further papers in the consolidated application. The applicants again did not file an answering affidavit (FA Vol 1 p 15 para 21; City AA **AA4** Vol 4 pp 408-409; City AA Vol 4 p 332 para 18).

City.¹²⁴

- 95.3. On 19 August 2016, Weinkove AJ made a deed of settlement between the Bromwell residents and the Woodstock Hub an order of Court (‘the variation order’).¹²⁵ The deed of settlement and resultant order recorded that the Bromwell residents were occupying the property unlawfully and that the date by which they had to vacate had been varied to 9 September 2016.¹²⁶ This order too appears not to have been served on the City.¹²⁷
- 95.4. On 3 September 2016, NU sent a letter to the City in which it advised that there were 43 people who were going to be evicted on 9 September 2016, several of whom were vulnerable persons. NU said that the Bromwell residents would be rendered homeless and enquired what temporary emergency accommodation the City would be providing.¹²⁸
- 95.5. Two days later, on 5 September 2016 the City responded that it was not privy to either the evidence which had been placed before the Court or what its reasoning had been. The City pointed out that it had been for the Court to determine whether the eviction order was just and equitable; that the City’s obligation to provide emergency housing was only triggered when people faced the threat of homelessness; and that in any event the City did not have emergency accommodation available. The City assumed at this point that the Court had taken into account a financial contribution which had been offered by the Woodstock Hub to the Bromwell residents to be used towards alternative accommodation.¹²⁹

¹²⁴ FA Vol 1 p 20 para 41; City AA Vol 4 p 360 para 84.

¹²⁵ The Bromwell residents had become represented by attorneys on 18 September 2015.

¹²⁶ City AA Vol 4 p 333 para 22; FA **CC3** Vol 1 pp 48-59.

¹²⁷ FA Vol 1 p 20 para 41; City AA Vol 4 p 360 para 84.

¹²⁸ FA Vol 1 p 21 para 42; City AA Vol 4 p 360 para 85; FA **CC7** Vol 2 pp 105-107.

¹²⁹ FA Vol 1 p 22 para 44; City AA Vol 4 pp 360-361 paras 86-88; FA **CC8** Vol 2 pp 108-109.

- 95.6. On 7 September 2016, the Mayor met with the Bromwell residents and although she expressed the same view as that which had been expressed in the letter, she offered to mediate between the Woodstock Hub and the Bromwell residents to stay the eviction and agreed to look into possible solutions including whether land could be made available.¹³⁰
- 95.7. On 8 September 2016, the City met with the Bromwell residents and advised that the Woodstock Hub had agreed not to proceed with the eviction until 26 September 2016. The City said it would assist the Bromwell residents to apply for social housing and arrange site visits of available social housing units. The City urged the Bromwell residents to make application for social housing urgently.¹³¹
- 95.8. On 12 September 2016 most of the Bromwell residents who were able, attended the City's housing office, accompanied by their attorney, to update their data on the City's housing database or to register for the first time.¹³² On the same day, the Mayor's spokesperson advised the Bromwell residents' spokesperson that certain of the Bromwell residents qualified for social housing and others for GAP housing and that the City had arranged transport for site visits.¹³³
- 95.9. On 16 September 2016, NU wrote a letter to the City's principal legal advisor asking for the City's response to its correspondence, reiterating that the Bromwell residents would be rendered homeless, and demanding that the City furnish details of temporary emergency accommodation to be provided, failing which NU would bring a court application.¹³⁴

¹³⁰ FA Vol 1 pp 22-23 para 46; City AA Vol 4 pp 334-335 para 25.3; City AA Vol 4 p 361 paras 89-91.

¹³¹ FA Vol 1 pp 24-25 paras 49-50; City AA Vol 4 p 335 para 25.4; City AA Vol 4 p 362 paras 95-97.

¹³² FA Vol 1 pp 26- 27 paras 58-59; City AA Vol 4 p 364 paras 103-104; RA Vol 6 p 620 para 47.

¹³³ City AA Vol 4 p 336 para 25.7; RA Vol 6 pp 620-621 para 49. The applicants who qualified (together with their family units) were 1st, 3rd and 11th applicants.

¹³⁴ FA Vol 1 pp 29 to 30 para 69; City AA Vol 4 p 367 para 113; FA **CC19** Vol 3 pp 211-213.

- 95.10. On 19 September 2016 the City’s principal legal advisor responded that she would be consulting with all role players that afternoon and would take the necessary instructions and revert.¹³⁵
- 95.11. On 20 September 2016, before the City could respond, the Bromwell residents launched the present application. Part A of the relief sought was an order suspending the execution of the March eviction order and the variation order and granting the Bromwell residents leave to file an affidavit in relation to the relief sought in Part B. Part B was for an order containing the standard relief in eviction matters.¹³⁶
- 95.12. On 5 October 2016, despite the pending litigation, the City continued in its efforts to find the appropriate housing solution for the Bromwell residents and visited the property to assess the composition of the various family units.¹³⁷
- 95.13. On 8 October 2016 the City arranged for the Bromwell residents to attend Belhar Social Housing Development and to apply for social housing.¹³⁸
- 95.14. On 14 October 2016 NU did as it had undertaken to do, and on 21 October 2016 (7 days later) the City’s attorneys, having assessed the information, advised that family units 1, 2, 4 to 7 and 9 would qualify, and should apply immediately for social and/or GAP housing. The City offered emergency housing at Wolwerivier for the remaining family units.¹³⁹
- 95.15. On 25 October 2016, the City delivered its answering affidavit in which it, among other things:

¹³⁵ FA Vol 1 p 30 para 69.4; City AA Vol 4 p 367 para 113; FA **CC20** Vol 3 p 214.

¹³⁶ NoM Vol 1 pp 1-7.

¹³⁷ City AA Vol 4 pp 328-329 paras 11-12; City AA Vol 4 p 338 para 26.1.

¹³⁸ City AA Vol 4 pp 338-339 para 26.2.

¹³⁹ City AA Vol 4 p 339 para 28; City AA **AA8A** Vol 5 pp 435-442.

- 95.15.1. set out the City's housing policies and programmes and explained why the City does not provide emergency housing in the City centre;¹⁴⁰
- 95.15.2. referred in passing to six separate sites which were being targeted in Woodstock for different forms of housing, as well as a transitional housing development and a social housing development in Salt River ('the social housing sites');¹⁴¹
- 95.15.3. explained in detail why none of the 15 City-owned land parcels identified by NU could be used as emergency housing;¹⁴²
- 95.15.4. set out the details of the family units which qualified for social and GAP housing explaining that the City had been liaising with individual social housing institutions;¹⁴³ and
- 95.15.5. set out the details of the offer of emergency housing at Wolwerivier.¹⁴⁴
- 95.16. There followed an exchange of correspondence from which it appears that NU raised concerns as regards Wolwerivier including its distance from the property, and the City, in turn, explained that Wolwerivier was the closest available emergency accommodation at that time.¹⁴⁵
- 95.17. On 9 November 2016 Weinkove AJ granted an order directing the Bromwell residents to apply by 30 November 2016 for a range of the City's permanent housing options.¹⁴⁶ The learned Judge also directed the City to request the relevant entities to expedite decisions on the applications. Both the Bromwell residents and

¹⁴⁰ City AA Vol 4 pp 339-349 paras 29-59; pp 354-356 para 66.

¹⁴¹ City AA Vol 4 p 355 paras 66.4.1-66.4.2.

¹⁴² City AA Vol 4 pp 369-373 paras 124-127.

¹⁴³ City AA Vol 4 pp 349-352 paras 60-63.

¹⁴⁴ City AA Vol 4 p 353 para 65.

¹⁴⁵ RA **RA2** Vol 7 pp 630-633 and RA **RA3** Vol 7 pp 634-638.

¹⁴⁶ This order does not form part of the CC record. None of the parties appear to have a copy of the order in its issued form. We rely in this paragraph on a draft version of the order, which we believe was the same as the final version which was granted.

the City were directed to report back to Court.

95.18. On 30 November 2016 NU filed a schedule in which it described the progress which had been made as regards obtaining social housing for the Bromwell residents¹⁴⁷ and on 8 December 2016 NU followed up with a letter to the City in which it referred to a further list of properties including the Pickwick transitional housing property, enquiring whether these could be considered as emergency housing, and if not, the reasons for that.¹⁴⁸

95.19. On 16 January 2017 the City's attorneys wrote to NU saying, among other things, that the Pickwick transitional housing property had already been allocated as a transitional area for housing beneficiaries who needed to be relocated from one of the sites to be developed for (social) housing.¹⁴⁹

95.20. On 18 January 2017, the City confirmed that it was still willing and able to provide emergency housing units for all remaining families, despite the fact that several of them¹⁵⁰ potentially qualified for home loans and had not explained what measures they had taken to pursue alternative housing options.¹⁵¹

95.21. On 23 January 2017, a week before the matter was to be heard, the Bromwell residents filed a supplementary affidavit in which they requested further information from the City as regards Wolwerivier¹⁵², and details about the Pickwick

¹⁴⁷ Bromwell residents' schedule Vol 7 pp 703-892 esp pp 705-706; 727; 728; 730; 733; 762.

¹⁴⁸ Bromwell residents' report **DG23** Vol 10 pp 1014-1015. By 8 December 2016, social housing units had been offered to 3 of the 10 family units (family units 4, 6 and 9) and there were 27 people remaining who required emergency housing (Bromwell residents' report **DG23** Vol 10 pp 1014-1015 and Schedule Vol 7 pp 728, 730 and 733). Family units 6 and 9 eventually refused the offers of social housing (re 9th family unit see NU Report Vol 9 p 899 para 6.2.3.4; re 6th family unit see City 2nd further affidavit Vol 11 p 1051 para 6.2). The residents also referred to a statement in the City's answering affidavit that it was developing transitional and social housing in the area and enquired whether the Bromwell residents could be provided with accommodation in the vicinity pending the conclusion of these housing developments.

¹⁴⁹ City 1st further affidavit Vol 11 p 1038 para 11; City 1st further affidavit **RP2** Vol 11 p 1043 (Erf 13814).

¹⁵⁰ Family unit 1 earned R3 073 p/m, family unit 5 earned R3 500 p/m and family unit 7 earned R10 780 p/m) (City 3rd further affidavit Vol 11 p 1109 para 5).

¹⁵¹ City 2nd further affidavit Vol 11 pp 1048-1053.

¹⁵² Including whether relocation costs and assistance with transport to work and school were included in the offer.

transitional housing property and its designation as a transitional area.¹⁵³ They also sought permission to admit an affidavit of Shaun Russell¹⁵⁴ regarding, among other things, the distance of Wolwerivier from the property.¹⁵⁵

95.22. On 30 January 2017 the City filed a third further affidavit in which it explained that the Pickwick transitional housing property was in the planning stage (and would take 18 months to complete), that it was required for the relocation of persons on sites identified for social housing, and that it comprised a hostel which was going to be upgraded to create 40 housing opportunities for this purpose. The City responded to the information provided by Shaun Russell and provided details as regards MyCiti bus routes and prices.¹⁵⁶

95.23. On 1 February 2017 the City filed a fourth further affidavit in which it responded to an enquiry which had been made by Weinkove AJ the day before as regards the number of households at Wolwerivier and whether families ever moved out from there.¹⁵⁷

95.24. There followed further exchanges of affidavits arising from further queries raised by Weinkove AJ until 14 June 2017, when Weinkove AJ recused himself following an application brought by the Bromwell residents requesting that he should do so.¹⁵⁸

95.25. On 18 July 2017 the City issued a media release of a speech by (then) Cllr Brett Herron. Cllr Herron said that the City must mitigate against the displacement of

¹⁵³ Applicants' 1st supplementary A Vol 11 p 1058 para 8.

¹⁵⁴ Applicants' 1st supplementary A Vol 11 pp 1059-1060 paras 10-13. Russell said that Wolwerivier was 29km by car from Bromwell Street; travel between the two would take 3 taxi trips one way costing R30; the nearest Golden Arrow bus stop was 3.9km away; the nearest no fee primary school was 8.2km away; the nearest no fee secondary school was 10.8km away; the nearest clinic was 10km away; and the nearest police station was 8.5km away.

¹⁵⁵ Russell Vol 11 pp 1062-1069.

¹⁵⁶ City 3rd further affidavit (2) Vol 11 pp 1113-1125.

¹⁵⁷ The City advised that there were 428 occupied structures containing approximately 1122 people and that households did move from there to other housing opportunities (City 4th further affidavit Vol 11 pp 1127-1130).

¹⁵⁸ High Court judgment Vol 21 p 2027 para 26.

residents who have lived their entire lives in suburbs like Woodstock and Salt River where high-end developments are rising; referred to a decision by the City on 1 January 2017 to ‘turn a corner in our approach to affordable housing’ and to leverage City-owned assets to achieve spatial transformation; referred to an undertaking by the City within its means to provide those facing emergency situations with temporary housing as close as possible to their places of work or at least to transport; and announced 10 City-owned sites in the city centre to be used for social housing and GAP rental housing and, as part of this project, a transitional housing project in Salt River.¹⁵⁹

95.26. On 25 July 2017, the Mayor approved the implementation of the transitional housing project involving the Pickwick transitional housing property to accommodate households in informal settlements on Pine Road in Woodstock and at the Salt River Market site in Salt River to make way for affordable rental housing.¹⁶⁰

95.27. On 12 September 2017, the matter came before the Court *a quo* once more and Sher AJ asked the City to provide information pertaining to the Pickwick transitional housing property.¹⁶¹

95.28. On 1 November 2017 the City filed a further affidavit in which it reiterated among other things that the Pickwick transitional housing property and one other proposed transitional housing development (at St James Street) were intended

¹⁵⁹ Applicants’ 5th supplementary affidavit Vol 15 pp 1504-1507 para 3; Applicants’ 5th supplementary affidavit **DG1** Vol 15 pp 1512-1521.

¹⁶⁰ Applicants’ 5th supplementary affidavit Vol 15 pp 1507-1509 para 4; Applicants’ 5th supplementary affidavit **DG2** Vol 15 pp 1522-1555. On the same day, the City published a further statement by Cllr Herron saying that the transitional housing project in Salt River which would be the first of several ‘will provide households who have been displaced or evicted...with temporary or semi-permanent housing’ (Applicants’ 5th supplementary affidavit Vol 15 pp 1509-1511 para 5; Applicants’ 5th supplementary affidavit **DG3** Vol 16 pp 1556-1559) but this was corrected in an affidavit by the City on 1 November 2017 in which the City explained that while it would continuously seek access to other potential transitional housing sites, these were unlikely to be in inner city due to scarcity of land and costs of development (Vol 16 p 1570 para 23).

¹⁶¹ Applicants’ 5th SA Vol 15 p 1504 para 2.

primarily to house residents of informal settlements in Pine Road and at the Salt River Market site to enable both sites to be developed for social housing. The families to be housed at the Pickwick transitional housing property had already been identified. The estimated date of completion of the building was December 2018.¹⁶²

95.29. On 13 August 2018, Sher AJ granted an application by the Bromwell residents (which had been opposed by the City and the Woodstock Hub) to amend the relief sought in their notice of motion to seek orders:¹⁶³

95.29.1. Declaring the City's housing programme and its implementation in terms of the City of Cape Town Integrated Human Settlements: Five Year Plan to be inconsistent with its constitutional and statutory obligations to the extent that it failed to provide the Bromwell residents and people living in Woodstock and Salt River who are at risk of homelessness with access to transitional housing or temporary emergency accommodation in the immediate City centre and surrounds;

95.29.2. Declaring that the City is under a constitutional duty to provide the Bromwell residents and their dependents with temporary emergency accommodation or transitional housing in the inner city; and

95.29.3. Directing the City to make such housing available to the Bromwell residents within 12 months.

95.30. In or about February 2019 the City identified two sites in Maitland for possible relocation of the Bromwell residents.¹⁶⁴ Unfortunately, these sites were ultimately

¹⁶² City's 6th further affidavit Vol 16 pp 1560-1576.

¹⁶³ Amended NoM Vol 17 pp 1749-1753.

¹⁶⁴ City AA to amended relief Vol 18 pp 1800-1801 paras 56.1 and 56.2.

not available for the relocation of the Bromwell residents on account of the resistance from extant communities in the surrounding areas.¹⁶⁵

95.31. On 16 August 2019, the City offered the Bromwell residents emergency housing at Kampies in Philippi (which is some 15 km from Woodstock).¹⁶⁶

95.32. On 2 March 2020 the City filed its answering affidavit to the amended relief in which it said that the Pickwick transitional housing had been completed,¹⁶⁷ all 42 rooms were occupied by residents of the Pine Road settlement;¹⁶⁸ construction of the transitional housing at St James Street had not yet commenced;¹⁶⁹ and there were no other sites for emergency or transitional housing in the inner city and surrounds.¹⁷⁰

95.33. Finally, on 6 April 2020 the Bromwell residents rejected the offer of Kampies ostensibly because the City had failed to respond to certain of the Bromwell residents' questions; relocation to Kampies would compound the applicants' vulnerability; Covid 19 presented a greater risk to people at Kampies and several of the Bromwell residents had comorbidities; and they were of the view that the offer of Kampies did not fulfil the City's constitutional and statutory obligations.¹⁷¹

96. We make the following submissions as regards these facts:

96.1. The City acted reasonably throughout the arduous process described above:

96.1.1. When it was first approached by the Bromwell residents after the eviction order had been granted, it responded both quickly and meaningfully. It

¹⁶⁵ City AA to amended relief Vol 18 pp 1802-1803 paras 56.3.1-56.3.2.

¹⁶⁶ City AA to amended relief Vol 18 pp 1803-1806 paras 56.3.3-56.6; City AA to amended relief Vol 18 **AR4** pp 1850-1851.

¹⁶⁷ City AA to amended relief Vol 18 p 1797 para 54.1.

¹⁶⁸ City AA to amended relief Vol 18 p 1797 para 54.2.

¹⁶⁹ City AA to amended relief Vol 18 pp 1797-1798 para 54.5.

¹⁷⁰ City AA to amended relief Vol 18 p 1798 para 54.7.

¹⁷¹ RA Vol 20 CCR15 pp 1986-1987.

set out first to facilitate the allocation of social housing to the Bromwell residents on the understanding that at least some of them qualified for such housing. That was appropriate given that a permanent housing solution is the ultimate ideal and could be accommodated at the time and in the circumstances. It was also appropriate because emergency housing is meant only for those who would otherwise be rendered homeless. That this approach was warranted is demonstrated by the fact that, in the end, three of the ten family units¹⁷² were either accommodated in social housing or found their own housing solutions.

96.1.2. When it became clear that emergency housing would be required for several of the remaining family units, the City offered them the only emergency housing which it had available at the time, being units at Wolwerivier.

96.1.3. As time passed and as other options became available, the City went to considerable effort to offer the Bromwell residents emergency accommodation closer to the property culminating in an offer of emergency accommodation at Kampies in Phillipi.

96.2. At the time that the Bromwell residents amended their notice of motion to seek different relief, the City had offered them precisely what they had applied for at the outset, namely temporary emergency accommodation as near as possible to the property.

96.3. But the Bromwell residents were not satisfied and went about identifying land which appeared to be available in the inner city which would suit them better. When

¹⁷² We have counted the 8th family unit as being two units and the two individuals as being a single family unit (the 9th).

the City explained that none of this land was available for emergency housing, and that 10 of the sites had been earmarked for social housing (including two transitional housing developments which were critical for giving effect to the social housing project), the Bromwell residents insisted that they should nevertheless be accommodated there.

96.4. The City responded that it could not accommodate the Bromwell residents at the expense of its plans to develop social housing. Far from fulfilling its housing obligations in a reactive and *ad hoc* fashion, the City insisted on sticking to its plans while at the same time accommodating the Bromwell residents to the best of its ability.

96.5. The City's actions have been consistent with what Cllr Herron said in his speech. It is primarily by providing permanent affordable housing in the inner city that the City can mitigate against the displacement of residents there, and achieve spatial transformation. Neither of these aims is inconsistent with the City's other objective which is to provide those facing emergency situations with temporary housing as close as possible to their places of work or at least to transport.

97. In summary, the steps taken by the City in relation to the Bromwell residents have been more than reasonable.

CONCLUSION

98. It is respectfully submitted that the appeal should be dismissed with an order directing all parties to pay their own costs.

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15 February 2024