THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case no: 338/10

CITY OF JOHANNESBURG METROPOLITAN MUNICIPALITY Appellant

and

BLUE MOONLIGHT PROPERTIES 39 (PTY) LTD First Respondent

THE OCCUPIERS OF SARATOGA AVENUE Second Respondent

Neutral citation: *City of Johannesburg Metropolitan Municipality v Blue Moonlight* (338/10) [2011] ZASCA 47 (30 March 2011)

CORAM: Navsa, Tshiqi, Theron JJA and Plasket and Petse AJJA

HEARD: 18 February 2011

DELIVERED: 30 March 2011

SUMMARY: Eviction of desperately poor from privately owned building – constitutional duty of municipality to provide emergency temporary shelter – municipality held to have resources to provide emergency temporary shelter – fulfils important role in the progressive realisation of right of access to adequate housing – no bar to using ratepayer contributions to provide emergency temporary shelter to longstanding residents who otherwise would be forced onto public spaces.

ORDER

On appeal from: South Gauteng High Court (Johannesburg) (Spilg J sitting as court of first instance).

1. The application by the appellant to have new evidence admitted on appeal succeeds and the appellant is to pay the costs of the application on the unopposed scale.

2. Save as is reflected in the substituted order set out hereunder the appeal is dismissed and the appellant is ordered to pay the second respondents' costs, including the costs of two counsel.

3. No order is made in respect of the cross-appeal by the second respondent.

4. In respect of the abandoned cross-appeal by the first respondent, no costs order is made in relation thereto.

5. The order of the court below is set aside and substituted as follows:

'1. The first respondent and all persons occupying through them (collectively "the occupiers") are evicted from the immovable property situate at Saratoga Avenue, Johannesburg and described as Portion 1 of Erf 1308 Berea Township, Registration Division IR, Gauteng ("the property");

2. The first respondent and all persons occupying through them are ordered to vacate by no later than 1 June 2011, failing which the Sheriff of the Court is authorised to carry out the eviction order;

3. The second respondent's housing policy to the effect that it only provides temporary emergency accommodation to those evicted from unsafe buildings by the City itself or at its instance, in terms of the National Building Regulations and Building Standards Act 103 of 1977 is declared unconstitutional to the extent that it excludes the occupiers from consideration for such accommodation;

4. The second respondent shall provide those occupiers whose names appear in the document entitled "Survey of Occupiers of 7 Saratoga Avenue, Johannesburg" filed on 30 April 2008, and those occupying through them, with temporary emergency accommodation as decant in a location as near as

feasibly possible to the area where the property is situated, provided that they are still resident at the property and have not voluntarily vacated it;

5. The second respondent is ordered to pay the applicant's costs and the costs of the first respondent, including the costs of two counsel.'

JUDGMENT

NAVSA JA and PLASKET AJA (Tshiqi, Theron JJA and Petse AJA concurring)

[1] Courts are increasingly being called upon to adjudicate disputes involving homeless persons, owners of land or buildings and local authorities. It was firmly established more than 15 years ago that the socio-economic rights enumerated in our Constitution are justiciable.[1] The adjudication of the right of access to adequate housing more often than not presents intractable problems. The challenge is to forge a coherent jurisprudence.

[2] The right of access to adequate housing cannot be seen in isolation. It has to be seen in the light of its close relationship with other socio-economic rights, all read together in the setting of the Constitution as a whole.[2] It is irrefutable that the State is obliged to take positive action to meet the needs of those living in extreme conditions of poverty, homelessness or intolerably inadequate housing. What is in dispute in the present case, as is frequently the case in disputes concerning housing, is the extent of the State's obligation in this regard. This usually telescopes into an enquiry concerning the State's resources to meet its constitutional obligations. That issue, amongst others, has come sharply into focus in this case. As stated in *Government of the Republic of South Africa & others v Grootboom & others*,[3] the precise form of the State's obligation to provide housing depends on the context within which

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1 See *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC) para 78.
2 *Government of the Republic of South Africa & others v Grootboom & others* 2001 (1) SA 46 (CC) paras 23-24.
3 *Government of the Republic of South Africa & others v Grootboom & others* 2001 (1) SA 46 (CC).

the right is asserted by an aggrieved citizen.[4]

Orders issued by the court below

[3] On 4 February 2010 the South Gauteng High Court (Spilg J), ordered the eviction of the second respondents, the occupiers of buildings situated at Saratoga Avenue in Berea in Johannesburg (the occupiers), by no later than 31 March 2010. In addition, the court ordered the appellant, the City of Johannesburg Metropolitan Municipality (the City), to pay the first respondent, Blue Moonlight Properties 39 (Pty) Ltd (Blue Moonlight), the company that owns the buildings occupied by the occupiers, an amount equivalent to the fair and reasonable monthly rental of the premises from 1 July 2009 until 31 March 2010. The court directed that the amount either be agreed or determined by a sworn valuator appointed by the President of the South African Council for Property Valuers Profession. We shall for convenience refer to the buildings as the property.

[4] Furthermore, the court declared the application of part of the City's housing policy unconstitutional. In terms of its housing policy, the City provides emergency shelter to persons evicted by it from unsafe or 'bad' buildings owned by private landowners but not to persons evicted by private landlords for other reasons. Spilg J held, erroneously, that the City's housing policy discriminated unfairly because persons evicted from state-owned properties were provided with temporary shelter but persons, such as the occupiers in this case, evicted by private landowners from their properties were not. In fact the City's policy is that only where it acts in terms of s 12(6) of the National Building Regulations and Building Standards Act 103 of 1977 to evict persons from unsafe buildings, whether privately-owned or state-owned, will temporary accommodation be afforded.

[5] The court below went further and issued a structural interdict in terms of which the City was ordered to remedy the defect in its housing policy and to report to the court on what steps it had taken to do so and what steps it

4 Paras 35-37.

intended to take in the future. The City was required to deliver the report by 12 March 2010. It was also ordered to report on the details of all state-owned office buildings that are unoccupied and to report on when the buildings might be occupied.

[6] Spilg J did not stop there. He went on and made the following orders against the City:

'6. a. the Second Respondent shall provide each of the occupiers who are entitled to claim as the First Respondent with at least temporary accommodation as decant in a location as near as feasibly possible to the area where the property is situated and if rental is expected then, unless there is agreement with the individual occupier or household head (as the case may be), such rental may only be imposed pursuant to a court order, which application may be dealt with at the same hearing to consider the report referred to in paragraph 5 above;

b. ALTERNATIVELY and until such time as such accommodation is provided the Second Respondent shall pay per month in advance, on the 25th of each month preceding the due date of rental and commencing on the 25 March, to each occupier or household head (as the case may be) entitled to claim as the First Respondent the amount of R850 per month until the final determination of the relief referred to in paragraph 5(e) above that might be sought;

PROVIDED THAT:

i. The amount payable in the first month to each occupier or household head shall include an additional sum of R850 should a deposit be required from a landlord, which shall be refunded in full to the Second Respondent upon expiry of the lease or upon accommodation being provided as aforesaid by the Second Respondent.

ii. Where a monthly amount is paid to one of the First Respondents in lieu of accommodation as provided for in paragraph 6(b) then such amount will be reviewed by the parties every six months without prejudice to any party's right to approach a court to increase or decrease the amount;

7. For the purposes of paragraphs 5 and 6 the persons entitled to claim as the First Respondent are those whose names appear in the Survey of Occupiers of 7 Saratoga Avenue, Johannesburg under filing notice of 30 April 2008 at pages 784 to 790 of the record provided they are still resident at the property and have not voluntarily vacated.'

[7] The order set out in the preceding paragraph in terms of which the City was required to pay a stipend of sorts is, to say the least, somewhat unusual. Finally, the City was ordered to pay Blue Moonlight's costs as well as the costs of the occupiers, including the costs of two counsel.

[8] Lest the impression be created that the occupied buildings were of the kind usually let for residential use it is necessary to have regard to the description provided by Blue Moonlight:

'The property comprises old commercial premises with a factory building, a number of garages and a double-storey office space. The double storey office space and the garages are occupied for residential purposes as are two or three shacks which have been erected in the factory space. There are illegal electricity connections in the factory space, to the extent that the electricity box therein glows red hot. Although water was previously disconnected, it has been illegally reconnected.'

The facts

[9] It is necessary to describe the history of the occupation and to set out the events leading to the orders being granted. It appears that a long time before Blue Moonlight's involvement a company known as Kernel Carpets operated from the property. One of the occupiers, Mr David Goge, has lived on the property since 1976, when he took up employment with Kernel Carpets. Many of the occupiers were employed by Kernel Carpets and the period of their occupation of the property varies. Kernel Carpets ceased trading in 1999.

[10] After Kernel Carpets departed the scene the occupiers continued paying rent to a caretaker who ostensibly collected it on behalf of the owner. A property letting firm started collecting rentals during 2000. The property and living conditions started to deteriorate. This led to a complaint being laid by the occupiers with a housing tribunal. Nothing came of the complaint.

[11] During 2002 another management company began collecting rent from the occupiers. That company was supplanted by two individuals who collected rent from the occupiers. A complaint concerning their authority to collect rentals was referred to a housing tribunal without any result. Living conditions got worse and maintenance of the buildings was non-existent. In 2004 Blue Moonlight purchased the building. The occupiers alleged that in 2005 an individual named Eddie, purporting to speak on behalf of Blue Moonlight, engaged them and promised that the building would be renovated. According

to the occupiers, someone called Nkomo started collecting rent, ostensibly on behalf of Blue Moonlight. The occupiers stated that they had paid rentals into two bank accounts. Blue Moonlight's response to these allegations is that they had never received rentals from any of the occupiers and they put the occupiers to the proof of the aforesaid assertions.

[12] It is clear that a stand-off developed between Blue Moonlight and the occupiers. There are disputes concerning the termination of the water supply to the building during certain periods and about whether it was safe for Blue Moonlight's representatives to enter the premises it owned. For present purposes it is not necessary to explore this any further.

[13] On 28 June 2005 Blue Moonlight posted a notice to vacate at the buildings. The occupiers were called upon to vacate the property by 21 July 2005. The notice purported to cancel any lease agreements that may have been in existence.

[14] On 12 October 2005 the City served a notice on Blue Moonlight in terms of the Fire Brigade Services Act 99 of 1987 calling upon it to do the following:

'Remove illegal combustible shacks
Provide fire fighting equipment
Remove unsafe electrical connections which are illegal
Remove combustible partitions
Submit plans for change of occupancy
Provide adequate escapes.'

[15] On 11 November 2005 the City's environmental health practitioner sent the following notice to Blue Moonlight in relation to the building:

'TAKE NOTICE that the City Council of Johannesburg is satisfied that the above premises, where the business of an Accommodation Establishment is conducted, do not comply with the abovementioned By-Laws of the City of Johannesburg.

In order to make the premises comply with the said By-Laws, you are hereby required to do the work or things herein specified forthwith namely:

1. Take effective measures to prevent the harbouring or breeding and for the destruction of flies, cockroaches and other insects, rodents and other vermin.

2. Provide and maintain artificial lighting at every entrance, passage and staircase, of which persons have the use in common. The level of illuminance of such lighting shall not be less than 160 LUX at any point or in such entrance, passage or staircase.
3. Every such entrance, passage or staircase shall be kept in a clean state and in good repair.
4. Eliminate the cause of dampness in the wall(s) / ceiling(s) of the premises and repaint with a light coloured washable paint.
5. Reglaze all broken windowpanes.
6. Provide an adequate and constant supply of hot and cold running water to every bath, wash hand basin, shower and wash up sink.
7. Provide an adequate and constant supply of cold running water to the cistern(s), urinal(s).
8. Repair / replace the defective cistern(s).
9. Replace the broken / missing toilet seat(s) and cover(s).
10. Replace the broken / leaking water supply pipe(s).
11. Replace the broken / leaking soil pipe(s) / waste pipe(s).
12. Remove the accumulation(s) of domestic refuse; builder's rubble from the courtyard area.
13. Repair / replace all broken suspended wooden floors.
14. Repair / replace all broken wooden doors throughout the premises.
15. Ensure adequate ventilation throughout the premises by installing windows where there are no windows.
16. Provide ablution facilities for use by separate sexes.
17. Take effective measures to prevent wastewater / sewerage from running down into the street.
18. Maintain the premises in a clean and sanitary condition and in good repair at all times.'

[16] This led to Blue Moonlight posting a further notice to the occupiers to vacate on 6 January 2006. This was followed by an application to court for substituted service. The application was subsequently served and was opposed. When the main application was brought in May 2006 the buildings were occupied by 62 adults and nine children. One of the children was 12 years old at the time and is disabled. Two of the occupiers are pensioners. Ten of the households are headed by women. All of the occupiers have lived on the property for more than six months. The majority have lived there for more than two years. The occupiers are all desperately poor and most of them have no formal employment. Many have no income at all. The average

household income at the time the application was brought was R790 per month.

[17] In opposing the application for their eviction the occupiers stated that if evicted they would be rendered homeless and in the short term would have no shelter at all. In the medium term they were unaware of alternative accommodation which any of them could afford. They contended that the City was obliged to take reasonable measures to ensure the progressive realisation of their constitutional right of access to adequate housing and that this included an obligation to provide shelter should they be rendered homeless as a result of their eviction. Importantly, they accepted that they were unlawful occupiers and contended that for that very reason they were entitled to assistance from the City.

[18] This led to an application by the occupiers for the City to be joined as a respondent. Furthermore, they sought an order declaring that the City had a constitutional obligation to make temporary emergency shelter available to them on the basis that in the event of their eviction they would have no alternative accommodation available and that they would be in a crisis or intolerable situation.

[19] The City was duly joined as a respondent and entered the fray. Numerous delays occurred in the prosecution of the case due, amongst other reasons, to a pending decision in the Constitutional Court involving the City and dealing with the City's obligations to occupiers of privately owned buildings whom the City had applied to evict on the basis that the buildings they had occupied were unsafe and unhealthy. The case in question is *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg & others*.[5]

[20] Before us, the City submitted that the court below had not properly taken into account that there had been a full judicial process by Blue

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5 *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg and others* 2008 (3) SA 208 (CC).

Moonlight, in compliance with the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE) and that the position of the occupiers was not comparable to persons evicted due to fire, flood or unsafe buildings. Thus, it was argued, the City was not obliged to make emergency provision for them. Put simply, the City adopted the position that it bore no constitutional obligation to provide shelter when an eviction is prompted by a private landlord asserting its superior right to property against occupiers. The City pointed out that, in any event, it has limited housing stock to deal with life threatening emergencies.

[21] The City contended that its housing policy that prioritises life threatening situations was not random, arbitrary or discriminatory but was carefully developed, within its budgetary constraints, giving priority to the most pressing demands. The City was adamant that this policy was in line with the policy of the national government in terms of a national legislative framework and that it was unable to make policy that does not conform to that policy and framework. It was emphatic that the duty to approve and fund emergency relief in terms of prevailing legislation rests on the provincial government through its housing department. The City was aggrieved that the court below had refused its application to join the provincial government, which the City had argued was a necessary party to the proceedings. The City argued that the occupiers were seeking to obtain an unfair advantage over others who were in the queue for State subsidised housing. In this regard it pointed to the sequence of steps in its housing policy directed at the *progressive* realisation of housing rights, namely, from emergency housing to temporary accommodation and then finally to permanent accommodation.

[22] The City was adamant in its submission that it had no original power to initiate housing schemes or provide accommodation on its own. It contended that it could not use ratepayer contributions or any of its own income to that end. The corollary is that it had no obligation to house persons other than in terms of national housing policy and only to the extent that it was funded by national or provincial government. The contention that the City was precluded from using ratepayer contributions to meet housing needs was mentioned for

the first time in argument before us. It was submitted that if any of the housing schemes referred to by the City in its affidavit had in fact used ratepayer contributions the City might have acted *ulta vires*. In a report it had filed pursuant to an order by the high court to do so, it stated, however, that while it was not obliged to do so, it focused on the 'provision of shelter to occupants of dangerous buildings, who qualify as being desperately poor and who find themselves in a true crisis situation' and that this assistance was funded 'from its own resources and within its financial constraints'.

[23] The City was particularly aggrieved at the 'constitutional damages' that the court below appeared to have granted against it. It labelled the order imposing direct financial obligations on it by payment to the landlord, and the provision of a stipend of sorts to the occupiers, as extraordinary and unwarranted.

[24] Blue Moonlight, on the other hand, contended that its rights to the property owned by it could not indefinitely be thwarted by the occupants and that it should not be obliged to carry the burden of continuing to house persons who were in unlawful occupation, particularly since it received no income and was under threat from the City about meeting safety and health regulations. It was submitted that the occupiers stood in the path of its right to develop the property in question. Significantly, before us, Blue Moonlight refrained from asserting any entitlement to the monetary orders granted in its favour by the court below. It expressly abandoned any reliance on those orders and limited itself to contending that the eviction order by the court below was justified.

[25] In order to begin to appreciate the issues raised in this appeal it is necessary to start with the constitutional and legislative framework against which they fall to be decided.

The legal framework

[26] In order to determine if the City owes the occupiers any obligations

concerning their accommodation on eviction from the property and, if so, the nature of those obligations, it is necessary to start with s 26 of the Constitution. It provides:

'(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.

(3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.'

[27] The Constitutional Court held, in *Government of the Republic of South Africa & others v Grootboom & others*[6] that subsecs (1) and (2) of s 26, being related, need to be read together: the first defines the scope of the right,[7] while the second 'speaks to the positive obligation imposed upon the State'.[8] The court proceeded to say:[9]

'It requires the State to devise a comprehensive and workable plan to meet its obligations in terms of the subsection. However subsec (2) also makes it clear that the obligation imposed upon the State is not an absolute or unqualified one. The extent of the State's obligation is defined by three key elements that are considered separately: (a) the obligation to "take reasonable legislative and other measures"; (b) "to achieve the progressive realisation" of the right; and (c) "within available resources".'

[28] In order to give effect to the fundamental right of access to adequate housing, the state has developed a legislative and policy framework. In its preamble, the Housing Act 107 of 1997 recognises, in express terms, that it forms part of the legislative measures required to give effect to s 26. Its long title states that its purpose is:

'To provide for the facilitation of a sustainable housing development process; for this purpose to lay down general principles applicable to housing development *in all spheres of government*, to define the functions of national, provincial and local governments in respect of housing development and to provide for the establishment of a South African Housing Development Board, the continued existence of provincial boards under the name of provincial housing development boards and the financing of national housing programmes; to repeal certain laws; and to provide for matters connected therewith.' (Our emphasis.)

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6 Footnote 2.
7 Para 34.
8 Para 38.
9 Para 38.

[29] The Act deals specifically with the functions of the national, provincial and local spheres of government in respect of housing. The national sphere of government has the function, in essence, of establishing and facilitating a 'sustainable national housing development process' [10] and for that purpose the Minister is required, *inter alia*, to determine national policy and set national norms and standards,[11] set national housing delivery goals and facilitate the setting of provincial and local government housing delivery goals[12] and monitor performance, in all three spheres of government, against 'delivery goals and budgetary goals'.[13] In order to perform the functions allocated to him or her the Minister is, *inter alia*, vested with the power to 'allocate funds for national housing programmes to provincial governments, including funds for national housing programmes administered by municipalities in terms of section 10'.[14] In terms of s 3(7), all provincial governments and municipalities are obliged to furnish any 'reports, returns and other information' that the Minister may require. Finally, the Minister is required to publish a National Housing Code[15] which must contain national housing policy and may contain administrative or procedural guidelines concerning the 'effective implementation and application of national housing policy' and 'any other matter that is reasonably incidental to national housing policy'.[16]

[30] Section 7 of the Act defines the role of provincial government. Section 7(1) provides that every provincial government must, after consultation with organised local government, 'do everything in its power to promote and facilitate the provision of adequate housing in its province within the framework of national housing policy'. Section 7(2) spells out what this obligation (which is to be undertaken by the respective MEC's for Housing) entails. It includes the determination of provincial housing policy,[17] the promotion of the adoption of provincial legislation to 'ensure effective housing

10 Section 1.
11 Section 3(2)(a).
12 Section 3(2)(b).
13 Section 3(2)(c).
14 Section 3(4)(d).
15 Section 4(2)(a)
16 Section 4(2)(b).
17 Section 7(2(a).

delivery';[18] the taking of 'all reasonable and necessary steps to support and strengthen the capacities of municipalities, to effectively exercise their powers and perform their duties in respect of housing development',[19] the coordination of housing development provincially,[20] and the taking of 'all reasonable and necessary steps to support municipalities in the exercise of their powers and the performance of their duties in respect of housing development'.[21]

[31] The functions of local government in respect of housing are set out in s 9. Section 9(1) provides:

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

(a) ensure that ─

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

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

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

(b) set housing delivery goals in respect of its area of jurisdiction;

(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) . . . ;

(f) initiate, plan, co-ordinate, facilitate, promote and enable appropriate housing development in its area of jurisdiction;

(g) . . . ;

(h) . . . .'

[32] These functions must be viewed in the wider context of what are described as the 'rights and duties' of municipalities in s 4 of the Local Government: Municipal Systems Act 32 of 2000.[22] Section 4(1) empowers municipal councils to govern, on their own initiative, 'the local government affairs of the local community', to exercise their executive and legislative

18 Section 792)(b).
19 Section 7(2)(c).
20 Section 7(2)(d).
21 Section 7(2)(e).
22 A more correct description would be powers and duties.

authority without 'improper interference' and to finance their 'affairs' by charging fees for services and imposing rates and other forms of taxation.

[33] Section 4(2) prescribes a set of duties that municipalities are required to comply with, subject to 'financial and administrative capacity and having regard to practical considerations'. For present purposes, only one of these duties needs be mentioned. It is the duty to 'contribute, together with other organs of state, to the progressive realisation of the fundamental rights contained in sections 24, 25, 26, 27 and 29 of the Constitution'.[23] Section 8(2) provides that a City may do 'anything reasonably necessary for, or incidental to, the effective performance of its functions and the exercise of its powers'.

[34] Section 11(3) vests legislative or executive authority in municipalities to perform a number of functions, including 'developing and adopting policies, plans, strategies and programmes including setting targets for delivery';[24] the 'promoting and undertaking of delivery';[25] the implementation of 'applicable national and provincial legislation' as well as by-laws;[26] the preparation, approval and implementation of budgets;[27] the imposition and recovery of rates, taxes, levies, duties, service fees and surcharges on fees . . .';[28] and the doing of 'anything else within its legislative and executive competence'.[29] Finally, s 23(1) places an obligation on municipalities to undertake 'developmentally-oriented planning' aimed at ensuring that they achieve their constitutional objects, give effect to their constitutionally enshrined developmental duties and 'contribute to the progressive realization of the fundamental rights contained in sections 24, 25, 26, 27 and 29 of the Constitution'.[30]

[35] The third part of the legislative scheme is the National Housing Code

23 Section 4(2)(j).
24 Section 11(3)(a).
25 Section 11(3)(b).
26 Section 11(3)(e).
27 Section 11(3)(h).
28 Section 11(3)(i).
29 Section 11(3)(n).
30 See generally *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes & others (Centre on Housing Rights and Evictions and another, Amici Curiae)* 2010 (3) SA 454 (CC) paras 348-351.

contemplated by s 4 of the Housing Act. Chapter 12 of the Code is headed 'Housing Assistance in Emergency Housing Circumstances'. As its heading suggests, chapter 12 records policy in respect of 'assistance to people who, for reasons beyond their control, find themselves in an emergency housing situation such as the fact that their existing shelter has been destroyed or damaged, their prevailing situation poses an immediate threat to their life, health and safety, or they have been evicted, or, face the threat of imminent eviction'.[31]

[36] The process created by chapter 12 is that when a municipality considers that a housing emergency that falls within the terms of chapter 12 has arisen within its area of jurisdiction, it is required to apply to the provincial government for 'project approval' for its plan to deal with the emergency. If the provincial government approves the project, it provides funding to the municipality to enable it provide temporary shelter for the victims of the emergency. In this case, the City belatedly applied for funding to provide temporary shelter for the occupiers and others who were similarly situated but the provincial government, pleading a lack of funds, refused to assist.

[37] The final part of the legislative scheme is the City's own housing programme. In dealing with the provision of alternative accommodation in the inner city, the City draws a distinction between the following forms of emergency accommodation: (a) accommodation kept in reserve for possible disasters; (b) temporary accommodation as decant, which is accommodation 'custom built to receive people who need to be removed from informal settlements or bad buildings that are unsafe to occupy'; (c) transitional accommodation, which is similar in nature to temporary accommodation but 'refers to accommodation established under the transitional housing programme of government'; and (d) shelters, which are 'social development interventions' in terms of which private bodies such as churches provide shelter, with limited support from the City, for vulnerable groups of people such as street children.

31 Introductory paragraph to chapter 12.

[38] As far as the provision of any form of accommodation to people in the position of the occupiers is concerned, the City's policy has been set out as follows in its first report in terms of s 4(2) of PIE:

'The City itself has a programme that seeks to address the dangerous conditions presented by bad buildings in the Inner City and elsewhere. These buildings present a danger to the lives of those occupying them and the buildings surrounding them. There are hundreds of problem buildings, and safety concerns make it inevitable that the City will have to evict the occupiers of many of these bad buildings. The City is in fact obliged to do so in terms of the National Building Regulations and Building Standards Act. The City will probably have to accommodate many of the occupants of these buildings for various periods of time. Because these occupants will be evicted for safety reasons, the City will obviously have to utilise any accommodation available to it to accommodate those evicted from bad buildings. The temporary accommodation as decant is just beginning to come on stream at the time this Report is made. Because of the scale of the task facing the City, the City cannot for the time being make any of its emergency shelters available for any persons evicted from private property by way of PIE.'

[39] In *Grootboom*, the Constitutional Court considered it to be essential to a reasonable housing programme that responsibilities be allocated not only to the national and provincial spheres of government but also to the local sphere of government, principally because of its important role in ensuring that 'services are provided in a sustainable manner to the communities they govern'.[32] The court continued to say:[33]

'Thus, a co-ordinated State housing program must be a comprehensive one determined by all three spheres of government in consultation with each other as contemplated by chap 3 of the Constitution. It may also require framework legislation at national level, a matter we need not consider further in this case as there is national framework legislation in place. Each sphere of government must accept responsibility for the implementation of particular parts of the program but the national sphere of government must assume responsibility for ensuring that laws, policies, programs and strategies are adequate to meet the State's s 26 obligations. In particular, the national framework, if there is one, must be designed so that these obligations can be met. It should be emphasised that national government bears an important responsibility in relation to the allocation of national revenue to the provinces and local government on an equitable basis. Furthermore, national and provincial government must ensure that executive obligations imposed by the housing legislation are met.'

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32 Footnote 2 para 39.
33 Para 40.

[40] The legislative framework that has been described above appears in large measure to be designed to give effect to the obligations referred to in *Grootboom* in a co-ordinated manner. It is clear from that framework that each sphere of government has obligations imposed on it in respect of the right of access to adequate housing; that they are required to work together ─ as one would expect in a system predicated on principles of co-operative government[34] ─ to 'achieve the progressive realisation of this right'; and that each sphere is an independent bearer of the obligation. From this, and the legislative scheme as a whole, we conclude that the City's obligations to the occupiers is not derivative, as was argued on its behalf, but direct and that the City has the authority to fund its own housing programme and administer its own housing policy from its own resources as well as from the national and provincial spheres of government, within the parameters of the national housing policy.

Conclusions

[41] The City appeals against the order in terms of which it was required to accommodate the occupiers and the associated monetary orders. It also appeals against the order declaring its housing policy to be unconstitutional. The City is also aggrieved that the court below refused its application to join the provincial government as a party to the proceedings.

[42] We consider it convenient to deal first with the contention on behalf of the City set out in para 22 above, namely, that it has no power to act other than in accordance with national legislation and policy and only in circumstances where it receives funding from national or provincial government to that end. The City is obviously constrained to act within the applicable legislative and policy framework. It is clear, however, from what is set out in paras 32-38 above, that the City is not only empowered to act in

34 Constitution s 40.

circumstances such as those under consideration, but is obliged to.

[43] We begin with the Constitution. Section 26(2), which is set out in para 26 above, obliges the State in all its guises to take reasonable legislative and other measures 'within its available resources', to achieve the progressive realisation of the right of access to adequate housing. Whatever the precise parameters of the term 'the State' may be, there can be no doubt that for purposes of the Bill of Rights and s 26 of the Constitution, in particular, it includes the local sphere of government.[35] Furthermore, the Constitutional Court has made it clear, in *Olivia Road*, that the City owes those who live within its precincts certain obligations. The court stated:[36]

'The city has constitutional obligations towards the occupants of Johannesburg. It must provide services to communities in a sustainable manner, promote social and economic development, and encourage the involvement of communities and community organisations in matters of local government. It also has the obligation to fulfil the objectives mentioned in the preamble to the Constitution to "[i]mprove the quality of life of all citizens and free the potential of each person". Most importantly it must respect, protect, promote and fulfil the rights in the Bill of Rights.'

Later in the judgment the court stated, in the context of the interplay between ensuring safe buildings and preventing homelessness, that 'the city has a duty to ensure safe and healthy buildings on the one hand and to take reasonable measures within its available resources to make the right of access to adequate housing more accessible as time progresses on the other'.[37]

[44] In *Port Elizabeth Municipality v Various Occupiers*[38] the Constitutional Court made the point that, generally speaking, courts should be reluctant to grant eviction orders against persons who are 'relatively settled' in the absence of reasonable alternative accommodation for them 'even if only as an interim measure pending ultimate access to housing in the formal housing programme'. The court proceeded to state:[39]

'The availability of suitable alternative accommodation will vary from municipality to

35 See too, s 40, although in this section, the term 'government' is used. Section 40(1) provides: 'In the Republic, government is constituted as national, provincial and local spheres of government which are distinctive, interdependent and interrelated.'
36 Footnote 4 para 16.
37 Para 44.
38 *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 28.
39 Para 29.

municipality and be affected by the number of people facing eviction in each case. The problem will always be to find something suitable for the unlawful occupiers without prejudicing the claims of lawful occupiers and those in line for formal housing. In this respect, it is important that the actual situation of the persons concerned be taken account of. It is not enough to have a programme that works in theory. The Constitution requires that everyone must be treated with care and concern; if the measures, though statistically successful, fail to respond to the needs of those most desperate, they may not pass the test. In a society founded on human dignity, equality and freedom, it cannot be presupposed that the greatest good for the many can be achieved at the cost of intolerable hardship for the few, particularly if, by a reasonable application of judicial and administrative statecraft, such human distress could be avoided.'

[45] The provisions of the Housing Act, referred to earlier in this judgment, envisages an interactive approach between local and other spheres of government to facilitate the provision of housing. In *Port Elizabeth Municipality* the Constitutional Court said that 'municipalities have a major function to perform with regard to the fulfilment of the rights of all to have access to adequate housing'. It went on to say that municipalities have a 'duty systematically to improve access to housing to all within their area'.[40]

[46] Section 9 of the Housing Act, set out in para 31 above, obliges every municipality, within the framework of national and provincial housing legislation and policy, to ensure that inhabitants within its area of jurisdiction have access to adequate housing on a progressive basis and to provide conditions conducive to the health and safety of such persons. In terms of s 9(1)(f) every municipality must initiate, plan, coordinate, facilitate, promote and enable appropriate housing development in its area of jurisdiction. Section 4(2) of the Local Government: Municipal Systems Act, referred to in para 33 above, imposes a duty on municipalities to contribute 'together with other organs of State', *inter alia*, to the progressive realisation of the right of access to adequate housing. Section 8(2) of the same Act empowers municipalities to take such steps as are reasonably necessary for or incidental to the effective performance of their functions and powers.

[47] It is clear from the City's own affidavits and reports that it has an

40 Para 56.

extensive and impressive housing programme, signifying that it is indeed taking steps to comply with its constitutional and statutory obligations. The question before us is whether it is doing so in respect of the occupiers.

[48] In our view, for all the stated reasons, there is no merit in the submission that the City is not empowered or obliged to act other than as an agent of national or provincial government with funding from those sources. As we have shown, it uses its own resources to fund the housing needs of certain persons who find themselves in dire circumstances of homelessness. It would appear that the City has done so without any concern, before the issue was raised in argument before us, that it may have been acting beyond its powers. We conclude that the City is, indeed, empowered to provide for the progressive realisation of the right of access to adequate housing within its area of jurisdiction and to utilise its own resources to do so, if needs be, as long as its actions in this regard are not inconsistent with the Housing Act or the National Housing Code.

[49] The next question that falls to be addressed is whether the City is able, within its available resources, to meet the needs of the occupiers. Whilst the City has explained that operating within a budget surplus, which it acknowledges, for at least one financial year, does not mean that it can employ such monies at will, it does not anywhere state that it is unable to re-allocate funds or that it is unable financially to meet the temporary housing needs of the occupiers. All that is being sought at the moment, by the occupiers, is temporary accommodation as an entrée to the progressive scheme which envisages permanent accommodation in the future in the sequence referred to earlier in this judgment. While we appreciate that the City faces immense challenges as a result of the influx of persons into Johannesburg, the papers do not attempt to grapple with, and inform us, as to what is possible.

[50] In dealing with its financial constraints the City speaks in the vaguest terms about the affordability of meeting demands for housing. Much of the affidavits deposed to on behalf of the City is devoted to the cost of providing

permanent accommodation. It states that for the 2008/2009 financial year its projections indicate a movement towards a budget deficit. It does not say in terms that it has no funds to provide temporary emergency housing as decant for the occupiers.

[51] The City has for a long time been faced with emergency housing situations of all kinds. It appears to have adopted an entrenched position that excludes persons such as the occupiers from assistance. It is abundantly clear that but for this approach it could have adopted a long-term strategy, which ought to have included financial planning, to deal with such exigencies. It did not do so and that is what caused it to apply belatedly to the provincial government for funding to deal with the occupiers' needs. The City's application to provincial government for last-minute funding was misdirected as it must have been clear to the City that the former's budgetary and financial resources had already been committed. The written response by the provincial government to that effect could hardly have been surprising.

[52] To a great extent the City is to blame for its present unpreparedness to deal with the plight of the occupiers. It knew of their situation from the time that the litigation started, through its many delays extending over three financial years. It did not, in all that time, make any provision, financial or otherwise, to deal with a potentially adverse court order or take steps to re-allocate resources or re-work priorities so that the occupiers could be accommodated. As a result, the City has, through its general reports, vague responses to its budget surplus and denial of any obligations towards the occupiers, failed to make out a case that it does not have the resources to provide temporary accommodation for the occupiers if they are to be evicted.

[53] The use of ratepayer contributions or any of the City's own funds to prevent the City being exposed to long standing residents, who in their humble way contributed to the economic life-blood of Johannesburg, squatting in public places accompanied by the attendant environmental impact can hardly be objectionable. The City's recent disavowal of its power and entitlement to engage in accommodation projects on its own, without funding

from national or provincial government, is contradicted by its own accommodation report in which it indicated that of its capital budget of R170 million for housing for the 2007/2008 financial year for R55 million is derived from the City's own funds. As indicated above, the City has an indispensible role to play in the progressive realisation of the right of access to adequate housing. It has a constitutional obligation in the circumstances of this case to provide temporary emergency housing to the occupiers. We were not referred by counsel on behalf of the City to any statutory prohibition against the use by the City of its own funds to provide temporary emergency accommodation.

[54] Proportionality is a constitutional watchword. In dealing with the interrelated issues of the limits of judicial intrusion and the reality of available resources, balanced against the assertion of socio-economic rights, a court's role can rightly be described as 'the art of the possible'.

[55] It is necessary at this stage to deal with the submission on behalf of the City, that if it were compelled to accommodate the occupiers, it would be enabling them to jump the queue of persons waiting their turn in the various stages that lead ultimately to permanent accommodation. We fail to see how they would be jumping the queue. They would be the last in the line and would have to wait their turn like everyone else. Counsel for the occupiers accepted, correctly, that this was the position and that, at this stage, they were entitled to nothing more than temporary emergency accommodation.

[56] The court below found that the City's housing policy was unfairly discriminatory and hence unconstitutional because it drew an illegitimate distinction between persons evicted from state-owned property and those evicted from privately-owned property, rendering assistance to the former category only. The court below erred in two respects.

[57] First, it categorised the differentiation in treatment incorrectly. It did not involve a difference in treatment between those evicted from state-owned properties and those evicted from privately-owned properties. Rather the difference was one between persons evicted from privately-owned unsafe

buildings by the City itself, acting in terms of s 12(6) of the National Building Regulations and Building Standards Act, and those evicted from privately-owned buildings (which are not necessarily, but could be, dangerous buildings) by private landowners.

[58] Secondly, the court below erred in categorising the differentiation in treatment as unfair discrimination as contemplated by s 9(3) of the Constitution. In *Harksen v Lane NO & others*[41] the Constitutional Court held that the right to be protected from unfair discrimination sought to 'prevent the unequal treatment of people based on such criteria which may, amongst other things, result in the construction of patterns of disadvantage such as has occurred only too visibly in our history'[42] and that discrimination on unspecified grounds (ie on grounds other than the grounds listed in s 8(2) of the interim Constitution and s 9(3) of the final Constitution) is established if a differentiation of treatment 'is based on attributes or characteristics which have the potential to impair the fundamental dignity of persons as human beings, or to affect them adversely in a comparably serious manner'.[43] That does not apply in respect of the differentiation in treatment in this matter: the constitutionality of the differentiation must be considered against s 9(1) which provides that '[e]veryone is equal before the law and has the right to equal protection and benefit of the law'.

[59] We turn now to a consideration of the City's policy against s 9(1) of the Constitution. The policy is inflexible because it does not allow at all for the provision of temporary accommodation for persons evicted from privately-owned land, even if they are desperately poor and find themselves in a crisis, while it provides temporary accommodation to those whom it evicts from privately-owned dangerous buildings, if they are desperately poor and find themselves in a crisis. It excludes one category of evictees from consideration completely and includes another category completely without concerning itself with any other personal circumstances of those to be evicted.

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41 *Harksen v Lane NO & others* 1998 (1) SA 300 (CC).
42 Para 50.
43 Para 47. See too *National Coalition for Gay & Lesbian Equality and another v Minister of Justice & another* 1999 (1) SA 6 (CC) paras 16-17.

[60] The inflexibility of the policy, which effectively precludes a proper consideration of the merits of the claims of evictees to be housed by the City, is in itself a basis for setting it aside. In the pre-constitutional era, in dealing with a fixed policy applied to the granting of housing permits by a township housing authority, the court in *Mahlaela v De Beer NO*,[44] said the following:

'[I]f the permit is refused or the grant of a permit is not considered on the ground of a fixed policy, there can be no proper exercise of a discretion or a performance of a duty and the decision of the superintendent falls to be set aside on this ground. This is also trite.'

[61] The policy is, as a result of its inflexibility, also irrational and can on that basis alone be impugned. In *Pharmaceutical Manufacturers Association of SA & another: In Re Ex Parte President of the Republic of South Africa & others*,[45] Chaskalson P held:

'It is a requirement of the rule of law that the exercise of public power by the Executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the Executive and other functionaries must, at least, comply with this requirement. If it does not, it falls short of the standards demanded by our Constitution for such action.'

In *Grootboom* the Constitutional Court, in the context of the right of access to adequate housing, held that 'the real question in terms of our Constitution is whether the measures taken by the State to realise the right afforded by s 26 are reasonable'.[46]

[62] It is, furthermore, arbitrary and unequal in its operation and effect. The connection between arbitrariness and inequality was drawn by Ackermann J in *S v Makwanyane & others*[47] as follows:

'Arbitrariness, by its very nature, is dissonant with these core concepts of our new constitutional order. Neither arbitrary action nor laws or rules which are inherently arbitrary or must lead to arbitrary application can, in any real sense, be tested against the precepts or principles of the Constitution. Arbitrariness must also inevitably, by its very nature, lead to the unequal treatment of persons. Arbitrary action or decision-making is incapable of providing a

44 *Mahlaela v De Beer NO* 1986 (4) 782 (T) at p 791I.
45 *Pharmaceutical Manufacturers Association of SA & another: In Re Ex Parte President of the Republic of South Africa & others* 2000 (2) SA 674 (CC) para 85.
46 Para 33.
47 *S v Makwanyane & others* 1995 (3) SA 391 (CC) para 156.

rational explanation as to why similarly placed persons are treated in a substantially different way. Without such a rational justifying mechanism, unequal treatment must follow.'

[63] Arbitrariness thus offends against equality which is a founding value of our Constitution. Equal protection under the law is central to the rule of law, another founding value of the Constitution.[48]

[64] In *Harksen v Lane NO & others*,[49] the Constitutional Court set out the method for analysing allegations of unequal treatment in the following terms:
'Where s 8 [of the interim Constitution] is invoked to attack a legislative provision or executive conduct on the ground that it differentiates between people or categories of people in a manner that amounts to unequal treatment or unfair discrimination, the first enquiry must be directed to the question as to whether the impugned provision does differentiate between people or categories of people. If it does so differentiate, then in order not to fall foul of s 8(1) of the interim Constitution there must be a rational connection between the differentiation in question and the legitimate governmental purpose it is designed to further or achieve. If it is justified in that way, then it does not amount to a breach of s 8(1).'

[65] In the application of its policy the City effectively ties its own hands and renders itself blind to the real plight and homelessness of persons who find themselves in the circumstances of the occupiers. It precludes itself from considering the duties placed on it by the Constitution. As stated above, by drawing the irrational and arbitrary distinction referred to, it is effectively putting potentially vast numbers of persons beyond State assistance in the face of an obligation to take positive steps to assist those who, because of their poverty and because of circumstances beyond their control, find themselves in dire need.

[66] The differentiation between persons who have been evicted by the City from privately-owned dangerous buildings and by private landowners bears no rational connection to the City's legitimate purpose of providing temporary accommodation to those who are vulnerable and most in need. Its policy does not factor in the degree of need of evictees in either situation because the personal circumstances and needs of *all* are irrelevant: while the unsafe

48 *Van der Walt v Metcash Trading Ltd* 2002 (4) SA 317 (CC) para 36.
49 Footnote 39 para 42.

condition of buildings is a sufficient basis for the City providing accommodation, as long as that the eviction is at its instance, the same does not apply when persons are evicted from unsafe buildings by private landlords even though the danger in the latter instance might in some cases be greater. The City's policy does not take this into account. Even though the City's notices to Blue Moonlight, referred to in paras 13 and 14 above, were not in terms of the National Building Regulations and Buildings Standards Act, in substance they addressed health and safety concerns. The distinction drawn by the City between the occupiers and those evicted by virtue of a notice in terms of the Act is also irrational.

[67] Having regard to the above, a further foundational value is implicated, namely, the right to dignity entrenched in s 10 of the Constitution. This section provides that 'everyone has inherent dignity and the right to have their dignity respected and protected'. The importance of dignity ─ particularly in the light of our history ─ was emphasised by O'Regan J in *S v Makwanyane & another*[50] when she stated that recognition of the right to dignity 'is an acknowledgment of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern'. And in *Grootboom*, within the specific context of the right of access to adequate housing, the Constitutional Court made the point that the 'Constitution would be worth infinitely less than its paper if the reasonableness of State action concerned with housing is determined without regard to the fundamental constitutional value of human dignity'.[51] The inflexible application of the City's policy subjects the occupiers to continued violation of their dignity because its effect is that they are rendered homeless on eviction and vulnerable to eviction wherever they go because they are, on the uncontested evidence, unable to afford other accommodation. We conclude, therefore, that to the extent that the City's policy treats the occupiers differently to those who are evicted from privately-owned unsafe buildings by the City, it is unconstitutional. (There is no need to enquire whether it is nonetheless a reasonable and justifiable infringement of the right to equality in terms of s 36(1) of the Constitution

50 Footnote 46 para 328.
51 Footnote 2 para 83.

because the City's policy is not a 'law of general application'.)

[68] We turn to the question of non-joinder of the provincial government. Generally speaking, the provincial government has an important role to play in the progressive realisation of the constitutional right of access to adequate housing. However, in these proceedings it is not clear to us that it has any role at all. First, it was called upon at the eleventh hour by the City to provide funds to deal with the crisis situation in which the occupiers (and others) found themselves, a crisis which it could not on its own have foreseen or planned for. It refused to assist because, it said, it lacked the resources in that financial year, and that decision is not being challenged in these proceedings. The provincial government fell out of the picture at that point. Secondly, no relief is sought against the provincial government by either the owner, the occupiers or the City. Thirdly, the joinder of the provincial government was sought by the City on the basis of its own incorrect view that it had no primary obligation towards the occupiers to provide accommodation. Last, it appears to us that there is no impediment to the City's fulfilment of its own constitutional obligation to provide temporary emergency housing, by placing the occupiers on the lowest rung of their climb towards ultimate permanent accommodation, which sequence it should be borne in mind the City laudably established on its own. Joinder of the provincial government would only be necessary if it had a direct and substantial interest in any order that might be made or if that order could not be carried into effect without prejudicing the provincial government.[52] This case, apart from the eviction order that is sought by Blue Moonlight, concerns the City's obligations and the obligations of no-one else: no relief is claimed against the provincial, it cannot be said to have a real and substantial interest in any order that may be made and any order that is made can be carried out without any prejudice to the provincial government. Consequently, its joinder was not necessary.

[69] It is necessary to deal briefly with two further aspects of the order made by the court below. We begin with the structural interdict which the occupiers

52 *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A). See too *Occupiers of Erf 101,102, 104 and 112 Shorts Retreat, Pietermaritzburg v Daisy Dear Investments (Pty) Ltd and others* 2010 (4) BCLR 354 (SCA) paras 11-14.

persisted in before us. Counsel for the occupiers conceded that the setting aside of the unconstitutional aspect of the policy coupled with an order that obliged the City to house the occupiers in temporary emergency accommodation en route to the ultimate realisation of permanent accommodation would mean that they had succeeded in their primary objective. Questioned by the court about the need for the structural interdict counsel was unable to persuade us that it was necessary. In our view, the structural interdict would serve no purpose and, that being so, it cannot be said to be relief which is appropriate.

[70] The other aspect concerns the compensation order ─ the so-called constitutional damages awarded to the owner. Allied to this was the stipend referred to above. The compensation order, an order that is, to say the least, far-reaching, was ostensibly modelled on the decision of this court in *Modderfontein Squatters, Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, Amici Curiae); President of the Republic of South Africa and others v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, Amici Curiae)*.[53] In our view, the peculiar facts of *Modderklip* render it distinguishable and it certainly is not authority for the proposition that constitutional damages is always available, or ordinarily appropriate, as a remedy whenever a fundamental right has been breached.

[71] In *Modderklip* Harms JA found that compensation was the only remedy that was appropriate in the circumstances in order to remedy the violation of the owner's rights by the State.[54] The Constitutional Court agreed with this finding.[55] It is, in any event distinguishable. First, in *Modderklip* the compensation order was made not, as in this case, as an ancillary to an eviction order but after an eviction order had been granted and ignored by the

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53 *Modderfontein Squatters, Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, Amici Curiae); President of the Republic of South Africa and others v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, Amici Curiae)* 2004 (6) SA 40 (SCA).

54 Para 43.

55 *President of the Republic of South Africa & another v Modderklip Boerdery (Pty) Ltd (Agri SA & others, Amici Curiae)* 2005 (5) SA 3 (CC) para 66. Note that Langa ACJ categorised the relief ordered by this court as being 'the most appropriate in the circumstances'. The only other remedy suggested as being appropriate was a declarator.

40 000 unlawful occupiers of Modderklip Boerdery's land. Secondly, compensation was ordered because the State had violated the fundamental rights of Modderklip Boedery by failing to assist it to execute the eviction order which, in view of the large number of occupiers who had invaded the land, Modderklip Boerdery was unable to do on its own. There is no question that, in this case, Blue Moonlight will be able to execute an eviction order if it has to. Thirdly, because of the large number of persons on the land, their eviction was, for all practical purposes, impossible to achieve and that left Modderklip Boerdery without the use and enjoyment of its land and, as stated above, with compensation as the only viable and hence appropriate remedy. Once again, the facts of this case are very different and there is no suggestion that Blue Moonlight cannot evict the occupiers if it has to. Finally, Modderklip Boerdery was the innocent victim of a land invasion and it took all reasonable steps – and did so expeditiously – to safeguard its interests. In this case, Blue Moonlight bought the property in the full knowledge that it was occupied by a number of persons. For these reasons we consider that *Modderklip* is no authority for the granting of the compensation order in the circumstances of this case and that compensation cannot be said to be appropriate relief. Wisely, Blue Moonlight eschewed any reliance on the compensation granted to them.

[72] The granting of the stipend to the occupiers, albeit in the alternative, is in itself extraordinary. It has no basis in law that we can discern and, if allowed to stand, would have had the potential to serve as a precedent for abuse by unscrupulous landlords who might see the State as a default source of rental income. It, like the compensation order, is relief which is not appropriate.

[73] In arriving at our conclusions we have been mindful of the doctrine of the separation of powers and the limits of judicial intrusion into the domains of other branches of government. We are, however, compelled to give effect to the rights being asserted before us and to the extent that this may take us into the City's administrative system, we are of the view that it is an intrusion that is mandated by the Constitution. In *Minister of Health & others v Treatment*

Action Campaign & others (No 2)[56] the Constitutional Court held:

'The primary duty of Courts is to the Constitution and the law, "which they must apply impartially and without fear, favour or prejudice". The Constitution requires the State to "respect, protect, promote, and fulfil the rights in the Bill of Rights". Where State policy is challenged as inconsistent with the Constitution, Courts have to consider whether in formulating and implementing such policy the State has given effect to its constitutional obligations. If it should hold in any given case that the State has failed to do so, it is obliged by the Constitution to say so. Insofar as that constitutes an intrusion into the domain of the Executive, that is an intrusion mandated by the Constitution itself.'

[74] It is not in dispute that Blue Moonlight has complied with the requirements of PIE and that it is entitled to an eviction order. All that remains is for us to determine the timing of the eviction. This is necessary in order to allow the City to make the necessary arrangements for the temporary accommodation of the occupiers and for the occupiers to make their preparations for moving from a building that has, for many of them, been home for many years. Taking all of the circumstances into account and the suggestions of the parties, we consider a period of two months from the date of this judgment to be just and equitable.

[75] For the reasons set out above, a number of orders issued by the court below fall to be set aside. The eviction order has to be amended in accordance with what is set out in the preceding paragraph. The declaration of invalidity has to be in line with our reasoning. Even though the order of the court below is being changed to a significant degree, the City has nevertheless failed in its resistance to the order imposing an obligation on it to accommodate the occupiers. Consequently, the appeal must fail in respect of their primary point. The cross-appeal by the occupiers on the basis that the court below ought to have made the eviction order conditional upon the provision of suitable alternative accommodation to them became academic for the reason set out in para 69 above and there is no need to make any order in relation thereto. Blue Moonlight's cross-appeal for the compensation order to be varied was abandoned during the hearing. That cross-appeal therefore

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56 *Minister of Health & others v Treatment Action Campaign & others (No 2)* 2002 (5) SA 721 (CC) para 99.

should also fail.

[76] The City applied to have new evidence admitted on appeal, namely, an updated housing report dated 21 December 2010. The application was opposed by the occupiers. We inclined to admit the report and considered it in arriving at our conclusions.

[77] The following order is made:

1. The application by the appellant to have new evidence admitted on appeal succeeds and the appellant is to pay the costs of the application on the unopposed scale.
2. Save as is reflected in the substituted order set out hereunder the appeal is dismissed and the appellant is ordered to pay the second respondents' costs, including the costs of two counsel.
3. No order is made in respect of the cross-appeal by the second respondent.
4. In respect of the abandoned cross-appeal by the first respondent, no costs order is made in relation thereto.
5. The order of the court below is set aside and substituted as follows:

'1. The first respondent and all persons occupying through them (collectively "the occupiers") are evicted from the immovable property situate at Saratoga Avenue, Johannesburg and described as Portion 1 of Erf 1308 Berea Township, Registration Division IR, Gauteng ("the property");

2. The first respondent and all persons occupying through them are ordered to vacate by no later than 1 June 2011, failing which the Sheriff of the Court is authorised to carry out the eviction order;

3. The second respondent's housing policy to the effect that it only provides temporary emergency accommodation to those evicted from unsafe buildings by the City itself or at its instance, in terms of the National Building Regulations and Building Standards Act 103 of 1977 is declared unconstitutional to the extent that it excludes the occupiers from consideration for such accommodation;

4. The second respondent shall provide those occupiers whose names appear in the document entitled "Survey of Occupiers of 7 Saratoga Avenue,

Johannesburg" filed on 30 April 2008, and those occupying through them, with temporary emergency accommodation as decant in a location as near as feasibly possible to the area where the property is situated, provided that they are still resident at the property and have not voluntarily vacated it;

5. The second respondent is ordered to pay the applicant's costs and the costs of the first respondent, including the costs of two counsel.'

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M S NAVSA
JUDGE OF APPEAL

_____
C PLASKET
ACTING JUDGE OF APPEAL

APPEARANCES:

For Appellant:	J J Gauntlett SC J Both SC A W Pullinger Instructed by Moodie & Robertson Johannesburg Claude Reid Bloemfontein
For 1st Respondent:	M S M Brassey SC G A Fourie Instructed by Schindlers Attorneys Webbers Bloemfontein
For 2nd Respondent:	P Kennedy SC H Barnes S Wilson Instructed by The Wits Law Clinic Braamfontein McIntyre & Van Der Post Bloemfontein