CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 49/23

In the matter between:

CHARNELL COMMANDO	First Applicant
GICILLE VANESSA COMMANDO	Second Applicant
PRISCILLA NEL	Third Applicant
DYLAN NEL	Fourth Applicant
MA-AIDA ABELS	Fifth Applicant
SULAIMAN GOLIATH	Sixth Applicant
FAIZA FISHER	Seventh Applicant
GEORGE FARIA RODRIGUES	Eighth Applicant
NASHIET ABELS	Ninth Applicant
MICHELLE SMITH	Tenth Applicant
MEGAN SMITH	Eleventh Applicant
ROSELINE SMITH	Twelfth Applicant
RASHIEDA SMITH	Thirteenth Applicant
MARK NEIL SMITH	Fourteenth Applicant
MOGAMAT TAURIQ SMITH	Fifteenth Applicant

and

CITY OF CAPE TOWN	First Respondent

WOODSTOCK HUB (PTY) LIMITED Second Respondent

and

ABAHLALI BASE MJONDOLO Amicus Curiae

Neutral citation: *Charnell Commando and Others v City of Cape Town and Another* [2024] ZACC 27

Coram: Madlanga ADCJ, Bilchitz AJ, Chaskalson AJ, Dodson AJ, Majiedt J, Mathopo J, Mhlantla J, Theron J and Tshiqi J.

Judgments: Mathopo J (majority): [1] to [116]
Bilchitz AJ (dissenting in part): [117] to [205]

Heard on: 27 February 2024

Decided on: 20 December 2024

Summary: Gentrification — eviction — temporary emergency accommodation — inner city

Spatial apartheid — unconstitutional — progressive realisation — as near as possible

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ORDER

On appeal from the Supreme Court of Appeal (hearing an appeal from the High Court of South Africa, Western Cape Division, Cape Town) the following order is made:

1. Leave to appeal is granted.
2. Condonation is granted.
3. The appeal is upheld.
4. The orders of the Supreme Court of Appeal and the High Court are set aside and substituted with the following order:

(a) "The City of Cape Town's implementation of the National Housing Programme is declared to be unconstitutional to the extent that the City—

(i) unreasonably failed to adopt its own Temporary Emergency Accommodation Policy to be implemented in conjunction with the National Emergency Housing Programme;

(ii) declines to consider providing Temporary Emergency Accommodation in the inner city on a blanket basis without considering the circumstances of individuals;

(iii) provides Transitional Housing in the inner City for evicted persons who have occupied land in the inner city unlawfully from the outset but does not do so for evicted persons who are former lawful occupiers, such as the applicants;

(iv) fails to make provision for any Temporary Emergency Accommodation in the inner city in the face of the foreseeable evictions resulting from the phenomenon of gentrification consequent upon the implementation of the City of Cape Town's development policies in Woodstock and Salt River;

(v) unreasonably compounds the legacy of spatial apartheid by failing to provide Temporary Emergency Accommodation in the inner city to persons evicted from Woodstock, when its residents had succeeded in resisting forced removals under the successive Group Areas Acts.

(b) The City of Cape Town is directed to develop a reasonable Temporary Emergency Accommodation Policy to be implemented together with the National Emergency Housing Programme, in a reasonable manner, consistent with this judgment.

(c) The City of Cape Town is directed to provide the applicants with "Temporary Emergency Accommodation" or "Transitional Housing" in Woodstock or Salt River or, failing those, the

Inner-City Precinct[1], and, as near as possible, to the property at Units 122 to 130A, Bromwell Street, Woodstock (the property) within 6 months of the date of this order, provided that they are still resident at the property and have not voluntarily vacated it.

(d) Pending the implementation of this order, the applicants may not be evicted from the property."

5. The City of Cape Town is ordered to pay the costs of the applicants in this Court, in the Supreme Court of Appeal and in the High Court, including the costs of two counsel.

JUDGMENT

MATHOPO J (Madlanga ADCJ, Chaskalson AJ, Majiedt J, Mhlantla J, Theron J and Tshiqi J concurring):

Introduction

[1] "We have a long way to go because we still live with the legacy of apartheid, the legacy of violence, the legacy of separateness, of suspicions around people, the legacy of tremendous disparities between white and black, the legacy between some living in opulence and some in dire poverty, the legacy of racism."[2] This statement is by Abdullah Mohamed Omar, a man who held many titles, but relevant to this matter, a renowned freedom fighter and a lawyer who was compelled to move his practice to Woodstock, Cape Town due to the stringent and racist provisions of the Group Areas

[1] As contemplated in the City of Cape Town "Affordable Housing Prospectus: Woodstock, Salt River and Inner-City Precinct", issued on 28 September 2017.

[2] Omar "Community Peace" (2003) 16 *Third World Legal Studies* 7.

Act[3] in the 1960s.[4] He made this statement during the post-apartheid era, lamenting the fact that very little had changed in the lives of some members of the community.

[2] This case concerns the City of Cape Town's (City) implementation of an emergency housing programme in relation to persons who may be rendered homeless pursuant to their eviction in Woodstock and Salt River, Cape Town, in the context of the gentrification of these areas which is encouraged by the City and supported with tax breaks. The key issue is whether the constitutional duty of a municipality to provide temporary emergency housing extends to making temporary emergency housing available at a specific location. In this regard, in particular, the issue is whether the City has acted reasonably in not delivering emergency housing in the inner city, in circumstances where residents in these areas face eviction as a result of gentrification arising from a development policy implemented by the municipality. In respect of the applicants, the central question is whether the City acted reasonably in its determination of the locality of the emergency housing offered to them, which was some 15 km away from their current residences, and, importantly, outside the inner city and its surrounds.

[3] The issues surface in the application for leave to appeal by the applicants against the judgment and order of the Supreme Court of Appeal, which upheld an appeal by the first respondent, the City, against the judgment of the Western Cape Division of the High Court, Cape Town (High Court). The High Court granted the applicants an order declaring the City's emergency housing programme and its implementation unconstitutional. That Court also directed the City to provide the applicants with temporary emergency housing in the inner city or its surrounds. The Supreme Court of Appeal disagreed with the High Court and held that the City only bore an obligation to provide emergency housing to the applicants in a location as near as possible to the area from where they were evicted.

[3] 41 of 1950.

[4] Advocate Omar is perhaps best known as the first post-apartheid Minister of Justice in the Cabinet of President Nelson Mandela.

Parties

[4] The applicants in this matter are collectively referred to as the "Bromwell residents". They reside in five adjoining cottages in Bromwell Street, Woodstock, Cape Town.

[5] The first respondent is the City, which has opposed the relief sought by the Bromwell residents. The second respondent is Woodstock Hub, a property development and management company and the owner of the property in which the Bromwell residents reside. The second respondent does not participate in the proceedings. Abahlali baseMjondolo (Abahlali) filed an application to be admitted as amicus curiae (friend of the court).

Background

[6] The Bromwell residents, who now constitute a group of some 15 persons, excluding their dependants and children, initially occupied the property by virtue of lease agreements with the previous owners and, in some cases, in terms of inter-generational leases going back to the era of their grandparents. The Bromwell residents, who form part of the Woodstock and Salt River communities, are one of the very few communities that managed to resist forced removals from "white" cities under apartheid. The premises constituting their homes are five adjoining cottage units situated on a single erf. The rental they were paying for each housing unit ranged from R300 to R2 000 per month. The erf was then purchased for proposed development by Woodstock Hub on 30 October 2013 for R3.15 million from Reza and Erefaan Syms. This was all done with a view of building residential units for letting at rentals that were significantly higher than what the Bromwell residents were paying. This purchase and proposed development were part of a broader wave of gentrification in the inner city. Developers largely capitalised on tax incentives in the form of deductions in respect of capital expenditure for private residential or commercial developments, pursuant to the Taxation Laws Amendment Act,[5] which they were afforded from 2012 onwards, after

[5] 22 of 2012.

the inner city precinct which included Woodstock and Salt River, was declared an Urban Development Zone.[6]

[7] The Bromwell residents continued to occupy the property even after it was sold. During June 2014, the Bromwell residents received letters of cancellation of their lease agreements from Woodstock Hub's attorneys, who were managing the property even though the transfer of ownership had not yet occurred. The letters required the Bromwell residents to vacate the property. During July 2015, Woodstock Hub instituted eviction proceedings against the Bromwell residents in terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act[7] (PIE).

[8] On 17 March 2016, an order was granted in terms of which the Bromwell residents were directed to vacate the property by 31 July 2016. According to the Bromwell residents, this order was taken by agreement pursuant to legal advice given to them by their former attorney, that the Bromwell residents had no legal defence to the eviction application. They were not advised at that time of the City's obligation to provide temporary emergency accommodation. The Bromwell residents brought an urgent application seeking to vary the dates in the order of 17 March 2016 by extending the deadline for them to vacate the property to 30 November 2016. The variation application was dismissed on 5 August 2016.

[9] Between 3 and 19 September 2016, the Bromwell residents, their current attorneys, Ndifuna Ukwazi Law Centre (NU), City officials, and the Executive Mayor engaged in various discussions regarding alternative accommodation options. The discussions arose by virtue of a letter by NU alerting the City, including the Mayoral Committee Member responsible for Human Settlements, of the imminent evictions, and further seeking the assistance of the City with regard to temporary emergency

[6] The tax breaks that became available under section 13*quat*(6) of the Income Tax Act 58 of 1962 required the City to designate the area as an Urban Development Zone. Thus, the City subjectively foresaw that the gentrification policy would result in the displacement of the existing Woodstock community.

[7] 19 of 1998.

accommodation. In its response the City, among other averments, denied that it had an obligation to provide temporary emergency accommodation. Further, the City was of the view that the eviction was a "private eviction" which was "just and equitable", and that they did not have temporary emergency accommodation available but were willing to place the Bromwell residents on the waiting list for such emergency housing, provided they applied and met the criteria.

[10] On 8 September 2016, the Bromwell residents were informed by the City officials that Woodstock Hub had agreed not to proceed with the execution of the eviction order until 26 September 2016. The City officials proposed that the City would assist the Bromwell residents to apply for social housing and that they would have "first option" to apply for units in the upcoming social housing developments in the Woodstock and Salt River areas once these had been developed "in approximately 18 months". It subsequently transpired that the Bromwell residents did not qualify for the social housing. During the course of September 2016, various items of correspondence were directed to the City by NU on behalf of the Bromwell residents, placing the City on terms to provide details of when it would provide temporary emergency accommodation to the Bromwell residents, failing which the Court would be approached for relief. With no adequate response received from the City and considering that the eviction of the Bromwell residents was imminent, an application was launched on 20 September 2016 in the High Court.

[11] In its original form, the notice of motion sought an order in two parts; Part A suspending the execution of the eviction orders which were granted on 17 March and 19 August 2016 pending the outcome of Part B, in which an order was sought declaring that the City was under a constitutional obligation to provide the Bromwell residents with temporary emergency accommodation in a location "as near as possible" to erf 10626 Bromwell Street, within three months. To this end, the Bromwell residents sought an ancillary order directing the City to report to the Court within two months as to what accommodation it would make available and the nature and proximity thereof, together with an explanation as to why the particular location and form of

accommodation had been chosen. The report was also to set out the steps which had been taken by the City to engage "meaningfully" with the Bromwell residents with regards to such accommodation.

[12] At the hearing of the application on 9 November 2016, the parties agreed to an order postponing the application to 31 January 2017, and providing for, among others, the Bromwell residents to apply for all social housing opportunities within the city by 30 November 2016.[8] The outcome of this process was that there was no social housing available in the greater Cape Town area for the Bromwell residents, principally because they did not meet the basic affordability/income and other criteria to qualify for it.

[13] The application was argued on 31 January 2017 and 1 February 2017 before Weinkove AJ who, prior to his recusal but subsequent to the hearing, requested the parties to provide further information on the issue of the transportation needs of the Bromwell residents based on a hypothetical scenario of their relocation to Wolwerivier (which is about 30 km away from the city and from where the Bromwell residents are currently residing), which the City had offered to the Bromwell residents as temporary emergency accommodation during the course of the litigation. In their letter dated 8 December 2016, the Bromwell residents indicated that they had concerns about accepting the offer which the City had made to provide them with such accommodation in Wolwerivier, given the absence of schools, health facilities and work opportunities there and the distance between Wolwerivier and the City/Woodstock/Salt River area, which would adversely affect the Bromwell residents' ability to travel to their current workplaces, schools and health facilities.

[14] The matter was reallocated to Sher J who heard it on 12 and 13 September 2017. In the course of the hearing on 13 September 2017, the High Court raised certain questions regarding the use of erf 13814, Salt River for the purposes of a City-owned

[8] Social housing is housing which is subsidised to a greater or lesser extent, depending on the financial circumstances of the applicant, and is not free. It appears that as at September 2017 it was generally available in the inner City of Cape Town for households with a monthly income of between R3 501 and R15 000. Those earning less than R3 500 would therefore ordinarily not qualify.

transitional housing project. On the same day, the then Mayor Patricia de Lille and Councillor Brett Herron issued media statements regarding the City's inner city social housing initiative and affordable housing on well-located City-owned land in the Woodstock and Salt River areas. The significance of their statements will be apparent below. The matter was subsequently postponed for the City to file an affidavit in respect of these developments, to which the Bromwell residents had a right to reply.

[15] Following the City's further affidavit, the Bromwell residents brought an application for leave to amend their relief. They intended to amend their notice of motion to include an order stating that the City's housing programme and its implementation under the Integrated Human Settlements Five-Year Plan[9] was inconsistent with its constitutional and statutory obligations. This inconsistency arose from the City's failure to provide the Bromwell residents and the residents of Woodstock and Salt River, who were at risk of homelessness due to eviction, with access to "transitional" housing or temporary emergency accommodation in the immediate city centre and surrounding areas.

[16] On 20 December 2018, the City advised NU that it had identified possible temporary emergency accommodation for the Bromwell residents in Maitland and requested the Bromwell residents to indicate when they could view the accommodation. On 16 August 2019, the City advised that the offer of temporary emergency accommodation in Maitland was no longer available as the receiving community had objected to the relocation of the Bromwell residents to the Maitland site. In the same letter, the City advised that temporary emergency accommodation could be made available to the Bromwell residents at a site called Kampies, which is about 15 km away from the inner city. The site visit to Kampies took place on 29 February 2020.

[9] Since 2015, the City has devised a new strategy, the Integrated Human Settlements Framework ("IHSF") which is aimed at improving the delivery of housing opportunities in the city. The IHSF identifies how housing delivery needs are going to be met until the year 2030, a period in which housing demand is expected to rise significantly. In addition, the City has adopted the Integrated Human Settlements: Five Year Plan, ("the Five Year Plan"), which it reviews annually to ensure that it considers and responds to any significant changes in the micro and macro environments that may impact on delivery.

[17] On 2 March 2020, over a year and a half after the amended notice of motion was filed, the City delivered its further answering affidavit in respect of the amended relief. On 4 March 2020, two days after filing its further answering affidavit, the City requested the Bromwell residents to indicate their acceptance or rejection of the Kampies offer by 7 April 2020. On 6 April 2020, the Bromwell residents directed a letter to the City's attorneys providing reasons for their rejection of the City's offer of temporary emergency accommodation at Kampies.

Litigation history

High Court

[18] The issue before the High Court was whether the City has an obligation to provide emergency housing to persons who would be rendered homeless pursuant to an eviction in the inner city and its surrounds, in particular Woodstock and Salt River. The High Court held that the occupancy rights afforded by section 26(3) of the Constitution are but one of a subset of so-called "housing rights", which are provided for by the section. It relied on *Grootboom*,[10] which held that section 26(1) provides that everyone has the right to have access to adequate housing, and in terms of section 26(2) the state must take reasonable legislative and other measures to achieve the progressive realisation of this right. Progressive realisation means, in effect, that the state is required to make housing more accessible, not only to a larger number, but also to a wider range of people. Relying on *Blue Moonlight*,[11] the Court pointed out that the provision of temporary or "emergency" accommodation to persons who find themselves in situations of crisis or emergency is an accepted part of the state's obligation to provide access to adequate housing, in terms of section 26 of the Constitution.

[19] The High Court, however, made it clear that as a matter of law, neither the Bromwell residents nor any other evictees in the city have a right to demand to be placed

[10] *Government of the Republic of South Africa v Grootboom* [2000] ZACC 19; 2000 (11) BCLR 1169 (CC); 2001 (1) SA 46 (CC) (*Grootboom*) at para 45.

[11] *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* [2011] ZACC 33; 2012 (2) SA 104 (CC); 2012 (2) BCLR 150 (CC) (*Blue Moonlight*) at para 88.

in temporary emergency housing in the area or location in which they live.[12] The Court reasoned 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, was unconstitutional. The City was directed to provide the Bromwell residents with "temporary" emergency accommodation or "transitional" housing in Woodstock, Salt River or the inner city precinct, in a location which was as near as feasibly possible to where the Bromwell residents were residing, within 12 months of the date of such order. The High Court rejected the City's answer that it had identified social housing as being the most appropriate form of housing for the inner city. It reasoned that "the City does not appear to have a comprehensive, workable, and coherent emergency housing plan or programme". For this finding, it relied on the statement made by the mayoral committee and the prospectus for the development of affordable and inclusionary housing opportunities in the Salt River, Woodstock, and inner city precinct,[13] which mentioned a change in the approach on the housing delivery programme. In conclusion, the High Court held that the City should have allocated its spending and budget differently.

Supreme Court of Appeal

[20] Before the Supreme Court of Appeal, the central issue was narrowed to whether the constitutional duty of the City to provide temporary emergency housing extended to making temporary emergency accommodation available at a specific location.

[21] In the Supreme Court of Appeal, the City argued that the order of the High Court was inappropriate for two reasons, firstly, it offends the doctrine of separation of powers by trespassing into the heartland of policy-laden and polycentric matters of housing

[12] *Commando v Woodstock Hub (Pty) Ltd* [2021] ZAWCHC 179; [2021] 4 All SA 408 (WCC) (High Court judgment) at para 159. In *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes (Centre on Housing Rights and Another, Amici Curiae)* [2009] ZACC 16; 2009 (9) BCLR 847 (CC); 2010 (3) SA 454 (CC) (*Thubelisha Homes*) at para 254. Ngcobo J pointed out that the Constitution does not guarantee a person a right to housing at government expense at the locality of his or her choice.

[13] City of Cape Town "Affordable Housing Prospectus: Woodstock, Salt River and Inner-City Precinct", issued on 28 September 2017.

delivery. Secondly, its effect was overbroad. The City argued that courts have no knowledge or expertise to determine the wide-ranging housing needs confronting the City, the socio-economic and other competing conditions to be met by the City, the City's budget devoted thereto, the land available, the economies of scale and what informs the allocation of resources to these needs and for housing, and in which areas. Further, the Court cannot dictate to the City in which location a particular housing programme is to be implemented.

[22] The City further contended that it had identified and adopted a policy that social housing was the most appropriate form of housing for the inner city, and that the High Court erred in ordering it to make available alternative emergency housing in the inner city for the occupiers. This amounted to courts dictating to the City how to allocate and spend its housing budget, including the placement of occupiers in transitional accommodation in the inner city, an aspect which falls within the exclusive domain of the government's executive function to determine how public resources are to be drawn upon and re-ordered.

[23] The Supreme Court of Appeal rejected the contention by the Bromwell residents that they were treated differently from the residents of Pine Road and Salt River by not being afforded transitional housing. It emphasised that the City's solution of relocating people from informal settlements to transitional housing with a view of developing the land they occupied, does not render the policy unreasonable or arbitrary. The City alleged that, due to the scarcity of land and the cost of development, it is unlikely that any further transitional housing would be developed in the city centre.

[24] The Supreme Court of Appeal held that no case had been made out for the declaration of unconstitutionality of the City's housing programme and its implementation. Nor had any case been made for the provision of temporary emergency housing at a specific locality. However, the Supreme Court of Appeal said that it still had to make a just and equitable order so as to avoid rendering the occupiers homeless. Accordingly, the Supreme Court of Appeal held that an order must be made that

accommodation be provided at a location as near as possible to the area where the property is situated, provided that the Bromwell residents still reside at the property and have not voluntarily vacated it.

[25] The Supreme Court of Appeal emphasised that it is imperative for the City to realise that it has the responsibility of ensuring that the Bromwell residents are treated with dignity and care when choosing an appropriate location and that in doing so, the City should take into account their places of employment and children's schooling, hospitals, transportation and other important amenities that their relocation may require. On this point, it concluded that the City should be provided with reasonable time to find temporary emergency accommodation, and the date of eviction stipulated in the eviction order be extended to a reasonable date after the City has provided the necessary accommodation.

[26] Furthermore, the Supreme Court of Appeal agreed with the City that the Five-Year Plan which was for the period of June 2012 to June 2017 had expired. It disagreed with the High Court's order that the plan was inconsistent with the City's constitutional and statutory obligations to the extent that it failed to provide the occupiers and people living in Woodstock and Salt River who were at the risk of homelessness due to the eviction, with temporary emergency accommodation or transitional housing in the city and its surrounds. It reasoned that the City's new approach to the housing situation by prioritising social housing over temporary emergency accommodation was in line with the effects of gentrification. It concluded that there was nothing objectionable in the City's adoption of the social housing programme in the inner city as part of addressing the legacy of apartheid spatial planning.

Before this Court

Applicants' submissions

[27] The Bromwell residents assert that their application for leave to appeal has reasonable prospects of success and that it is in the interests of justice for this Court to grant leave to appeal. They also assert that this matter raises a number of important constitutional issues and arguable points of law of general public importance, namely—

(a) the obligation of the City in terms of section 26(2) of the Constitution to take reasonable measures to respond to the short-term emergency housing needs of the Bromwell residents who are displaced due to the gentrification of Woodstock and Salt River;

(b) the obligation imposed on the City to take reasonable measures to mitigate the perpetuation of spatial apartheid at emergency housing sites;

(c) the appropriate level of judicial scrutiny where an organ of state alleges the lack of available resources; and

(d) the application of the principle of subsidiarity in challenges to unreasonable conduct by a municipality in its implementation of its housing programme.

[28] As to the merits, the Bromwell residents raised three principal arguments. First, the Supreme Court of Appeal mischaracterised the constitutional issue as being simply whether the Bromwell residents have the right to demand emergency housing at a specific location. As a result, that Court answered the wrong question. The correct question was whether the City acted reasonably in its determination of the locality of the temporary emergency accommodation offered to the Bromwell families and in excluding temporary emergency accommodation entirely as a housing option in the inner city. They submit that the evidence before the Supreme Court of Appeal proved that the housing in the inner city area was exclusively focused on the provision of social housing and not emergency housing in these areas. And furthermore, the policy of the

City to exclude emergency housing in the inner city was unreasonable and irrational, and contrary to the reasonableness test set out in *Grootboom*.[14]

[29] Second, the Bromwell residents contend that the Supreme Court of Appeal misunderstood the concept of gentrification as being "urban renewal and development for commercial and business purposes" and this interpretation is inconsistent with the way in which the concept has been understood internationally. The negative effects of gentrification on housing rights of low income and other vulnerable groups were highlighted by the United Nations Special Rapporteur which stated that:

> "Gentrification and escalating prices have the effect of forcing out low income communities in favour of middle- and upper-class residents. The community thus suffers a major change in its demographic composition. While middle- and high-income populations move into former poor areas and find housing increasingly available, former residents are pushed to the outskirts of the city, losing their communal ties and enduring further impoverishment owing to the reduction of employment and schooling opportunities, as well as the increase in their commuting costs."[15]

Their submission is that the policy of gentrification has the effect of forcefully removing and displacing the residents from their homes in Woodstock and Salt River to informal settlements far from the city centre, with deleterious effects on their human dignity and thus entrenching spatial apartheid.

[30] Thirdly, they contend that the declaration of unconstitutionality by the High Court was correct and that the Supreme Court of Appeal did not identify any authority in support of the proposition that the High Court did not identify the extent of invalidity for the City to rectify in its order and as such, its order of unconstitutionality could not stand. The order states that "it is declared that the second respondent's emergency housing programme and its implementation, in relation to persons who may

[14] *Grootboom* above n 10.

[15] Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living and on the right to non-discrimination in this context, UN Doc A/HRC/13 (2009) at para 20.

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 Bromwell residents assert that an order is merely the executive part of the judgment to be interpreted with the judgment as a whole.

[31] The Bromwell residents submit that the order of constitutional invalidity is limited in its scope to a specific category of persons and therefore complies with section 172(1)(a) of the Constitution, which requires law or conduct inconsistent with the Constitution to be declared invalid to the extent of its inconsistency.[16] They rely on this Court's findings in *Treatment Action Campaign*[17] and maintain that the Supreme Court of Appeal erred in criticising the declaratory order granted by the High Court on the basis that the order did not accord with the relief sought by the occupiers/residents in the amended notice of motion. They add that the Supreme Court of Appeal did not identify which aspects of the High Court judgment were inconsistent with its order, with the result that the order was misplaced. The Bromwell residents highlight that the Supreme Court of Appeal differed with the High Court jurisprudentially on its interpretation of the extent of constitutional obligations imposed on the City regarding the right to have access to adequate housing. Their submission is that a proper reading and analysis of the High Court's order indicates that it was well substantiated and borne out by the evidence.

[32] Furthermore, the Bromwell residents contend that the criticism of the Supreme Court of Appeal is unwarranted and at variance with the authority of that Court,[18] which states that "[i]f a constitutional breach is established, this court is (as was the court below) mandated to grant appropriate relief. A claimant in such circumstances should not necessarily be bound to the formulation of the relief originally

[16] That category is "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".

[17] *Minister of Health v Treatment Action Campaign (No 2)* [2002] ZACC 15; 2002 (5) SA 721 (CC); 2002 (10) BCLR 1033 (CC) (*Treatment Campaign*) paras 121-2.

[18] *Modderfontein Squatters, Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd (Agri SA and Another, Amici Curiae); President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd (Agri SA and Another, Amici Curiae)* [2004] ZASCA 47; 2004 (6) SA 40 (SCA).

sought or the manner in which it was presented or argued."[19] The Bromwell residents challenged the constitutionality of the City's conduct in the implementation of its housing programme, because the City failed to provide the residents who were facing eviction and homelessness with transitional housing and temporary emergency accommodation in the inner city and surrounds.

[33] The Bromwell residents assert that the Supreme Court of Appeal's findings that no basis had been established for the constitutional challenge to the Five-Year Plan and its implementation due to the expiration of the plan, is incorrect. They emphasise that in their amended notice of motion, the constitutional challenge was to the constitutionality of the implementation of the plan by the City. Therefore, it was not necessary for them to attack specific provisions of the plan.

[34] As regards the finding by the Supreme Court of Appeal that the City did not undertake to provide emergency housing in the City, but only housing available in Wolwerivier, the Bromwell residents contended that the Supreme Court of Appeal misconstrued the facts. In support of their case in this regard, they relied on the affidavit dated 1 November 2017, deposed by Mr Molapo, the Manager: Land Restitution and Social Housing at the City, and the City's affordable housing prospectus, stating that the remaining units in the Pine Road transitional housing project will be used for other emergency housing needs. They also refer to the statement by Councillor Herron of 25 July 2017 where he stated that development would provide temporary or semi-permanent housing to households who have been displaced or evicted from their homes.

[35] The Bromwell residents contend that the Supreme Court of Appeal erred in its application of the principle of subsidiarity to a constitutional challenge to the reasonableness of an organ of state's conduct in the provision of housing and emergency housing. They assert that the Supreme Court of Appeal ought to have found that the

[19] Id at para 18.

principle does not apply as the challenge did not involve the constitutional validity of legislation.[20] They maintain that the constitutional challenge is against the reasonableness of the City's conduct in implementing its emergency housing plan, and excluding the provision of such emergency housing from housing developments in the inner city and its surrounds. According to the Bromwell residents, the onus was on the City to demonstrate that it had a reasonable plan for addressing emergency housing needs. They assert that the Supreme Court of Appeal was wrong in finding that the lack of provision of emergency housing within the inner city was not irrational or unreasonable.

[36] The Bromwell residents submit that the Supreme Court of Appeal erred in finding that they were not unreasonably and differentially treated from the residents of Pine Road and Salt River Market by not being offered transitional housing. They assert that the Supreme Court of Appeal ought to have found that the occupiers had been subjected to unreasonable and arbitrary conduct by the City in relation to the implementation of its housing delivery programme. The differentiation was evidenced, they contend, by the City's preparedness to consider allocating the Pine Road residents transitional housing in the immediate vicinity of their former homes. And the City treated the Bromwell residents irrationally and arbitrarily by not engaging in a consultative exercise with them and failing to provide emergency housing within the inner city. In arguing this point, they relied on the finding made by the High Court that "the City clearly did not consider itself bound to apply the selfsame policy/policies which it claims were applicable to persons rendered homeless as 'evictees' in the City".[21] They urged upon us to set aside the findings made by the Supreme Court of Appeal.

[37] The Bromwell residents conclude with the assertion that the Supreme Court of Appeal's finding, that the High Court erred in making an order

[20] *Mazibuko v City of Johannesburg* [2009] ZACC 28; 2010 (3) BCLR 239 (CC); 2010 (4) SA 1 (CC) (*Mazibuko*) at para 74.

[21] High Court judgment at para 151.

without knowing the land use for that specific area, is flawed. They contend that paragraph 3 of the order of the High Court required the City to provide a report and the provision of the report would accommodate the concern raised by the Supreme Court of Appeal.

[38] Finally, in answer to the Supreme Court of Appeal's finding that the High Court was usurping the function of the executive and trespassing on the doctrine of separation of powers, it was submitted that, because paragraph 3 of the High Court's order requires the City to provide a report, the finding of the Supreme Court of Appeal is unsustainable.

First respondent's submissions

[39] The City contends that it would not be in the interest of justice for leave to appeal to be granted. They assert that the prospects of this Court overturning the order of the Supreme Court of Appeal and upholding the judgment of the High Court are poor, on the basis that the decision of the High Court is far-reaching and without legal basis.

[40] The City submits that the declaratory order by the High Court is premised on there being a constitutional obligation on the City to provide emergency housing in the inner city and its surrounds, and on there being a correlative right that the Bromwell residents have to have emergency housing within a specific designated area. The City contends that the Supreme Court of Appeal was correct in finding that there is no constitutional obligation to make temporary emergency accommodation available within a specific location. The City asserts that, were it to be compelled to find space elsewhere in the inner city, the effect of the order would be to redirect the City's resources from the social housing programmes to temporary emergency housing within the inner city, as there is presently no land available for other purposes. They state that this decision is not for a court to make.

[41] The City contends that its emergency housing programme and its implementation is not unreasonable and for the Bromwell residents to succeed they

must prove that the City acted unreasonably in failing to provide emergency housing in the inner city and its surrounds. They assert that this cannot be established by the Bromwell residents. Instead, what can be established is:

(a) Land and resources allocated to emergency housing are not available for allocation to permanent forms of housing.

(b) The social housing programmes are best suited in the inner city and are targeted as such.

(c) The City's housing policy applies to people threatened with imminent eviction, the City delivers on the Emergency Housing Programme by creating incremental development areas and the City does not generally provide emergency housing in the inner city. This is due to the high cost of developing such housing (high property rates, scarcity of land and competing demands on land such as the social housing programmes).

(d) The various pieces of land identified by the Bromwell residents cannot be used for emergency housing due to the costs involved and their better use for larger developments.

[42] The City contends that the declaratory order is impermissibly vague and ineffective as it does not define what is meant by "the inner city and its surrounds". The High Court was required to declare the extent to which the City's conduct was inconsistent with section 172(1)(a) of the Constitution; instead it declared that the City's conduct was inconsistent in relation to an unspecified class of people. The City further contends that there is no relief in the declaratory order and this is required with reference to *Tswelopele*[22] and *Pheko*.[23] As the order stands, there is no just and equitable remedy with regard to the larger groups whose rights have been allegedly infringed and that the order seeks to come to the aid of the Bromwell residents rather than address a broader constitutional injustice.

[22] *Tswelopele Non-Profit Organisation v City of Tshwane Metropolitan Municipality* [2007] ZASCA 70; 2007 (6) SA 511 (SCA).

[23] *Pheko v Ekurhuleni Metropolitan Municipality (No 2)* [2015] ZACC 10; 2015 (5) SA 600 (CC); 2015 (6) BCLR 711 (CC).

[43] Another contention disputed by the City is that they treated the Bromwell residents differently from the Pine Road and Salt River Market residents. This is because the City had developed transitional housing in the city for the purpose of relocating the informal settlement residents in order to develop the land they occupy unlawfully for social housing. The City denies that it implements the housing policy arbitrarily, in a manner that is distinguishable from *Blue Moonlight*.[24] They assert, among others, that *Blue Moonlight* involved a class of people for whom emergency housing was not made available at all, whereas, the City provides emergency housing across the board, to all people who find themselves in need. They further assert that the Supreme Court of Appeal correctly found that the situations are completely different.[25]

[44] The City contends that its response takes into consideration spatial planning, economic development, social welfare and spatial integration. The City relies on *Grootboom*[26] and the National Housing Code. They maintain that section 26 does not establish a duty on the state to make temporary emergency accommodation available at a specific location.

[45] The City contends that the amended notice of motion dated 13 September 2018 constituted entirely new relief. They allege that the case shifted from being premised on a constitutional duty on the City to provide the Bromwell residents with emergency housing, to a constitutional duty to provide a certain class of people with access to transitional housing or temporary emergency accommodation in the immediate city area. The City asserts that the Bromwell residents did not properly plead this. Accordingly, so the argument continues, the High Court's order impermissibly expanded the amended relief sought. The City supports the Supreme Court of Appeal's finding with regards to its Five-Year Plan.

[24] *Blue Moonlight* above n 11 at para 88.

[25] *City of Cape Town v Commando* [2023] ZASCA 7; 2023 (4) SA 465 (SCA) at paras 66-70.

[26] *Grootboom* above n 10.

[46] The City takes issue with the Bromwell residents' claim that the Supreme Court of Appeal erred in finding that there was no basis for the constitutional challenge on the City's Five-Year Plan in the pleadings and argues that the High Court's findings went further than addressing the City's Five-Year Plan. Lastly, the City takes issue with the Bromwell residents' assertion that the Supreme Court of Appeal erred in accepting the City's submissions regarding subsidiarity, which the City claims was cursory and did not form the basis of the Supreme Court of Appeal's decision.

[47] The City summarised its obligations in terms of section 26 of the Constitution as follows:

(a) It requires a comprehensive and workable national housing programme and each sphere of government must accept responsibility for its implementation.

(b) Measures aimed at giving effect to section 26 of the Constitution must be reasonable, balanced, and appropriate and must be continuously reviewed.

(c) The right must be realised progressively and the availability of resources must be considered.

Amicus' submissions

[48] Abahlali was admitted as amicus curiae. Abahlali submitted that South Africa has formally ratified both the International Covenant on Economic, Social and Cultural Rights[27] (ICESCR) and the African Charter on Human and Peoples' Rights[28] (the African Charter). Accordingly, they are now binding international law in South Africa and reliance can be placed on them together with the authorities interpreting them in relation to the issue of where alternative accommodation is situated for individuals facing eviction and homelessness.

[27] 16 December 1966.

[28] Adopted on 27 June 1981.

[49] According to Abahlali, the ICESCR enhances the duties of states in fulfilling the rights enshrined in Article 2(1), which provides:

> "Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures."

Article 2(1) of the ICESCR ought to be read in conjunction with Article 11 of the ICESCR, which essentially guarantees access to housing as an integral component of the right to an adequate standard of living.

[50] The considerations of access to employment, public services, education and healthcare, which ought to be at the forefront in assessing the appropriateness of locality in the context of emergency accommodation are well explored and clarified by the UN Committee on Economic, Social and Cultural Right's General Comments 4[29] and 26[30], which contextualise the obligations on the state in the provision of alternative accommodation subsequent to evictions. The latter, according to Abahlali, forms part of the components which buttress the adequacy standard in the provision of alternative accommodation.

[51] Abahlali rely on the UN Special Rapporteur's Guidelines for the Implementation of the Right to Adequate Housing[31], which provides that if, following substantial consultation with those impacted, relocation is deemed necessary or preferred by the

[29] General Comment No. 4: The Right to Adequate Housing (Article 11 (1) of the Covenant) (13 December 1991) UN Doc E/1992/23 (1991).

[30] General Comment No. 26: Land and Economic, Social and Cultural Rights (22 December 2022) UN Doc E/C.12/GC/26 (2022).

[31] Guidelines for the Implementation of the Right to Adequate Housing – Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-discrimination in this context, UN Doc A/HRC/43/43 (2020).

community, adequate alternative housing in terms of size, quality, and affordability must be provided in close proximity to the original residence and source of livelihood.[32]

[52] The Supreme Court of Appeal directed the City to provide temporary emergency accommodation in a location as near as possible to where the Bromwell residents currently reside. Abahlali are of the view that the order of the Supreme Court of Appeal provides inadequate direction to municipalities, when considered independently.

[53] In addition to the above, Abahlali assert that the binding obligations on South Africa in terms of the African Charter include the immediate provision of adequate alternative accommodation and the prioritisation of vulnerable and disadvantaged groups in the allocation of housing and land.

[54] According to Abahlali, the concept of reasonableness in this context implies a balance between discretion and constraint. This balance should be guided by both constitutional rights and corresponding international legal obligations. Abahlali contend that this rigid policy, denying emergency accommodation to anyone in the inner city, regardless of circumstances, is unreasonable for several reasons. First, it restricts individualised assessments required before eviction, potentially leading to unjust outcomes. Second, it overlooks international legal obligations, such as ensuring access to healthcare, education, and basic amenities, all of which are crucial constitutional rights. Furthermore, the City's plan to develop social housing in the long term does not suffice as an immediate alternative. International law mandates that emergency accommodation upon eviction must meet certain adequacy standards, including location suitability. Abahlali submit that the uncertainty and delays associated with the development of social housing worsen this issue. They argue that the City must adopt a more balanced approach, including the provision of temporary emergency housing within the inner city, rather than presenting it as an either or scenario with future social housing plans.

[32] Id at para 38.

[55] To provide clarity to the "as near as possible" standard, which Abahlali deem insufficient, they argue that international law interprets "as near as possible" as an absolute concept, indicating close proximity objectively rather than a loose, relative distance. The range of reasonable approaches, mandated by both international law and the Constitution, falls between the extremes of no legal constraint on location and a requirement for specific sites. The "as near as possible" principle, as accepted by the City, is criticised for lacking objective constraints on location, essentially allowing relocation wherever the City decides, contrary to international law and the Constitution. They suggest that the courts ought to define the "as near as possible" range by distance or reference to areas, considering factors like employment, education, healthcare, cultural or community considerations, affordable transport, and available state-owned land.

Issues

[56] There are a number of interrelated or interconnected issues in this case, which are:

(a) whether this Court has jurisdiction and whether it is in the interests of justice to grant leave to appeal;

(b) whether the late filing of the application should be condoned;

(c) whether the constitutional duty of a municipality to provide temporary emergency housing includes the obligation to make such housing available close to where the occupiers were evicted from (in the inner city) and with access to the inner city;

(d) Whether the City's failure to deliver emergency housing in the inner city is reasonable;

(e) whether the City's choice to prioritise social housing over the delivery of emergency housing is reasonable;

(f) whether the City's implementation of the National Emergency Housing Programme is reasonable; and

(g) whether the City's housing programme aligns with the Constitution, the Housing Act[33] and the National Housing Code.

Jurisdiction

[57] This matter raises important issues relating to the extent of the constitutional duty of the City to provide temporary emergency housing to persons pursuant to evictions as a consequence of gentrification in the areas of Woodstock and Salt River. This Court's decision in *Blue Moonlight*[34] recognised that the issue of the provision of temporary emergency accommodation necessarily implicates section 26(2) of the Constitution. The provision of temporary emergency accommodation by the state forms part of the right of access to housing in terms of section 26 of the Constitution.[35] The temporary emergency accommodation provided by the City implicates the rights to dignity, freedom and security of the person, and privacy.[36] This matter therefore raises constitutional issues that engage this Court's jurisdiction.

Leave to appeal

[58] The matter turns on legal questions of the constitutionality of the City's application of the National Emergency Housing Programme and the reasonableness of the implementation thereof, in particular, the failure to provide temporary emergency accommodation in the inner city and its surrounds. In this regard, this Court must consider the emergency housing needs of persons evicted in these areas as a result of the gentrification of the residential areas of Woodstock and Salt River. Further, this Court must consider whether the City's social housing programme reasonably addresses the legacy of spatial apartheid in Cape Town by providing permanent social housing instead of temporary emergency accommodation in the inner city and its surrounds.

[33] 107 of 1997.

[34] *Blue Moonlight* above n 11 at para 88.

[35] Id.

[36] *Dladla v City of Johannesburg* [2017] ZACC 42; 2018 (2) SA 327 (CC); 2018 (2) BCLR 119 (CC) (*Dladla*) at para 47.

These are novel and complex questions of law which transcend the interests of the litigants. Their determination is of public importance and in the public interest.

[59] It is in the interests of justice that this Court determines the question of whether the City's policy of totally excluding the provision in the inner city and its surrounds of temporary and emergency housing is reasonable. There are reasonable prospects of success of this question being answered in the Bromwell residents' favour. Accordingly, leave to appeal is granted.

Condonation

[60] The Bromwell residents seek condonation for the late filing of their application for leave to appeal to this Court. The judgment of the Supreme Court of Appeal was handed down on 6 February 2023. The application for leave to appeal should have been filed on 27 February 2023, but was instead lodged on 28 February 2023. The delay was one court day. The Bromwell residents submit that the reason for the delay was due to logistical difficulties with the finalisation of the application with counsel and then with their correspondent attorneys in having the legal processes issued. Notably, the City does not oppose the condonation application.

[61] The delay in bringing the application for leave to appeal is minimal, the explanation for the delay is adequate and there is no prejudice to the City. Consequently, condonation is granted.

[62] The Bromwell residents also applied for condonation for non-compliance with the directions issued by this Court to file their written submissions on 1 February 2024. Instead, they filed their written submissions on 5 February 2024, two court days late. They attribute the delay to the record being voluminous. The Bromwell residents did, however, alert the City to the late filing and served the written submissions on them electronically on 2 February 2024. The condonation is not opposed by the City.

[63] The delay is minimal and no prejudice was suffered by the City. It is in the interests of justice for condonation to be granted, and it is granted.

Analysis

Legislative framework

[64] The constitutionality of the implementation by the City of the National Emergency Housing Programme[37] and the reasonableness of the City's conduct in relation to the Bromwell residents specifically, must be determined with reference to section 26 of the Constitution and the established jurisprudence.

[65] Section 26 of the Constitution guarantees the right to access adequate housing and provides as follows:

> "(1) Everyone has the right to have access to adequate housing.
> (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive 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."

[66] Section 26(2) imposes a positive obligation on the state to take reasonable measures within its available resources to realise this right progressively over time. Section 26(3) of the Constitution prohibits unlawful evictions. Relatedly, section 25(5) of the Constitution provides that "the state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis".

[37] The City submits that it implements the National Emergency Housing Programme.

[67] The PIE was enacted to prevent unlawful evictions. It provides that a court must take into consideration all the relevant factors to determine whether granting an eviction is just and equitable.[38]

[68] Section 9(2) of the Constitution must be factored in when taking into account the need to ensure that corrective measures are put in place to address the legacy of spatial apartheid. It states as follows:

> "Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken."

[69] The Housing Act was enacted to give effect to section 26(2) of the Constitution. Its purpose, as described in the Preamble, is to provide for the facilitation of a sustainable housing development process by laying down the general principles applicable to all spheres of government. Section 4 of the Housing Act makes provision for the National Housing Code 2009, which sets out policy, principles and guidelines for housing assistance programmes. This matter brings to the fore the distinction between the Social Housing Programme and the Emergency Housing Programme, both of which are contained in the National Housing Code. Due to the need to address the inequalities of apartheid and resultant spatial disparities, the Social Housing Programme aims to achieve the development of high density, subsidised rental-housing in designated "restructuring zones". These are areas identified for the provision of access to economic opportunities and urban amenities on a more permanent basis to people who are slightly better off and have access to some income. Its overarching goal is security of tenure. This is different to the Emergency Housing Programme which was instituted in terms of the Housing Act to provide temporary relief for people who find themselves in emergency situations, such as a court mandated eviction where the evictee has no alternative accommodation.

[38] See section 4(6) and (7) of PIE.

[70] The Spatial Planning and Land Use Management Act[39] (SPLUMA) is worth mentioning in this context as it provides, as its title suggests, the framework for spatial planning and land use management in South Africa. Relevant to this matter, its purpose is to address past spatial and regulatory imbalances and to provide for inclusive, developmental, equitable and efficient spatial planning at different spheres of government.[40]

The defining features of the right to have access to adequate housing

[71] Several defining features of the right of access to adequate housing have emerged from the jurisprudence of the courts:

(a) Section 26(2) of the Constitution requires a comprehensive and workable national housing programme for which each sphere of government must accept responsibility. It also provides access to adequate housing for people at all economic levels of society.[41]

(b) 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.[42]

(c) 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.[43]

(d) 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

[39] 16 of 2013.

[40] See the long title of SPLUMA.

[41] *Grootboom* above n 10 at paras 39-41.

[42] Id at para 43.

[43] Id at para 45.

relation to the rate at which it is achieved as well as the reasonableness of the measures employed to achieve the result are governed by the availability of resources.[44]

(e) 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.[45]

(f) The state's obligation to provide access to adequate housing depends on context, and may differ from province to province, from city to city, from rural to urban areas and from person to person.[46]

(g) Access to land for the purpose of housing is included in the right of access to adequate housing.[47]

(h) The ultimate goal is access by all people to permanent residential structures, with secure tenure, and convenient access to economic opportunities and health, educational and social amenities,[48] but because this will take time, provision must also be made for those in desperate need.[49]

(i) In any proposed eviction which may render persons homeless, a process of meaningful engagement by the responsible authority is constitutionally mandated in terms of section 26(3).[50]

(j) The Constitution does not give a person the right to housing at the state's expense, at a locality of that person's choice (in this case the inner city). Thus, temporary emergency accommodation is not ordinarily required to be in the inner city.[51] However, the state would be failing in its duty if it

[44] Id at para 46.

[45] Id.

[46] Id at para 37.

[47] Id at para 35.

[48] These are the factors envisaged by the term "housing development" in the Housing Act.

[49] *Grootboom* above n 10 at paras 48-65.

[50] *Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street Johannesburg v City of Johannesburg* [2008] ZACC 1; 2008 (3) SA 208 (CC); 2008 (5) BCLR 475 (CC) (*Occupiers of 51 Olivia Road*).

[51] *City of Johannesburg v Rand Properties (Pty) Ltd* [2007] ZASCA 25; 2007 (6) SA 417 (SCA) (*Rand Properties*) at para 44.

were to ignore or fail to give due regard to the relationship between location of residence and place where persons earn or try to earn their living.[52]

(k) In *Thubelisha Homes*, this Court did not require alternative accommodation to be located in a specific area. Indeed, it said that "the Constitution does not guarantee a person a right to housing at the government's expense, at the locality of his or her choice".[53]

(l) In *Blue Moonlight*, this Court held that alternative accommodation needed to be "as near as possible" to the property from where the occupiers were evicted.[54] Thus, location is a relevant consideration in determining the reasonableness of temporary emergency accommodation. This is typically given effect to through orders that state that the emergency accommodation be "as near as possible" to the property from which persons are evicted.

(m) 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.[55]

(n) The right to dignity obliges the local authority to respect the family unit when it is obliged to supply homeless persons with temporary emergency accommodation.[56]

(o) Majiedt J, persuasively writing for the minority, in *Thubakgale*,[57] stated that—

> "the permanent accommodation to be provided by the Municipality must . . . include ensuring continued access to schools, jobs, social networks and other resources which the

[52] Id.

[53] *Thubelisha Homes* above n 12 at para 254.

[54] *Blue Moonlight* above n 11 at para 104(e)(iv).

[55] *Grobler v Phillips* [2022] ZACC 32; 2023 (1) SA 321 (CC); 2024 (1) BCLR 115 (CC) at para 36 and *Thubelisha Homes* above n 12 at para 254.

[56] *Dladla* above n 36.

[57] *Thubakgale v Ekurhuleni Metropolitan Municipality* [2021] ZACC 45; 2022 (8) BCLR 985 (CC) (*Thubakgale*) at paras 110-11.

> applicants in this case enjoy where they currently stay, and which they will lose if displaced. This interpretation is in line with spatial justice and the right to the city, and therefore also in line with the remedial and transformative purposes of socio-economic rights and the Constitution more broadly.
>
> . . .
>
> In the context of South Africa's highly segregated urban areas and scarce access to resources, it should also mean that spatial justice must be considered in determining what constitutes 'adequate housing'."[58]

(p) The right to adequate housing (permanent accommodation in the context of *Thubakgale*), is not a standalone right that should be interpreted in isolation of other rights enshrined in the Constitution. The rights in the Constitution are interdependent, interlinked and interconnected. This is exactly what this minority judgment highlights. The right to adequate housing in the current case implicates other rights, such as the right to dignity, the right to basic education and the right to freedom of trade, occupation and profession.

(q) This Court in *Grootboom* held as follows:

> "Socio-economic rights must all be read together in the setting of the Constitution as a whole. The state is obliged to take positive action to meet the needs of those living in extreme conditions of poverty, homelessness or intolerable housing. Their interconnectedness needs to be taken into account in interpreting the socio-economic rights, and, in particular, in determining whether the state has met its obligations in terms of them."

[72] Presently, the law does not provide evictees with a right to emergency housing in a specific location. However, the jurisprudence on the right of access to adequate housing has progressively developed over the years, such that the redress of poverty has

[58] There was no disagreement on this between the majority and minority.

now become a legitimate issue of judicial concern.[59] It is the constitutional duty of the state to arrange its resources in such a way that it is able to realise progressively all of the rights that are subject to progressive realisation, including housing rights.

[73] In determining if a set of measures are "reasonable", the measures ought also to be scrutinised within their social, economic and historical context. A housing programme must be balanced, consider all sections of society, be flexible, and be able to reasonably respond progressively to housing crises and short, medium and long-term needs. To be reasonable, there must be sufficient weight towards the most needy and vulnerable, so that they can live in conditions of dignity, equality and freedom guaranteed by the Bill of Rights. The state will be failing in its constitutional duties unless it takes reasonable steps towards addressing the needs of the most vulnerable groups.

[74] The link between sections 26 and 25(5) of the Constitution recognises that access to land is paramount in progressively realising the right to housing. Access to land must be construed in the context of gentrification and spatial inequality. The Bromwell residents are private tenants who were in lawful occupation of the property for generations and whose loss of lawful occupation is directly linked to the policy that caused gentrification. As highlighted by the High Court:

> "[131] A gentrification and regeneration process commenced, driven largely by private property developers who capitalized on rapidly increasingly property values and tax incentives they were afforded from 2012 onwards, after the inner city precinct which included Woodstock and Salt River, was declared an Urban Development Zone.
>
> [132] This process was aided by the adoption of the Woodstock and Salt River Revitalization Framework ('WSRF') policy in 2003, and changes to the zonings which applied to the area, which were introduced in 2012, whereby properties along Victoria

[59] *Soobramoney v Minister of Health (Kwazulu-Natal)* [1997] ZACC 17; 1997 (12) BCLR 1696 (CC); 1998 (1) SA 765 (CC) at para 8 and *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* [2005] ZACC 5; 2005 (5) SA 3 (CC); 2005 (8) BCLR 786 (CC) at para 36.

> and Albert Roads (which included the Bromwell street property), which were previously zoned for 'general commercial' use were rezoned for 'mixed use'.
>
> . . .
>
> [134] A director of the 1st respondent indicated during an interview which he held with a radio station in August 2016, that apartments which were to be erected on the Bromwell site were expected to be rented out at an estimated average rental of R5000-R9000 p.m.
>
> [135] He confirmed that property values in the City centre had risen quite extensively, and in Woodstock 'the pricing certainly has outrun even the middle market in terms of their ability to afford the property' (sic). In this regard, whereas in 2003 the average sale price for houses and apartments in Woodstock was between R100 000 and R300 000, as at 2015 it was about R1.6 million. According to data collected from the Registrar of Deeds, prior to 2004 the sale prices of properties on Bromwell Street had not exceeded R750 000. As was pointed out earlier, the property on which the applicants are living was purchased by the first respondent in October 2013 for R3.15 million.
>
> [136] Although the WSRF policy which was adopted in 2003 made provision for under-utilised public buildings in the Woodstock-Salt River area to be used for social programs and for public use, including accommodation for vulnerable groups such as homeless people and the elderly, and to this end it proposed rehabilitation subsidies for the conversion and maintenance of buildings as well as subsidies to ensure access to affordable accommodation, including interest-rate and rental subsidies for low-income groups, these proposals have not been implemented to date."[60]

[75] Addressing spatial apartheid requires that considerations include the accessibility of cities. Locality is hence paramount in the provision of temporary emergency housing. However, it might be argued that Courts requiring temporary emergency accommodation to be located in a specific area may encroach on the separation of powers and can have unforeseen adverse implications for cities across South Africa, for example perpetuating spatial apartheid by prioritising temporary emergency accommodation at the expense of social housing. A delicate balance is required.

[60] Above n 12.

[76] In *Occupiers of 51 Olivia Road*,[61] this Court recognised that: "the city must have been aware of the possibility, even the probability that people would become homeless as a direct result of their eviction at its instance". The question, therefore, is whether the City was unreasonable in not delivering emergency housing in the inner city, in circumstances where residents in these areas face eviction as a result of gentrification, when the City must have foreseen the adverse consequences of such an emergency housing policy. Although these are polycentric issues, this Court in *Blue Moonlight*,[62] after a careful analysis of all the facts, rejected arguments about the state's limited resources and ordered it to provide temporary emergency accommodation to those evicted in the circumstances.

[77] This matter presents this Court with the opportunity to develop the law such that a court can go beyond requiring merely that temporary emergency accommodation must be provided as "near as possible" to the property from which persons are evicted. It may be necessary and appropriate for a court to scrutinise the implementation of the emergency housing programme to the extent that it lacks temporary emergency accommodation in a specific locality, where that locality is significant in addressing spatial inequality and past redress, and important to respect other rights of individuals (such as family life, education, and access to employment opportunities).

Progressive realisation of housing rights

[78] The provision of adequate housing, which is inclusive of temporary or emergency housing, is a constitutional imperative that places obligations on the state to realise this right. The realisation of this right, which is closely interlinked with other socio-economic rights, is crucial in the Constitution's attempt to address the longstanding issues of social inequality deeply embedded in our society. Section 26(2) of the Constitution provides that the state must take reasonable legislative and other

[61] *Occupiers of 51 Olivia Road* above n 50 at para 13.

[62] *Blue Moonlight* above n 11 at para 95.

measures, within its available resources, to achieve the progressive realisation of this right. As it was put by Yacoob J in *Grootboom*:

> "The term 'progressive realisation' shows that it was contemplated that the right could not be realised immediately. But the goal of the Constitution is that the basic needs of all in our society be effectively met and the requirement of progressive realisation means that the State must take steps to achieve this goal. It means that accessibility should be progressively facilitated: legal, administrative, operational and financial hurdles should be examined and, where possible, lowered over time." [63]

[79] The provisions of section 26(1) are not absolute, but contingent upon the availability of the state's resources. This means that a balancing exercise is required in ensuring that the state fulfils its obligations within the confines of its available means. Progressive realisation, in this context, transcends a mere legal standard. It demands an appreciation of the intricate balance between legislative imperatives and economic realities such as the high costs associated with inner city development and the lack of available land. However, what ought to be emphasised is that in meeting its obligation, the state needs to ensure that the measures adopted are reasonable. This is the applicable test provided for in terms of section 26(2), in the context of the achievement of the progressive realisation of the right of access to adequate housing over time.

[80] While this enquiry requires the availability of the state's limited resources to be at the forefront in determining the reasonableness of the measures employed to achieve the progressive realisation of the right afforded by section 26,[64] this cannot and should not be viewed as a free pass for the state to arbitrarily adopt specific or selective measures in the realisation of this right through the prioritisation of one constitutional obligation at the expense of another. Ideally, this balancing exercise would also entail a balancing of the emergency housing crisis, with that of social housing development.

[63] *Grootboom* above n 10 at para 45.

[64] *Blue Moonlight* above n 11 at para 88.

[81] We cannot take away from the City's medium and long-term objectives and broader vision of "spatial transformation" through its prioritisation of the development of permanent affordable housing in the inner city. However, this broader vision appears to be a thoroughly misguided and ill-conceived project rooted in the perpetuation of spatial segregation and the infamous influx control, in an attempt to inexplicably "preserve" the inner city by marginalising poor persons.

[82] The gentrification policy seeks to achieve that which the forced removal policy of apartheid failed to achieve and destroy one of the only communities that had managed to resist removals from "white" Cape Town under apartheid. It is quite disconcerting that with this knowledge, the City failed to have an adequate plan for the evictees. The housing situation in the Western Cape has always been one which is desperate and there has not been significant change in the housing conditions in the Western Cape, and much of South Africa as a whole, decades after *Grootboom* and the new constitutional order. It is untenable for municipalities to conduct themselves in a manner that preserves spatial inequalities and reinforces patterns of social exclusion. The City failed to take heed of Majiedt J's remarks in the minority in *Thubakgale*:

> "Apartheid's spatial structures persist, and today continue to maintain race and class-based inequities in access to resources and services across Johannesburg and surrounding areas. It has been suggested that the law plays a role in more deeply entrenching these inequities, for example where it props up urban regeneration projects that exclude the poor."[65]

[83] The neglect of emergency housing by the City raises concerns regarding the fulfillment of its constitutional obligations towards vulnerable populations. Emergency housing serves as a crucial intervention to prevent homelessness and mitigate immediate crises, particularly for those facing eviction. The failure to allocate adequate resources by the City to emergency housing essentially undermines and infringes upon the right

[65] *Thubakgale* above n 57 at para 104.

of access to adequate housing for these vulnerable communities. It perpetuates inequality and violates its duty to protect the most vulnerable members of society.

[84] I acknowledge that the City operates within finite resources and must make difficult decisions about how to allocate those resources most effectively to meet the needs of its diverse population. However, a lack of resources cannot be accepted as an excuse in the present circumstances, because that is simply not the reasoning behind its failure to prioritise emergency housing. The availability of resources is evident. The City cannot hide behind the argument that it is providing social housing in the inner city by disregarding its crucial responsibilities in relation to emergency housing. Those whose needs are most urgent and whose ability to enjoy all rights is most in peril, must not be ignored.[66] The City's commitment to long-term social housing plans should not come at the expense of addressing urgent concerns. This is particularly the case when one considers the applicable waiting lists prevalent in the applications for state-subsidised housing and the policies against queue-jumping. The right of access to adequate housing, especially in emergency situations, is a fundamental human right that demands immediate attention. This Court cannot ignore the City's failure to progressively realise its constitutional obligation in terms of section 26 as far as emergency housing is concerned.

[85] That the City actively sought alternative solutions, offering housing options at Wolwerivier and Kampies, cannot be ignored. However, it cannot be denied that such measures are not adequate in the circumstances. I agree that the Constitution does not entitle an individual with the right to housing provided by the state at their preferred location.[67] The mere existence of suitable alternatives does not automatically extinguish the obligation imposed on the City by section 26. This is especially the case when alternatives fail to address the state's obligations in the context of spatial apartheid, as well as the Bromwell residents' genuine concerns, which are premised on

[66] *Grootboom* above n 10 at para 44.

[67] *Thubelisha Homes* above n 12 at para 254.

location and the accessibility to economic opportunities, healthcare, education and social amenities. Moreover, the accommodation to be provided by the City needs to ensure "continued access to schools, jobs, social networks and other resources which the applicants in this case enjoy where they currently stay . . . [t]his interpretation is in line with spatial justice and the right to the city, and therefore also in line with the remedial and transformative purposes of socio-economic rights and the Constitution more broadly".[68] The right of access to adequate housing in this context, is to be "understood as comprising an interrelated and interdependent package of rights rather than a singular entitlement".[69] Thus, the socio-economic rights to have access to health care services, food, water and social security have a bearing on the right of access to adequate housing.[70]

[86] While social housing is undoubtedly important, it should not come at the expense of the human rights of others and their basic dignity. To the extent that both social and emergency housing lie at one end of the spectrum, a distinction may be made between individuals who meet the financial threshold for social housing, and are therefore capable of affording the basic housing, and those who lack the means to do so. The latter face heightened vulnerability and, as such, are at the state's mercy for the realisation of their constitutionally enshrined right of access to adequate housing by virtue of their dire plight but distinct circumstances which warrant urgent consideration. The under-emphasis of emergency housing has the effect of disregarding those who urgently require assistance from the state, for reasons beyond their control. "The Constitution obliges the state to act positively to ameliorate these conditions."[71] In *Mazibuko*, this Court held:

> "At the time the Constitution was adopted millions of South Africans did not have access to the basic necessities of life, including water. The purpose of the constitutional

[68] *Thubakgale* above n 57 at para 110.

[69] Coggin and Pieterse "Rights and the City: An Exploration of the Interaction between Socio-Economic Rights and the City" (2012) 23 *Urban Forum* 257 at 264.

[70] Id at 266.

[71] *Grootboom* above n 10 at para 93.

> entrenchment of social and economic rights was thus to ensure that the State continue to take reasonable legislative and other measures progressively to achieve the realisation of the rights to the basic necessities of life. It was not expected, nor could it have been, that the State would be able to furnish citizens immediately with all the basic necessities of life. Social and economic rights empower citizens to demand of the State that it act reasonably and progressively to ensure that all enjoy the basic necessities of life. In so doing, the social and economic rights enable citizens to hold government to account for the manner in which it seeks to pursue the achievement of social and economic rights."[72]

[87] The City's failure to strike a balance between its housing development goals and situations which require urgent solutions reflects a misplaced set of priorities and a lack of responsiveness to the needs of its residents. The inconsistency in providing temporary emergency accommodation for people in informal settlements in the inner city and the Bromwell residents is palpable. There is no rational differentiation. The Bromwell residents did not settle on the land unlawfully. They were lawful rent-paying tenants who were affected by gentrification and are now expected to move 15 km out of the City to Phillipi. I acknowledge that the realisation of this right operates within the confines of available resources; however, the measures adopted by the City suggest an outright refusal to consider emergency housing and a frustration of their constitutional obligation to achieve the progressive realisation of the right of access to adequate housing. There cannot be a progressive realisation of the right provided for in terms of section 26 where the state continuously ignores the plight of those in desperate need, contrary to the remedial and transformative purpose of the section.

Whether the City's conduct is reasonable

[88] Reasonableness is the established test to assess the progressive realisation of socio-economic rights, in this context, the right of access to adequate housing. Relevant to this matter is *Grootboom*,[73] which, coincidently, also dealt with the reasonableness

[72] *Mazibuko* above n 20 at para 59.

[73] *Grootboom* above n 10 at para 43.

of the City's emergency housing programme at that time. The case established the test for assessing the reasonableness of a government programme. It must—

(a) be comprehensive and coherent;

(b) be adopted by way of policy and legislative measures;

(c) be reasonably implemented;

(d) be flexible and balanced;

(e) not exclude a significant section of the population; and

(f) contain efficient assignment functions for all three spheres of government, also be attentive to the urgent needs.

[89] The lack of an official temporary emergency accommodation policy indicates that the City has failed on that leg of the test. It firstly has a duty to have a policy in place. As the Housing Act and the Code were promulgated to "progressively realise" the Housing Act, its implementation must be assessed in light of the standard of reasonableness. The City's implementation of the National Emergency Housing Programme on the basis of what is before this Court cannot be said to have been adopted according to the correct measures prescribed by legislation. It goes further to exclude a significant section of the population as it does not cater for the people in most need of it, rather the resources are directed to social housing. The decision to prioritise one housing programme cannot absolve the City of its obligation in terms of another.

[90] The issue of location is one that cannot be ignored when assessing reasonableness. In *Blue Moonlight*, the Court dealt with the exclusion of persons evicted from private property. It found that such exclusion was unconstitutional and instructed the municipality to provide alternative accommodation as near as possible to the area where the property was located. *Thubelisha Homes* further held that "in deciding locality, the government must have regard to the relationship between the location of the residents and their places of employment".[74] The case made it unequivocally clear that it is not the responsibility of the municipality to make

[74] *Thubelisha* above n 12 at para 254.

temporary emergency housing available at a specific location.[75] However, *Blue Moonlight* established that alternative accommodation should be "as near as possible to" the existing lives of the people affected.[76]

[91] The City identified Wolwerivier which is about 30 km away from the inner city and from where the Bromwell residents are currently residing. The City refused to provide any kind of transportation to the City from this location. The City then offered Kampies as the temporary emergency accommodation, which is about 15 km away and would require the Bromwell residents to pay for transportation. These offers by the City indicate that it did not give sufficient consideration to the practical challenges of, among others, increased commuting distances and costs, as well as the social and economic disruption that moving away from established networks and services would cause the Bromwell residents, if they are moved to locations that are further away from the inner city, further exacerbating their already vulnerable situation.

[92] I have no doubt that the Bromwell residents are no ordinary evictees. They have generational ties to the area and given the racially discriminatory practices of this country's past, as one of the very few communities that managed to resist forced removals from "white" cities under the apartheid regime. This is something that must be factored in when weighing what is reasonable. In *PE Municipality*, this Court held that a court should "balance out and reconcile the opposed claims in as just a manner as possible, taking account of all of the interests involved and the specific factors relevant in each particular case".[77] These factors include the proximity to amenities and past injustices, that can only be resolved in consideration of "location". *PE Municipality* further held:

> "Thus, PIE expressly requires the court to infuse elements of grace and compassion into the formal structures of the law. It is called upon to balance competing interests

[75] Id.

[76] *Blue Moonlight* above n 11 at para 104.

[77] *Port Elizabeth Municipality v Various Occupiers* [2004] ZACC 7; 2004 (12) BCLR 1268 (CC); 2005 (1) SA 217 (CC) (*PE Municipality*) at para 23.

> in a principled way and to promote the constitutional vision of a caring society based on good neighbourliness and shared concern. The Constitution and PIE confirm that we are not islands unto ourselves. The spirit of ubuntu, part of the deep cultural heritage of the majority of the population, suffuses the whole constitutional order. It combines individual rights with a communitarian philosophy. It is a unifying motif of the Bill of Rights, which is nothing if not a structured, institutionalised and operational declaration in our evolving new society of the need for human interdependence, respect and concern."[78]

Constitutionality of the City's implementation of temporary emergency accommodation

[93] Section 172(1)(a) states that, when deciding a constitutional matter within its power, a court "must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of the inconsistency".

[94] Section 7(2) of the Constitution states that "the state must respect, protect, promote and fulfil the rights in the Bill of Rights". In this regard, respect means that the state must refrain from impairing existing access to adequate housing and not place undue obstacles in the way of people gaining access to adequate housing. The duty to protect includes protecting existing access to adequate housing from interference by third parties. *Grootboom* tells us that Courts are constitutionally bound to ensure that these rights are protected and, also, fulfilled – the latter obligation entailing positive action on the part of the state to provide housing. And it is only through promoting and enhancing channels that allow access to adequate housing that these rights can be achieved.

[95] Section 26 of the Constitution enshrines the right of everyone to have access to adequate housing and obligates the state to take reasonable legislative and other measures, within its available resources to achieve the progressive realisation of this right. As a response to this constitutional imperative, in terms of section 4 of the

[78] Id at para 37.

Housing Act, the government introduced various programmes for the provision of adequate housing to poor households. The National Housing Code is aimed at simplifying the implementation of housing projects by being less prescriptive whilst providing clear guidelines.

[96] It is the City's admission that it has no self-standing Emergency Housing Programme, and that it applies and implements the National Emergency Housing Programme. In light of this, I will proceed to analyse whether the City's "conduct" in its failure to provide temporary emergency accommodation close to the inner city is constitutional, when adjudged against the Constitution, the Housing Act and the National Housing Code.

[97] Section 9 of the Housing Act speaks to the functions of the municipality in realising the right to have access to adequate housing. It says:

> "(1) Every municipality must, as part of the municipality's process of integrated development planning, take all reasonable and necessary steps within the framework of national and provincial housing legislation 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, storm water 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) promote the resolution of conflicts arising in the housing development process;

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

(g) provide bulk engineering services, and revenue generating services in so far as such services are not provided by specialist utility suppliers; and

(h) plan and manage land use and development."

[98] Section 9(1)(a)(i) and (ii) of the Housing Act, in essence, states that every municipality must take all reasonable and necessary steps within the national and provincial framework of housing legislation and policy to ensure that the people in its area of jurisdiction have access to adequate housing on a progressive basis.

[99] The Housing Code in Part 3 Volume 4 contains the Emergency Housing Programme. The purpose of the programme is "to provide temporary assistance in the form of secure access to land and/or basic municipal engineering services and/or shelter in a wide range of emergency situations of exceptional housing need". The Code describes norms and standards for the provisions of the temporary emergency accommodation for all three spheres of government. It goes further to state that "[i]t will be the responsibility of a municipality to consider whether specific circumstances in its area of jurisdiction merit the submission of an application for assistance under this Programme".

[100] With regards to the availability of suitable accommodation, the Code says "[w]here land suitable for housing development in emergency housing situations is required, it must first be sought from land identified in Spatial Development Frameworks that supplement Integrated Development Plans". This is significant because the Bromwell residents presented vacant state-owned land as an option for temporary emergency accommodation for them. The City indicated that some of the land identified was for other use but later that much of the land was used for other social housing programmes and so-called transitional housing. Clearly, this is an untenable situation.

Concluding remarks

[101] It is important to underscore that the Bromwell residents were in lawful occupation of their premises and their loss of lawful accommodation is directly linked to a policy of gentrification driven largely by private property developers. In my view, the relocation of persons such as the Bromwell residents to outlying areas of the City has the effect of destroying their communal and social networks, which has the potential to deprive them of basic amenities. This is particularly so because they are being removed from areas they have lived in for many generations. The City and the Province through the mouths of Councillor Herron and former Premier Hellen Zille admitted that the City's gentrification policy was going to displace the occupants of Woodstock and Salt River. This policy motivated Woodstock Hub to purchase the properties from the previous owners who had been letting them to the Bromwell residents for generations and thereafter sought their evictions.

[102] Woodstock Hub had the support of the City and the Province which promised them tax breaks if they invested in the City. The aforegoing was not disputed. Support for this statement can be found in the undisputed evidence of Ms Royston, a professional development planner and an expert in housing policy urban land tenure security, who stated:

> "The Urban Development Zone ("UDZ") policy aims to 'regenerate' urban inner cities and other strategic city locations that have fallen victim to 'urban decay' due to the flight of capital. National Treasury created an amendment to the tax laws, which would allow tax breaks to developers if they built or refurbished buildings in certain areas. The UDZ was implemented in 2004 with Woodstock and Salt River lying at the heart of Cape Town's UDZ."

[103] It is cold comfort that the City does not make provision for temporary emergency housing programme within the inner city. The City should have foreseen in its planning that urban regeneration would lead to displacement. Its conduct was unreasonable because it failed to mitigate the effects and consequences of gentrification on the most vulnerable. It, in effect, forced the most vulnerable out of the city. This is a

retrogressive measure particularly in the light of South African history. The effect of what the City is doing, whilst ostensibly using the forces of the market, is reminiscent of the ravages wreaked upon the nearby District Six after the passing of the shameful Group Areas Act. The City's stance that it is better to develop permanent housing in the city rather than emergency housing because it is not in a position to provide individual tracts of land to the beneficiaries which includes Woodstock residents is untenable. In post-apartheid South Africa, human individuals are social beings who live in connection with their communities and environments. It is important to recognise that for people who live in circumstances of extreme vulnerability, location may be an important or essential component of adequate housing, without which, they will be denied their most basic needs as they will not be able to access employment, healthcare and education for their children.

[104] The City was aware that the vast majority of the Bromwell residents would not qualify for social housing or be allocated such housing, yet it proceeded to disregard their needs and circumstances. The question to be asked is whether such an approach can be described as reasonable. I think not. Reasonableness also involves a consideration of rationality and proportionality. Reasonableness ensures balancing the adverse and beneficial effects of the decision made in question. The City unreasonably adopted a position that none of the Bromwell residents would be considered for emergency housing until such time that they had applied for social housing. In my view, in the light of the residents' background and financial circumstances, it is unlikely that they will ever qualify for social housing. The obdurate stance of the City had the inevitable consequence that the Bromwell residents were unreasonably excluded from accessing temporary emergency accommodation opportunities in the inner city solely on the basis of their income. According to the City, the social housing programme requires an income of R3500 to R7500, and GAP housing in excess of R6500. Clearly the social and GAP housing were totally out of reach for the Bromwell residents and they cannot afford the amounts required by the City to be part of these programmes.

[105] It seems clear that the state (in this case the City) would be acting unreasonably if it fails to have regard to the location of the residents and places of employment when deciding the locality of the housing, regardless of whether such choice is located within the prescripts of section 26 of the Constitution. These are all the transformative imperatives of section 26 of the Constitution which are directed at addressing spatial injustice and spatial exclusion. Sadly, the Supreme Court of Appeal failed to consider them properly. *Rand Properties* stated that:

> "More particularly, the Constitution does not give a person a right to housing at state expense at a locality of that person's choice (in this case the inner city). Obviously, the State would be failing in its duty if it were to ignore or fail to give due regard to the relationship between location of residence and the place where persons earn or try to earn their living but a right of the nature envisaged by the court and the respondents is not to be found in the Constitution."[79]

[106] Another telling feature of the City's case is that it spoke in vague and unconvincing terms about the affordability of meeting housing needs. It referred to the cost of land in the inner city, economics of building costs, and the high costs of rates and taxes. It contended that the subsidy from the national government was inadequate. There was no real attempt on the part of the City to place before the Court detailed information and data that would be essential for the purposes of an assessment of the reasonableness of its measures. On the other hand, the Bromwell residents adduced considerable evidence, all aimed at demonstrating their history of lawful occupation and what would become of them if they were to be evicted or relocated. The City was required to respond rationally and apply its policies to the actual situation of the Bromwell residents but failed to do so.

[107] What is startling is that the City prevaricated. It initially denied that it had an obligation to provide emergency housing in the inner city and denied that the well-located land identified (by the Bromwell residents) was well suited for houses. It

[79] *Rand Properties* above n 51 at para 44.

later changed its tune and recognised that those identified parcels of land were indeed suitable for housing, albeit (on its approach) for transitional and social housing. Again, it excluded the Bromwell residents. The City also failed to provide the Court with a comparison of the costs of emergency housing in Woodstock and Salt River versus other areas. It only made bald statements about it costing three times the price, without substantiation and evidence of the impact on their budget. This Court rejected such weak evidence on available resources in *Blue Moonlight*.

[108] I accept that the City does not have an obligation to prioritise emergency housing over social housing. However, it is incongruous for the City to elect to deliver social housing and absolutely no emergency housing in the inner city. It is wrong to give preference to social housing and totally neglect or ignore emergency housing in the inner city. There is a constitutional obligation on the City to deliver both. The facts of this case demonstrate that it also failed to meaningfully engage with the residents' case for emergency housing. It prioritised the development of social housing in the inner city and shut its eyes to the lived realities facing the Bromwell residents. Chief amongst those were affordability in the inner city. The Bromwell residents' case is that the City adopted an obdurate stance by not assisting them with appropriate temporary emergency housing. The primary focus of the City on social development housing in the inner city meant that the Bromwell residents cannot be accommodated in the city and the City's view that it can meet them halfway by relocating them 15 km away from the city, fails to ameliorate their plight. It also impacts severely on their right to human dignity by stripping them of their right to reside in their homes which they have been occupying for generations.

[109] Abahlali make a compelling argument in support of the Bromwell residents' case. While acknowledging the importance of the "as near as possible/close proximity" principles, it is essential to understand the difficulties in effectively achieving the right of access to adequate housing. This entails carefully assessing how reasonable and fair the City's actions are, given the practical challenges and resources available. This view

recognises the delicate balance between what the law prescribes and what remains possible within available resources.

[110] The City's conduct falls short of the standard of reasonableness. It evinces a cavalier attitude to the rights of the Bromwell residents. Although I accept that it is not the Court's function to dictate to the City how to deal with its budget constraints, a fine balance has to be struck between reasonable action and the extent of the overall demands on those resources. The allocation of resources must be proportionate and not burden the state or the City unreasonably. However, what negates the reasonableness of the City is that not a single emergency housing development has been built in the last 30 years. The City has been acutely aware of the rising property prices in the inner city, particularly Woodstock, and the displacement of low-income groups as a result of the gentrification in the area. Yet, it prioritised social housing development which was clearly out of reach for the Bromwell residents.

[111] The City seems to have placed more emphasis on the gentrification programme and failed to take into account considerations of spatial justice, evictions and displacements of residents from the homes which they had occupied for many generations, having survived apartheid forced removals. It is unconscionable that residents should now, in the new democracy, face the ignominy of apartheid-style displacement when they had fought gallantly to remain in their properties.

Remedy

[112] It remains to consider the orders made by the Supreme Court of Appeal. The Supreme Court of Appeal erred and its orders must be disturbed. The Supreme Court of Appeal framed the issue before it wrongly. The correct question flowing from the High Court judgment was whether the City acted reasonably in determining the locality of the temporary emergency accommodation offered to the Bromwell residents and whether it acted reasonably in excluding emergency housing options entirely in the inner city. The concomitant question was, if not, what was the appropriate, just, and equitable remedy? How the Supreme Court of Appeal framed the

issue on appeal does not fairly reflect the case advanced by the Bromwell residents and is also at variance with section 26(2) of the Constitution.

[113] The Supreme Court of Appeal failed to correctly assess and review the City's implementation of the National Housing Programme and its implementation in relation to the Bromwell residents according to the constitutional standard of reasonableness. Another fallacy is that the Supreme Court of Appeal described gentrification as a form of urban renewal and development for commercial and business purposes. This is clearly wrong. Gentrification is simply a process of neighbourhood change whereby financial investment results in an influx of higher income residents and the displacement of the lower income and often marginalised or minority inhabitants. During the process of gentrification, neighbourhood are transformed, and physical and cultural connections disrupted as people have to move from their neighbourhood. In this case, it is clear that the second respondent planned to demolish those houses in the Woodstock area and construct apartments for middle to higher income earners to the total exclusion of the Bromwell residents.

[114] The progressive realisation of rights requires the Court to scrutinise the programmes and policies for reasonableness; however, courts should guard against dictating solutions which would violate the separation of powers. Section 38 is particularly significant when deciding on a remedy. It states that a court hearing a case involving an alleged infringement of, or threat to, a right in the Bill of Rights may grant "appropriate relief, including a declaration of rights". Section 172(1)(b) further states that a court may make any order that is just and equitable. I am of the view that the City's conduct is unconstitutional as its implementation of the temporary emergency accommodation policy is unreasonable and arbitrary and should be declared as such.

Costs

[115] The purpose of a costs order is to indemnify the successful party for the expense to which he has been put through, having been unjustly compelled either to initiate or

to defend litigation. Given this position in our law which is trite, I find that the City is liable to pay costs.

Order

[116] The following order is made:

1. Leave to appeal is granted.
2. Condonation is granted.
3. The appeal is upheld.
4. The orders of the Supreme Court of Appeal and the High Court are set aside and substituted with the following order:
   (a) "The City of Cape Town's implementation of the National Housing Programme is declared to be unconstitutional to the extent that the City—
      (i) unreasonably failed to adopt its own Temporary Emergency Accommodation Policy to be implemented in conjunction with the National Emergency Housing Programme;
      (ii) declines to consider providing Temporary Emergency Accommodation in the inner city on a blanket basis without considering the circumstances of individuals;
      (iii) provides Transitional Housing in the inner city for evicted persons who have occupied land in the inner city unlawfully from the outset but does not do so for evicted persons who are former lawful occupiers, such as the applicants;
      (iv) fails to make provision for any Temporary Emergency Accommodation in the inner city in the face of the foreseeable evictions resulting from the phenomenon of gentrification consequent upon the implementation of the City of Cape Town's development policies in Woodstock and Salt River;
      (v) unreasonably compounds the legacy of spatial apartheid by failing to provide Temporary Emergency Accommodation

in the inner city to persons evicted from Woodstock, when its residents had succeeded in resisting forced removals under the successive Group Areas Acts.

(b) The City of Cape Town is directed to develop a reasonable Temporary Emergency Accommodation Policy to be implemented together with the National Emergency Housing Programme, in a reasonable manner, consistent with this judgment.

(c) The City of Cape Town is directed to provide the applicants with "Temporary Emergency Accommodation" or "Transitional Housing" in Woodstock or Salt River or, failing those, the Inner City Precinct[80], and, as near as possible, to the property at Units 122 to 130A, Bromwell Street, Woodstock (the property) within 6 months of the date of this order, provided that they are still resident at the property and have not voluntarily vacated it.

(d) Pending the implementation of this order, the applicants may not be evicted from the property."

5. The City of Cape Town is ordered to pay the costs of the applicants in this Court, in the Supreme Court of Appeal and in the High Court, including the costs of two counsel.

BILCHITZ AJ (Dodson AJ concurring):

Introduction

[117] Socio-economic rights in the South African Constitution have two important foundations. The first is universalistic in nature and rooted in the notion that every individual is entitled to be treated with dignity and, as such, must be provided with the necessary conditions for living a life of dignity.[81] That idea has been behind the

[80] As contemplated in the City of Cape Town "Affordable Housing Prospectus: Woodstock, Salt River and Inner-City Precinct", issued on 28 September 2017.

[81] *Grootboom* above n 10 at para 23.

recognition of these rights at the international level in the Universal Declaration of Human Rights[82] and enshrined in the binding ICESCR.[83] South Africa signed the ICESCR on 3 October 1994 and ratified it on 12 January 2015: that change in the legal status of the ICESCR is an important development for this Court to grapple with.

[118] The second foundation of socio-economic rights is historical and relates to correcting the injustices wrought in our own history.[84] Deliberate policies from colonial times and the enactment of apartheid legislation from 1948 resulted in the impoverishment of Black people. Amongst other measures, the law was utilised to force Black people from their homes in rural areas in order to work on the mines for exploitative wages and without adequate provision of housing and services (through, for example, colonial taxes such as the hut tax),[85] to force Black people into a system of inferior education, and to give preferences to White people in the economic sphere (job reservation).[86] Budgets were developed to prioritise spending on White people and, thus, to provide inferior social welfare and other services for Black people.[87] The socio-economic rights in the Constitution are a promise to correct these past socio-economic injustices. They seek to address this devastating legacy which remains with us to this day and has proved very difficult to counteract.[88]

[119] This case implicates both these foundations of a central socio-economic right: the right to have access to adequate housing enshrined in section 26 of the Constitution. The Bromwell residents are facing eviction and potential homelessness. The duty on

[82] 10 December 1948. Articles 22-6 are generally regarded as enshrining these rights.

[83] Above n 27.

[84] Liebenberg *Socio-economic Rights: Adjudication under a Transformative Constitution* (Juta, Cape Town 2010) at 9.

[85] Demissie "In the Shadow of the Gold Mines: Migrancy and Mine Housing in South Africa" (1998) 13 *Housing Studies* 455 at 451-2.

[86] Seekings and Nattrass *Class, Race, and Inequality in South Africa* (Yale University Press, New Haven and London 2005) at 3.

[87] Id.

[88] On the distributive and corrective dimensions of socio-economic rights and their implications for judicial remedies, see Mbazira *Litigating Socio-Economic Rights in South Africa: A Choice between Corrective and Distributive Justice* (Pretoria University Law Press, Pretoria 2009).

the state to ensure dignified treatment of persons facing eviction and to be provided with alternative accommodation has been established by legislation – in the form of the PIE Act[89] – and by this Court. This is also a community that, against all odds, survived in inner city Cape Town against a sustained onslaught of forced removals and the attempted banishment of people classified by the apartheid government as Black or Coloured from this area in pursuance of spatial apartheid in terms of the various iterations of the Group Areas Act.[90] To allow their removal from that area would consolidate the legacy of apartheid rather than undermine it.

[120] I have had the pleasure of reading the ground-breaking judgment of my Colleague Mathopo J. I concur in the reasoning in his judgment but believe it is important to add complementary legal reasoning relating primarily to the role, applicability and usefulness of international legal approaches in interpreting the socio-economic rights in our Constitution in light of South Africa's ratification of the ICESCR. I am grateful in this regard for the submissions of Abahlali. I partially dissent in relation to the remedy as I am of the view that the order should include meaningful engagement with the applicants and a follow-up mechanism.

[121] In what follows, I address the following questions: first, I consider the applicable South African legal framework for deciding this case. I seek to articulate the relationship between the different elements of section 26, particularly in relation to negative and positive obligations.

[122] Secondly, I find that this Court must recognise the different legal position that applies when interpreting socio-economic rights, after South Africa ratified the ICESCR in 2015. That ratification led the ICESCR to be binding on South Africa on an international level. It would be highly undesirable for South Africa's obligations in relation to socio-economic rights to differ between the international plane and the

[89] Above n 7.

[90] These were the Group Areas Act 41 of 1950; the Group Areas Act 77 of 1957 and the Group Areas Act 36 of 1966.

domestic level. That means that this Court must seek to harmonise its approach to the interpretation of the socio-economic rights in the Constitution with the ICESCR, whose interpretation is most authoritatively contained in the General Comments of the UN Committee on Economic, Social and Cultural Rights (Committee).

[123] Thirdly, I consider a central element of this approach – the doctrine of non-retrogression. That doctrine provides a framework in relation to which we can assess the City's development policies and their failure to adopt concomitant measures to provide emergency housing to address the foreseeable displacement that would result from their desired gentrification.

[124] Fourthly, I consider the Committee's examination of the content of the right to housing which expressly references "location". I then, fifthly, briefly consider the international instruments that have raised the nexus between the obligations of the government and those of private entities in avoiding impairment of the right of access to adequate housing of the Bromwell residents.

[125] Finally, I consider the question of remedy. Given that it is not possible to prescribe a particular location for the accommodation, it seems to me necessary for this Court to require the City of Cape Town to engage meaningfully with the applicants about the suitability of the accommodation they propose. There is also a need for a follow-up mechanism for this matter to reach finality: in my view, the appropriate approach is for the High Court to retain supervision over this matter. The City must first report to the High Court on the suitability of the accommodation they identify and provide the applicants with an opportunity to respond to that report.

The applicable legal framework: evictions and alternative accommodation

[126] This case concerns the eviction of the Bromwell residents from their existing housing. That traditionally would be understood as an interference with the obligation on states and private parties not to harm existing access to housing. This Court has established a body of jurisprudence that deals with evictions and their consequences. In

seeking to prevent homelessness pursuant to an eviction, this Court has articulated an obligation on the state to provide alternative accommodation in the form of temporary emergency accommodation. In relation to people like the present occupiers without anywhere else to go, that temporary accommodation can easily become quasi-permanent, which is an important consideration when evaluating the adequacy thereof.

[127] The reasoning of the Court in these cases has been rooted in the obligations contained in section 26 of the Constitution. Section 26 reads as follows:

> "**26 Housing**
> (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."

[128] When dealing with evictions, the Court's jurisprudence articulates a close relationship between the different elements of this right. Evictions involve depriving an individual of existing housing: the Constitution requires in section 26(3) that such a deprivation take place only upon the granting of an order of Court which must consider all relevant circumstances. The PIE Act provides greater guidance on these circumstances. Interpreting this legal framework, this Court has found that such circumstances include whether or not alternative accommodation is available,[91] as well as whether the state has meaningfully engaged with the occupiers prior to eviction where the eviction is at the state's instance.[92] As can be seen, closely tied to the permissibility of an eviction – both from public and private land – is ensuring that individuals do not become homeless. The duty to provide alternative accommodation, however, involves a positive obligation on the state – that, in turn, implicates both

[91] *PE Municipality* above n 77 at para 28.

[92] *Occupiers of 51 Olivia Road* above n 50 at para 16.

sections 26(1) and 26(2): the accommodation must meet certain requirements of adequacy, be subject to the standard of "reasonableness" and be part of a programme to achieve the progressive realisation of the right in section 26(1).

[129] The *Grootboom* case dealt with a community who, after an eviction, were on a field with only plastic sheeting to cover them.[93] The Court, in that case, utilised section 26(1) to recognise that the right to adequate housing includes access to land, services and a dwelling.[94] Section 26(2) requires any government programme that provides for housing and its implementation to be evaluated against the central standard of "reasonableness".

[130] Reasonableness includes a range of factors: of central importance to this case are the elements of coherence, equality and urgency.[95] In particular, it is important to emphasise, as my Colleague Mathopo J has done, the following statement of the Court: "[t]hose whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril, must not be ignored by the measures aimed at achieving realisation of the right".[96] The Court, in that case, declared the government's housing programme to be unconstitutional to the extent that it did not provide for "those with no access to land, no roof over their heads, and who were living in intolerable conditions or crisis situations".[97] The order prompted the development of Chapter 12 of the Housing Code and the emergency housing policy of the government.

[131] The first case of this Court to engage in some detail with the framework concerning evictions was *PE Municipality*.[98] The case concerned an application for the eviction of 68 people who had erected shacks on privately owned land within the

[93] *Grootboom* above n 10 at para 11.

[94] Id at para 35.

[95] *Grootboom* summarises a range of dimensions of reasonableness at paras 39-44.

[96] Id at para 44.

[97] Id at para 99.

[98] *PE Municipality* above n 77.

municipality. Sachs J engaged, in that case, with the relationship between section 25 and section 26. In particular, he focused on section 26(3) and stated the following:

> "Section 26(3) evinces special constitutional regard for a person's place of abode. It acknowledges that a home is more than just a shelter from the elements. It is a zone of personal intimacy and family security. Often, it will be the only relatively secure space of privacy and tranquillity in what (for poor people in particular) is a turbulent and hostile world. Forced removal is a shock for any family, the more so for one that has established itself on a site that has become its familiar habitat."[99]

[132] Sachs J also emphasised that section 26(3) required courts to balance out and reconcile opposing interests in light of the circumstances of each case.[100] The availability of alternative accommodation was dealt with there in terms of section 6(3) of the PIE Act. Whilst not being an unqualified obligation, Sachs J states that "court[s] should be reluctant to grant an eviction against relatively settled occupiers unless it is satisfied that a reasonable alternative is available, even if only as an interim measure pending ultimate access to housing in the formal housing programme".[101] Moreover, even if a housing programme is theoretically sound and results in statistical success, the actual needs and circumstances of individuals must still be considered, particularly those subject to or at risk of severe material deprivation.[102]

[133] The next case to deal with the question of alternative accommodation was *Blue Moonlight*.[103] The case concerned an application to evict 86 people from private premises and whether the municipality had a duty to provide alternative accommodation in relation to private evictions. That case is highly relevant to the particular facts of this case as it also dealt with potential development by a private company in the inner city of Johannesburg.

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[99] Id at para 17.

[100] Id at para 23.

[101] Id at para 28.

[102] Id at para 29.

[103] Above n 11.

[134] The Court recognised that local government has a duty to be proactive in implementing an emergency housing programme. The Court was also faced with a challenge to the differentiation in the City of Johannesburg's policy between the provision of alternative accommodation to those evicted from public land but not to those evicted from private land. The Court recognised that the demand for housing exceeded supply, and that "any housing policy will have to differentiate between categories of people and to prioritise. The differentiation needs to be scrutinised though".[104] The framework for analysis of this differentiation was said to be the "rationality" and "reasonableness" standards in terms of section 9(1) and 26(2) of the Constitution and the Court ultimately found the differentiation to be constitutionally indefensible. As my Colleague Mathopo J has indicated, the order requiring the evictees to be provided with temporary accommodation included a requirement that the location be "as near as possible" to the building they were being evicted from.

[135] The standards governing the provision of the alternative accommodation that was ordered in the wake of the *Blue Moonlight* case were also at issue in *Dladla.*[105] That case concerned the constitutionality of rules that were set by the outsourced provider of shelter accommodation governing the use of that accommodation (the shelter rules). The majority found that the order in *Blue Moonlight* required the City of Johannesburg to provide "temporary accommodation in accordance with the general legal standards applicable to the provision of temporary accommodation".[106] It recognised that the order for temporary accommodation necessarily implicates section 26(2) of the Constitution. The reasonableness of the shelter was to be decided in terms of section 26(2) of the Constitution – however, the shelter rules themselves were to be assessed in terms of whether they infringed other rights in the Constitution. The rules in question were found unjustifiably to infringe the rights to dignity, freedom

[104] Id at para 86.

[105] Above n 36.

[106] Id at para 39.

and security of the person and to privacy.[107] That case illustrated the manner in which giving effect to the right to have access to adequate housing is intimately connected with the realisation of other rights in the Constitution.

[136] What emerges from this case law is that the eviction of people who lack the means to remain in their existing abodes implicates a number of intertwined legal principles. Our jurisprudence has evolved to a point where such an eviction may only be ordered if there is the provision of alternative accommodation for the people in question. Such alternative accommodation must meet certain standards of "adequacy" and be pursuant to a reasonable government programme that makes provision for accommodation to evictees.

[137] It is important to recognise, in this case, that we are dealing with an eviction of a group of people who have resided on the properties in question for a lengthy period. At the time the case was launched, many individuals had resided on the properties their entire lives – in 2016, some had resided there for between approximately 10 and 76 years. The deprivation of rights entailed by such an eviction is not only the loss of home – though that is in itself of momentous significance. It is also the deprivation of ties to the community in which the residents are embedded as well as the services they receive within that community such as education and healthcare. The circumstances of people whose lives and ties to particular localities are deep and long thus need to be factored into any assessment of the adequacy of alternative accommodation and the reasonableness of the government programmes pursuant thereto. In considering the approach to be adopted in this case, in my view, strong guidance can be gained by considering the applicable international law.

[107] The second judgment of Cameron J found that the rules had to be assessed in terms of the reasonableness standard in section 26(2) of the Constitution: see id at para 68.

International law and South Africa's ratification of the ICESCR

[138] Section 39(1)(b) of the Constitution expressly requires that when courts interpret the Bill of Rights, they must consider international law. In *Grootboom*, Yacoob J said the following:

> "The relevant international law can be a guide to interpretation but the weight to be attached to any particular principle or rule of international law will vary. However, where the relevant principle of international law binds South Africa, it may be directly applicable."[108]

[139] Directly relevant to the interpretation of the socio-economic rights in the Constitution is the ICESCR and the work of the United Nations Committee on Economic, Social and Cultural Rights. It is important to recognise that the legal position of this Court since 2015 is different to the position of the Courts in the early socio-economic rights cases. In *Grootboom*, Yacoob J recognised that, at the time, South Africa had only signed the ICESCR but not ratified it.[109] The signing of a treaty is determined by the national Executive in terms of section 231(1) and does not itself render the treaty binding on the Republic. It has certain legal consequences specified in the Vienna Convention on the Law of Treaties – namely, it places an obligation on the state not to act in a way that is contrary to the objects and purpose of the treaty[110] and not to render future compliance impossible.[111]

[140] Section 231(2) of the Constitution deals with ratification and states the following: "an international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces". The act of ratification renders the treaty legally binding on the Republic

[108] *Grootboom* above n 10 at para 26.

[109] Id at fn 29.

[110] Vienna Convention on Law of Treaties, 23 May 1969 at para 18.

[111] Report of the International Law Commission, 59th session (7 May-5 June and 9 July-10 August 2007) Supplement No. 10 (A/62/10) (2007) at 67. See also Coutsoudis and Du Plessis "We are all International Lawyers; Now What? Taking Seriously the Constitutional Injunction to Integrate International Law Obligations into South African Law" (2020) 10 *Constitutional Court Review* 155 at 173.

and indicates clear parliamentary approval of the treaty by the branch of state elected by the people. It thus places a democratic check on the Executive's power prior to rendering a treaty binding on the Republic.[112]

[141] In *Glenister*,[113] the majority of the Court held the following in this regard:

> "As noted earlier, the main force of section 231(2) is in the international sphere. An international agreement approved by Parliament becomes binding on the Republic. But that does not mean that it has no domestic constitutional effect. The Constitution itself provides that an agreement so approved "binds the Republic". That important fact, as we shortly show, has significant impact in delineating the State's obligations in protecting and fulfilling the rights in the Bill of Rights."[114]

[142] The decision to ratify clearly indicates parliamentary approval of the treaty and an intention to render it binding on the Republic.[115] Unless clearly in breach of our Constitution, this Court must thus give effect to that parliamentary intention and seek to harmonise our own domestic law with the relevant international law.[116] Indeed, this approach was clearly affirmed in *Glenister* when it stated the following:

> "[O]ur Constitution takes into its very heart obligations to which the Republic, through the solemn resolution of Parliament, has acceded, and which are binding on the Republic in international law, and makes them the measure of the state's conduct in fulfilling its obligations in relation to the Bill of Rights."[117]

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[112] Strydom and Hopkins "International Law" in Woolman et al (eds) *Constitutional Law of South Africa* 2 ed Service 6 (Juta, Cape Town 2014) at 9-10. On the separation of powers in this process, see Meyersfeld "Domesticating International Standards: The Direction of International Human Rights Law in South Africa" (2013) 5 *Constitutional Court Review* 399; and Coutsoudis and Du Plessis id at 172.

[113] *Glenister v President of the Republic of South Africa* [2011] ZACC 6; 2011 (3) SA 347 (CC); 2011 (7) BCLR 651 (CC) (*Glenister*).

[114] Id at para 182.

[115] See Sucker "Approval of an International Treaty in Parliament: How Does Section 231(2) 'Bind the Republic'?" (2013) 5 *Constitutional Court Review* 417.

[116] Liebenberg "South Africa and the International Covenant on Economic, Social and Cultural Rights: Deepening the Synergies" (2020) 13 *South African Judicial Education Journal* 12 at 39; and Coutsoudis and Du Plessis above n 113 at 172.

[117] *Glenister* above n 113 at para 178.

[143] Similarly, in *Sonke*,[118] this Court considered the effect of ratification by South Africa of the Optional Protocol to the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.[119] It held:

> "[T]he effect of South Africa's ratification of any international instrument is to bind the Republic on the international plane and to lend particular interpretative significance to the provisions of that instrument when interpreting rights in the Bill of Rights".[120]

[144] When ratifying the ICESCR in 2015, South Africa also bound itself to take seriously the mechanisms established therein for the interpretation and enforcement of that treaty. For purposes of meeting its obligations in terms of the ICESCR, the United Nations Economic and Social Council (ECOSOC) established the Committee on Economic, Social and Cultural Rights.[121] That Committee has developed a body of General Comments that seek to fill out the content of the obligations in the ICESCR; it also makes concluding observations on state reports relating to the fulfilment of their obligations in terms of the ICESCR. The approach adopted by the Committee thus affects how South Africa reports on its obligations in relation to the realisation of the socio-economic rights contained in the ICESCR.

[145] By ratifying the ICESCR, South Africa is bound to give effect to its obligations in good faith[122] – moreover, it may not use its own internal law to justify failing to give effect to its international obligations.[123] Prior to ratification by Parliament, the Rules of the National Assembly provide that an explanatory memorandum must be produced which includes an opinion by a legal advisor to the effect that the agreement is

[118] *Sonke Gender Justice NPC v President of the Republic of South Africa* [2020] ZACC 26; 2020 JDR 2619 (CC); 2021 (3) BCLR 269 (CC).

[119] Optional Protocol to the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by UN General Assembly Resolution 57/199, 18 December 2002.

[120] *Sonke* above n 118 at para 60.

[121] ECOSOC Resolution 1985/17.

[122] Article 26 of the Vienna Convention on the Law of Treaties above n 110.

[123] Id at Article 27.

consistent with the domestic law of South Africa, including the Constitution and other international agreements to which South Africa is a party.[124] It is highly undesirable for there to be one approach adopted towards South Africa's obligations at the international level and another approach adopted towards the interpretation of the socio-economic rights in our Constitution. It is for that reason that our Constitution includes the injunction in section 39(1)(b) to consider international law in the interpretation of the Bill of Rights and section 233 requires preference, in the interpretation of legislation, for any reasonable interpretation that is consistent with international law.[125]

[146] Whilst not directly binding, the approach of UN Committees is accorded "considerable weight in determining the meaning of a relevant right and the existence of a violation".[126] This approach was confirmed by the International Court of Justice which found that, affording significant weight to the interpretations of UN Committees established specifically to supervise the implementation of a treaty would "achieve the necessary clarity and the essential consistency of international law, as well as legal security, to which both the individuals with guaranteed rights and the States obliged to comply with treaty obligations are entitled".[127] As has been mentioned, the approach of the Committee also provides the basis for reporting on the international obligations in the ICESCR.

[147] Given the duties in our own Constitution, these interpretations of the ICESCR and South Africa's obligations pursuant thereto must be given serious attention by this Court. The ratification of the ICESCR – and the seriousness with which this must be

[124] Rules 341(1) and (2)(b) of the Rules of the National Assembly.

[125] Section 233 of the Constitution provides:

> "**233 Application of international law**
>
> When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law."

[126] International Law Association "Final Report on the Impact of Findings of the United Nations Human Rights Treaty Bodies" in International Law Association, Report of the Seventy-First Conference (International Law Association 2004) at para 175.

[127] *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of Congo)*, Merits, Judgment, ICJ Reports 2010 at para 66.

approached[128] – may mean that, in the future, it will be necessary to consider how to harmonise this Court's socio-economic rights jurisprudence with the approach of the UN Committee where differences have emerged to avoid a divergence between South Africa's international obligations and those at the domestic level.[129] In the context of this case, I will focus on two elements of the work of the Committee where synergies are clearly apparent and can assist this Court in interpreting our own Constitution: the Committee's approach to "progressive realisation" and particularly the duty not to adopt non-retrogressive measures; and its direct engagement with the question of locality. I also consider other instruments of international law, soft law and comparative law where relevant in relation to these dimensions.[130]

The duty not to adopt retrogressive measures

[148] General Comment 3[131] of the UN Committee sought to address the nature of state parties' obligations in terms of the ICESCR. A central concern of the Committee was that the notion of "progressive realisation" – language which our Constitution shares – could deprive the rights in the ICESCR of substantive content as their realisation could be continually deferred by state parties. To avoid this result, the Committee articulated a number of obligations on states that flowed from the ICESCR. The Committee finds that the duty of progressive realisation—

> "imposes an obligation to move as expeditiously and effectively as possible towards that goal. Moreover, any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference

[128] This was confirmed in *Sonke* above n 118 at para 57.

[129] The clearest case of divergence has been in relation to the minimum core obligation – opportunities may exist to harmonise the two approaches through the notion of "reasonableness" as was foreshadowed in *Grootboom* above n 10 at para 33: see *Liebenberg* above n 116 at 30-2.

[130] I will indicate the status and authority of these documents, accepting the point made by Tuovinen "What to do with International Law: Three Flaws in *Glenister*" (2013) 5 *Constitutional Court Review* 435 at 443-7 that not all texts engaging with international law have the same weight. Where useful, they can nevertheless be utilised as interpretive aids, assisting us in determining the meaning of our own constitutional provisions.

[131] General Comment No. 3 on the Nature of States Parties Obligations (Article 2, para 1) UN Doc E/1991/23 (1991).

> to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources."[132]

[149] The Committee has confirmed this to be its general approach in a number of its later General Comments and recognised there to be a strong presumption against retrogressive measures being taken by member states. Where such measures are adopted, they must be subject to a stringent justification which includes a careful consideration of all alternatives.[133] In General Comment 19[134] on the right to social security, the Committee elaborates on the factors it will take into account in deciding whether the burden to justify any retrogressive measures is met:

> "The Committee will look carefully at whether: (a) there was reasonable justification for the action; (b) alternatives were comprehensively examined; (c) there was genuine participation of affected groups in examining the proposed measures and alternatives; (d) the measures were directly or indirectly discriminatory; (e) the measures will have a sustained impact on the realization of the right to social security, an unreasonable impact on acquired social security rights or whether an individual or group is deprived of access to the minimum essential level of social security; and (f) whether there was an independent review of the measures at the national level."[135]

Whilst this General Comment relates particularly to the right to social security, the approach contained therein does not appear to have been specifically confined to this right and has been, for the most part, applied as the approach of the Committee in some

[132] Id at para 9. Approved of in *Grootboom* above n 10 at para 45.

[133] See, amongst others, General Comment No. 13: the Right to Education (Article 13 of the Covenant) UN Doc E/C.12/1999/10 (1999) at para 45; General Comment No. 14: the Right to the Highest Attainable Standard of Health (Article 12 of the Covenant) UN Doc E/C.12/2000/4 (2000) at para 32; and General Comment No. 15: the Right to Water (Articles 11 and 12 of the Covenant) UN Doc E/C.12/2002/11 (2003) at para 19. For an overview of the doctrine, see Liebenberg "Austerity in the Midst of a Pandemic: Pursuing Accountability through the Socio-economic Doctrine of Non-retrogression" (2021) 37 *SAJHR* 181 at 188.

[134] General Comment No. 19: The Right to Social Security (Article 9 of the Covenant) UN Doc E/C.12/GC/19 (2008).

[135] Id.

of its other documents such as its Statement on Public Debt, Austerity Measures and the ICESCR.[136]

[150] Subsequently, the UN Committee has had reason to consider the application of this doctrine in communications under the Optional Protocol[137] – which South Africa has neither signed nor ratified. The communications nevertheless help us to comprehend how the Committee approaches the application of the above-mentioned standards. In *Djazia and Bellili v Spain*,[138] the Committee was faced with an eviction when the individuals concerned could not pay their rent. The state had not provided them with any adequate guarantee of alternative accommodation. One important dimension of the case was the fact that the government had sold off a substantial amount of public housing to investors for private housing – that had reduced the housing stock available to assist those in need of alternative accommodation. The Committee found that the sale of such public housing constituted a retrogressive measure and that the state failed to show the necessity or proportionality of the measure in question.[139] It thus led the Committee to reject Spain's claim that it could not provide alternative accommodation to the complainants.[140]

[151] The African Commission on Human and People's Rights[141] has itself recognised the doctrine and been influenced by the approach of the Committee in its Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the

[136] Statement by the Committee on Economic, Social and Cultural Rights: Public Debt, Austerity Measures and the International Covenant on Economic, Social and Cultural Rights, UN Doc E/C.12/2016/1 (2016) at para 4. For an analysis of some of the changes and nuances in the formulation of the doctrine by the Committee, see Warwick "Unwinding Retrogression: Examining the Practice of the Committee on Economic, Social and Cultural Rights" (2019) 19 *Human Rights Law Review* 467 at 478-80.

[137] Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, 10 December 2008.

[138] Communication No. 5 of 2015, UN Doc E/C.12/61/D/5/2015 (2017).

[139] Id at para 17.5-17.6.

[140] On the application of the doctrine of non-retrogression in Spain, see Casla "The Rights We Live in: Protecting the Right to Housing in Spain through Fair Trial, Private and Family Life and Non-Retrogressive Measures" (2016) 20 *International Journal of Human Rights* 285.

[141] Above n 28.

African Charter on Human and Peoples' Rights.[142] Paragraph 20 recognises that "[m]easures that reduce the enjoyment of economic, social and cultural rights by individuals or peoples are prima facie in violation of the African Charter".

[152] The doctrine has not only been developed in international law but also has been utilised in comparative law.[143] The Colombian Constitutional Court, for instance, has directly adopted the doctrine in a case relating to the right to a healthy environment and stated the following:

> "The **mandate of progressiveness**, which arises from article 2.1 of the ICESCR, has two complementary dimensions: on the one hand, the recognition that the full satisfaction of the rights established in the Treaty will take place in a *gradual* manner. On the other hand, it also implies a second element, namely, that of *progress*, consisting of the State obligation to improve the conditions for the enjoyment and exercise of economic, social and cultural rights. Thus the Committee on Economic, Social and Cultural Rights has stated that "*the concept of progressive realization constitutes a recognition of the fact that the full realization of economic, social and cultural rights generally cannot be achieved in a short period of time*". This last understanding implies, as a counterpart, **the State's obligation of non-regression**, which has been interpreted doctrinally and jurisprudentially in the sense that once a certain level of protection has been reached, '*the broad freedom of configuration of the legislator in matters of social rights is restricted, at least in one aspect: any regression with respect to the level of protection achieved is constitutionally problematic since it precisely contradicts the mandate of progressiveness*'. This is not only applicable with respect to the activity of the Legislator but also with respect to the performance of the Administration in the design and execution of public policies in matters of economic, social and cultural rights, as well as any branch of the public powers with competence in the matter."[144] (Emphasis in original.)

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[142] Adopted on 24 October 2011.

[143] For a list of examples detailing the widespread uptake of the doctrine both in international law and domestic constitutional law, see Nolan et al "Two Steps Forward, No Steps Back? Evolving Criteria on the Prohibition of Retrogression in Economic, Social and Cultural Rights" in Nolan (ed) *Economic and Social Rights after the Global Financial Crisis* (Cambridge University Press, Cambridge 2014) at 140-4.

[144] C-443 of 2009 at section VI (4) (my translation) – original Spanish quoted here:

> "El **mandato de progresividad,** que se desprende del artículo 2.1 del PIDESC, tiene dos contenidos complementarios, por un lado el reconocimiento de que la satisfacción plena de los derechos establecidos en el pacto supone una cierta *gradualidad.* Por otra parte, también

[153] This Court has accepted that the doctrine of non-retrogression applies in our law.[145] The doctrine has also been referenced and utilised in *Equal Education*[146] and *SA Childcare*.[147]

[154] The above analysis has clarified that the doctrine of non-retrogression has two elements:[148] the first requires asking whether there has been a retrogression from existing programmes or policies. In assessing the first element, courts must have regard not only to detrimental changes in law, regulations or government policy but consider substantively the concrete effects and impact of those changes on the ability of individuals to enjoy their rights.[149] In assessing retrogression, courts must be particularly attentive to the experience of individuals – as attested to in court papers – affected by these changes in law, regulations or policy. The focus at this stage is on the

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> implica un segundo sentido, el de *progreso*, consistente en la obligación estatal de mejorar las condiciones de goce y ejercicio de los derechos económicos, sociales y culturales. Así el Comité de Derechos Económicos Sociales y Culturales ha expresado que "*el concepto de realización progresiva constituye un reconocimiento del hecho de que la plena realización de los derechos económicos, sociales y culturales, generalmente no podrán lograrse en un corto periodo de tiempo"*. Esta última comprensión implica como contrapartida la **obligación estatal de no regresividad**, la cual ha sido interpretada doctrinal y jurisprudencialmente en el sentido que una vez alcanzado un determinado nivel de protección *"la amplia libertad de configuración del legislador en materia de derechos sociales se ve restringida, al menos en un aspecto: todo retroceso frente al nivel de protección alcanzado es constitucionalmente problemático puesto que precisamente contradice el mandato de progresividad"*, lo cual no sólo es aplicable respecto a la actividad del Legislador sino también respecto a la actuación de la Administración en el diseño y ejecución de políticas públicas en materia de derechos económicos sociales y culturales al igual que cualquier rama de los poderes públicos con competencias en la materia."
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> See also C-298 of 2016.

[145] *Grootboom* above n 10 at para 45.

[146] *Equal Education v Minister of Basic Education* 2021 (1) SA 198 (GP) at para 46.

[147] *SA Childcare (Pty) Ltd and Others v Minister of Social Development and Others*, unreported judgment of the Gauteng Division of the High Court, Pretoria, Case No 36962/2020 (20 October 2020) at para 47. This case was, however, overturned in *Minister of Social Development v SA Childcare (Pty) Ltd* [2022] ZASCA 119; 2022 JDR 2535 (SCA) but not in relation to the doctrine of non-retrogression.

[148] These are similar to the general two-stage approach adopted by this Court: the first stage involves determining whether a right has been infringed; and the second stage whether that infringement is justifiable or not in terms of section 36(1) of the Constitution. In this context, the enquiry is conducted in terms of section 26(2) of the Constitution.

[149] Retrogression involves both normative and empirical dimensions – a distinction made in *Nolan et al* above n 143 at 123-4. For some of the complexities involved in determining retrogression and why they are not insurmountable, see *Warwick* above n 136 at 471-5.

detrimental impact of law, regulations or policy on the rights of an individual or community rather than on whether the state intended the retrogressive effect to occur.[150]

[155] The second dimension then requires consideration of whether the retrogressive measure can be justified – in our constitutional framework, that would involve an assessment of whether such a measure met the requirements of reasonableness. This Court will require a particularly weighty justification – including a consideration of the factors identified in our case law, complemented by some of the factors mentioned in the General Comments – to accept that a retrogressive measure is reasonable. The foreseeability of the retrogressive effects will be an important component in assessing whether the government's response was reasonable.

[156] Has there been a retrogressive measure in this case? In deciding on this question, it is also useful to refer to the Basic Principles and Guidelines on Development-Based Evictions and Displacement adopted by the United Nations Human Rights Council in 2007 (2007 Basic Principles).[151] Though not binding on South Africa, this instrument was produced by an independent expert who engaged widely in developing the document. It also references the international law obligations that are binding as well as the wider context in which retrogression has to be understood.

[157] The 2007 Basic Principles identify development-based evictions as those "planned or constructed under the pretext of serving the 'public good' such as those linked to . . . land-acquisition measures associated with urban renewal, slum upgrades, housing renovation, city beautification, or other land-use programmes (including for agricultural purposes)".[152] In specifying measures to prevent evictions, the 2007 Basic Principles go on to recognise the following state obligations:

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[150] See *Warwick* id at 477 for reasons why the focus should not be on any malign intention of the state. See also Nolan "Putting ESC-based Budget Analysis into Practice: Addressing the Conceptual Challenges" in Nolan et al (eds) *Human Rights and Public Finance: Budgets and the Promotion of Economic and Social Rights* (Hart, Oxford 2013) at 47.

[151] Annex I of the Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, UN Doc A/HRC/4/18 (2007).

[152] Id at para 8.

> "29. States should carry out comprehensive reviews of relevant strategies, policies and programmes, with a view to ensuring their compatibility with international human rights norms. In this regard, such reviews must strive to remove provisions that contribute to sustaining or exacerbating existing inequalities that adversely affect women and marginalized and vulnerable groups. Governments must take special measures to ensure that policies and programmes are not formulated or implemented in a discriminatory manner, and do not further marginalize those living in poverty, whether in urban or rural areas.
>
> 30. States should take specific preventive measures to avoid and/or eliminate underlying causes of forced evictions, such as speculation in land and real estate. *States should review the operation and regulation of the housing and tenancy markets and, when necessary, intervene to ensure that market forces do not increase the vulnerability of low-income and other marginalized groups to forced eviction. In the event of an increase in housing or land prices, States should also ensure sufficient protection against physical or economic pressures on residents to leave or be deprived of adequate housing or land*."[153] (Emphasis added.)

[158] The 2007 Basic Principles here identify the phenomenon common across the world whereby local authorities preside over a process in terms of which economic forces push individuals out of areas zoned for "urban renewal". A later document – also non-binding in nature – was produced by another Special Rapporteur which articulates Guiding Principles on Security of Tenure for the Urban Poor (2013 Guidelines),[154] which was also approved by the United Nations Human Rights Council. This document identifies the need to avoid displacement and in so doing for government planners to promote inclusive urban planning which is "instrumental in promoting integrated communities and ensuring that well-located housing is available to the poor".[155]

[153] Id at paras 29-30.

[154] Guiding Principles on Security of Tenure for the Urban Poor, UN Doc A/HRC/25/54 (2013).

[155] Id at para 46.

[159] The economic processes identified in these documents were clearly at work in this case. The affidavit produced by Ms Royston, a professional development planner is useful in this regard. She discusses the trend of gentrification in the areas of Woodstock and Salt River, which increasingly moved from being an industrial, residential and community hub to become a corporate centre of retail and entertainment as well as a place for investment in property. Investors who developed new buildings or refurbished existing ones in the area benefitted from tax breaks in terms of a tax incentive scheme created by National Treasury for Urban Development Zones and given effect to via amendments to the Income Tax Act.[156] That scheme was not utilised alongside other policy tools to enhance inclusive development but rather led to the area having more upmarket housing developments which attracted those with a higher income who could afford higher rentals or mortgage payments.

[160] The City also re-zoned the area in a way that allowed for more dense development and higher buildings. That re-zoning led developers to seize the opportunity to build in a way that was not previously accessible to them. Once again, this resulted in more expensive housing, with the result that owners of buildings were incentivised to sell and rent for leasing accommodation was increased – forcing those with less income out of these areas.

[161] Whilst gentrification is a phenomenon in many cities, it was clearly foreseeable that the incentives and zoning changes in this case would have the effect of raising property prices, and thus rent for those who leased these properties. It was also foreseeable that existing residents of these areas, who are the most seriously economically disadvantaged, would be unable to afford that rent and would thus be forced to move elsewhere, potentially through eviction, as existing owners sell their buildings. Gentrification without putting in place policies to mitigate its negative consequences will thus inevitably lead to a loss of existing access to adequate housing

[156] See [6] and n 6 in the first judgment.

for those most seriously economically disadvantaged. Policies that promote gentrification would thus be retrogressive in the absence of measures to counteract the potential displacement of the most socio-economically disadvantaged residents. They also fail to be inclusive in the manner outlined in the 2013 Guidelines above.

[162] The City's encouragement of gentrification and the failure to adopt policies that mitigated its effects cemented the socio-economic exclusion of those who are most vulnerable. The social housing programme of the City did not focus on the least advantaged but those who were able to afford social housing. The City provided for no emergency housing in the inner city and so had no policies in place to ensure that residents could remain within the communities in which they were embedded. The areas identified for relocating these vulnerable residents would have severed the ties these individuals had with their existing communities – as will be further explicated below, as such, they were not "adequate". No account was taken of their ability to earn a living only within the surrounds they were accustomed to, the treatments they were undergoing at local clinics and hospitals and the connectedness of the children to their local schools. The impact on individuals of being forced from their homes due to this combination of forces is movingly articulated in the affidavits attested to by the Bromwell residents.

[163] In short, the City's policies which, foreseeably, were destined to result in gentrification and yet failed to provide adequately for the effects thereof on the most vulnerable, constitute a retrogressive measure in the realisation of the right to have access to adequate housing.

[164] I agree, for the reasons provided by my Colleague Mathopo J, that the justifications provided by the City fail to meet the stringent burden required to justify such retrogressive measures as reasonable. The City failed to convince this Court that it had any adequate policy framework to prevent gentrification from leading to a retrogression in the right to adequate housing – it thus fails at this first hurdle to show that there is a plan which can be tested against the reasonableness standard. Its

justifications often simply assumed what it had to prove – that those who are being evicted and are at risk of being homeless cannot be housed in or near the inner city. It gave no comprehensive justification as to why this must be the case, particularly where the displacement of the residents is a foreseeable result of the City's own policies resulting in gentrification.

[165] The City initially denied that there were any sites on which to provide such accommodation but then changed its approach to recognise that there were sites for "transitional housing". That lent credence to the impression that it did not strongly engage with the alternative possibility of providing emergency accommodation in the inner city. To meet the standard of justification required in relation to a retrogressive measure, the City was obliged to prove that it had carefully considered all reasonable alternatives in the context of its available resources.[157] As my Colleague Mathopo J writes, the City made broad claims about the lack of available resources without providing this Court with the clear information it would need to meet its burden to justify those claims. To justify an infringement of socio-economic rights, the state must provide an adequate evidentiary basis for its claims that is both sufficiently detailed and appropriate to the circumstances – for instance, the greater the urgency of the needs or the vulnerability of the individuals concerned, the stronger the evidence that will have to be provided to meet the burden of justification.[158]

[166] After initially rejecting the possibility of providing any form of temporary accommodation in the inner city, the City offered "transitional" housing in the inner city to residents of an informal settlement at Pine Road and Salt River Market. Transitional housing was discussed in the record as being accommodation for people who need a transitional space in which to reside due to their existing location being ear-marked for

[157] See above n 133 – General Comment No. 13 at para 45; General Comment No. 14 at para 42; General Comment No. 15 at para 19; and General Comment No. 19 above n 134 at para 42.

[158] This accords with a more general approach to the justification of infringements of fundamental rights. Alexy *A Theory of Constitutional Rights* trans: Rivers (OUP, Oxford 2002) at 418 has termed this the "second law of balancing': "[t]he more heavily an interference in a constitutional right weighs, the greater must be the certainty of its underlying premises".

housing development. When announcing such a programme in a media release, Councillor Brett Herron described it as follows: "[p]art of the undertaking is to, within our means, provide those who are facing emergency situations with safe, decent and affordable temporary housing as close as possible to where they are working". In a feasibility study by the City concerning the development of transitional housing at the Pickwick site, that notion was defined as follows:

> "Housing for individuals and households that is temporary but which helps them to prepare their life circumstances to move to more permanent housing solutions. In this instance, it is envisaged that for some residents it will provide temporary housing as they transition to more permanent options although it is recognised that, because of the shortage of alternatives for low income households, some households are likely to remain on a semi-permanent basis."[159]

[167] It is difficult to see how these definitions of transitional housing differ in any meaningful way from temporary emergency accommodation – the latter is also not designed to be permanent. The Bromwell residents are also being evicted due to housing development – though of a private rather than a public nature and so also need transitional housing during this period. This Court in *Blue Moonlight* found that providing alternative accommodation in relation to evictions of a public nature but not of a private nature was unreasonable: "[t]o the extent that eviction may result in homelessness, it is of little relevance whether removal from one's home is at the instance of the City or a private property owner".[160] The same point applies in this context: the Bromwell residents are similarly situated to the residents of Pine Road and Salt River Market and will also experience severe dislocation if removed far away from the focal point of their lives.

[168] The City seems to envisage transitional housing would involve the payment of rent according to affordability and be in more formal structured accommodation – yet,

[159] CRU Report in respect of the Feasibility for the Development of "Transitional" Housing Project – Pickwick Site, City of Cape Town (January 2017) at 5.

[160] *Blue Moonlight* above n 11 at para 95.

it recognises subsidies will have to be provided to those who cannot afford the rent and, so, in this respect there is no real substantive difference to emergency housing. The City also appears to conceive of transitional housing as leading residents ultimately to move to social housing – yet, it is not clear how that would happen if individuals are unable to increase their earning power and reach the earning thresholds required for social housing. The City, indeed, seems to accept the need for subsidisation and that the inability of individuals to afford the required amounts for social housing would lead individuals to have to spend longer periods in transitional housing. In this respect, too, there is no clear differentiation between transitional and emergency housing. It is for these reasons that the High Court found that the differentiation between the Bromwell residents – who would face relocation far away from the inner city – and the residents of Pine Road and Salt River Market – who would be relocated in the inner city – was arbitrary and, consequently, unreasonable. I agree with this finding.

[169] Consequently, the City failed to provide an adequate justification for the lack of a policy framework to provide emergency accommodation in the inner city for those who would be displaced due to the City's policy that resulted in urban gentrification. Its approach also failed to justify its differential treatment of those eligible for transitional housing in the inner city and those who would only be entitled to emergency accommodation far away. Its lack of a programme to provide emergency accommodation in the inner city, therefore, falls to be declared unconstitutional.

[170] Apart from the doctrine of non-retrogression, this Court is also required to consider whether, given a background of long-standing occupation of premises by the Bromwell residents, the City is required to consider location in the provision of emergency accommodation. In my view, location matters in two further respects: in understanding what constitutes "adequate" temporary accommodation for the Bromwell residents; and in evaluating the reasonableness of the City's conduct in relation to these residents.

The right to have access to adequate housing and reasonableness

[171] The primary right in section 26 is defined as the right to have access to adequate housing. This Court in *Grootboom* provided us with some understanding of what constitutes adequate housing. It stated that what is required is the following: "there must be land, there must be services, there must be a dwelling".[161] In the context with which we are concerned here – that of urban housing in the inner city – adequate housing would not necessarily entail discreet plots of land but could include accommodation in a unit in a building.

[172] Further guidance as to what constitutes adequate housing can be obtained from the UN Committee's General Comment 4.[162] The Committee there recognised that housing involved the "right to live somewhere in security, peace and dignity".[163] The Committee outlines seven dimensions of "adequacy" that must be considered: legal security of tenure; availability of services, materials, facilities and infrastructure; affordability; habitability; accessibility; *location* and cultural adequacy.[164] In relation to location, the Committee states the following:

> "Adequate housing must be in a location which allows access to employment options, health-care services, schools, childcare centres and other social facilities. This is true both in large cities and in rural areas where the temporal and financial costs of getting to and from the place of work can place excessive demands upon the budgets of poor households. Similarly, housing should not be built on polluted sites nor in immediate proximity to pollution sources that threaten the right to health of the inhabitants."[165]

[173] Whilst the Committee was concerned to articulate broad, universal standards of adequacy, it is necessary to ensure adequacy is assessed in relation to the particular circumstances before a court. For individuals, like the Bromwell residents, with very

[161] *Grootboom* above n 10 at para 35.

[162] General Comment No. 4 above n 29.

[163] Id at para 7.

[164] Id at para 8.

[165] Id at para 8(f).

limited income they mostly acquire in the inner city, long-standing ties to particular communities, and access to services in those communities, accommodation far-removed from the long-standing focal point of their lives may well not be adequate.

[174] It is important here to stress the social dimension of human beings. This dimension is emphasised by aphorisms such as "a person is a person through other people" which gives expression to the African philosophy of *Ubuntu* and places emphasis on the fact that individuals are shaped through their relations with others.[166] Developing a home-grown approach to socio-economic rights, means that we must recognise front and centre the relationships between people, the community ties and networks within which they are embedded. The deliberate dislocation of individuals, and families from their communities thus constitutes a serious harm to their sense of self, well-being and thus dignity. Given these harms, there is a strong burden of justification on the state where its policies lead to the severance of people from their social and community networks.

[175] Nevertheless, neither this judgment, nor the first judgment hold that people can automatically claim a right to accommodation in a particular location. Section 26(2) allows the state the possibility of justifying as reasonable a policy of offering people emergency accommodation outside their existing communities. That could occur, amongst other reasons, if there was an absolute lack of space in which to provide emergency housing for people in the inner city or the conditions of any existing accommodation were such that they posed real health and safety hazards for those people.[167]

[166] See Mokgoro J's elaboration on this aphorism in *S v Makwanyane* [1995] ZACC 3; 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) at paras 307-8.

[167] In these cases, there should nevertheless be meaningful engagement with the people to address their relocation as this Court has indicated in *Occupiers of 51 Olivia Road* above n 50 at para 18; and a consideration of other measures – such as a transport allowance – to address the consequences of their displacement (see *Thubelisha Homes* above n 12 at paras 11.4-6 of the order).

[176] The City in this case clearly took a policy decision not to provide any emergency housing in the inner city and to focus on social housing which provided for those with greater financial capacity than most of the Bromwell residents. As my Colleague Mathopo J has discussed, it then engaged in several about-turns, creating a category of "transitional housing" which, as has already been examined, is hard to distinguish from emergency housing. Through its development of transitional housing in the inner city, it effectively admitted that there was no absolute scarcity of sites available for emergency housing. The City's policy became increasingly incoherent, whilst at the same time still failing adequately to make provision for the emergency accommodation of those being displaced through the process of gentrification. In light of the urgency and importance of the interests of long-standing residents – such as the present applicants – to remain in the inner city and the failure to provide any strong justification or evidence for why that was not possible, the City's approach to emergency accommodation and its application in the present case was unreasonable – a matter that is more comprehensively discussed in the first judgment.

[177] That conclusion is buttressed by the corrective dimension of socio-economic rights which has a particular relevance in South Africa. The separation of South Africans into separate areas of residence according to race was part of the destructive design of the apartheid regime when it enacted the successive Group Areas Acts.[168] The Constitution must be understood to seek to transform this legacy of spatial apartheid. When assessing reasonableness in section 26(2), this Court must thus take into account whether the government policy or action in question helps to address the legacy of past inequality and injustice or rather entrenches that legacy. The inner city of Cape Town itself experienced a great historical trauma with the displacement of residents of District Six and forced removals to separate "Black" and "Coloured" areas at the periphery of the City. Ngcukaitobi AJ in

[168] Above n 90. People designated as "Black", "Coloured" or "Indian" were also allocated less desirable areas – including in regard to location – than those people designated as "White".

District Six Committee[169] clearly describes the historical background and how the "destruction of the social fabric of this community led to the breakdown in community structures and threw people into economic destitution".[170]

[178] I agree with my Colleague Mathopo J that to allow the Bromwell residents to be forced out of the inner city by economic forces – some of which involved deliberate actions – in post-apartheid South Africa would be to exacerbate this legacy rather than undermine it. It would lead both to considerable economic hardship and social dislocation. The City thus has a clear duty – emerging from sections 9(2) and 25(5) of the Constitution amongst other provisions – to plan for development in such a way that seeks to address this bitter historical legacy and undermines the rigid divisions of race and class that existed in the past.

[179] It is not the role of this Court to prescribe policies to the government but, when evaluating reasonableness, it must consider whether the City has carefully considered alternatives, including those that have been adopted elsewhere, to develop an inclusive approach to housing development that addresses the legacy of spatial apartheid.[171] The various documents addressing international law referenced in this judgment provide some examples globally of such alternatives – for instance, where planning permission is only granted for the upgrading of buildings provided there is a contribution to low-cost housing initiatives in the same area or a percentage of that upgraded building is utilised for low-cost housing.[172] Whilst the discretion of the City remains in developing the exact policies it will adopt, these are the kinds of measures that could ensure that individuals who are economically disadvantaged are not left out of plans for the upgrading of buildings and inner cities.

[169] *District Six Committee v Minister of Rural Development and Land Reform* [2019] ZALCC 13; [2019] 4 All SA 89 (LCC).

[170] Id at para 23.

[171] The duty to carefully consider alternatives emerges from the General Comments quoted at [149] above.

[172] See, for instance, *2013 Guidelines* above n 154 which describe inclusive urban planning as involving these measures at para 46.

The obligations of the private sector

[180] The focus of this case has been on the obligations of the City in the provision of emergency accommodation. At the same time, it cannot be ignored that the dislocation of the Bromwell residents occurs pursuant to forces that are driven by private sector investment: the acquisition of their homes by a developer and the resulting application for eviction. This is not a phenomenon exclusive to South Africa: the Guidelines for the Implementation of the Right to Adequate Housing of 2020[173] (2020 Guidelines), a non-binding instrument approved by the United Nations Human Rights Council, recognises a global trend where "[i]nstitutional investors buy massive amounts of affordable and social housing (sometimes entire neighbourhoods), displacing lower-income families and communities".[174]

[181] Our Constitution imposes obligations on both the state and private entities. Section 7(2) of the Constitution requires the state to "respect, protect, promote and fulfil the rights in the Bill of Rights". The obligation to protect is understood in international human rights law to entail an obligation on the state to ensure private entities do not harm others in the possession of their rights. The UN Committee in General Comment 24 expressly recognises that the duty to protect would be violated by "failing to regulate the real estate market and the financial actors operating on that market so as to ensure access to affordable and adequate housing for all".[175] This international law framework thus highlights not only the City's own obligations to provide emergency housing – the City too has an obligation to adopt a policy framework in relation to the activities of private entities that ensures that they do not harm the right to have access to adequate housing of existing residents.

[182] Our Constitution in section 8(2) also recognises that the duties pursuant to the rights contained in the Bill of Rights do not only fall upon the state but also private

[173] Above n 31.

[174] Id at para 65.

[175] General Comment No. 24 on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities UN Doc E/C.12/GC/24 (2017) at para 18.

parties. Madlanga J, in an extra-curial lecture, explained clearly the background and rationale behind this provision:

> "[W]e are all aware of how apartheid, even though it was state-driven, invaded and pervaded some of the most intimate aspects of people's personal lives. This went so far as to pervert our interactions with one another. The daily news and law reports are replete with examples of how, despite nearly 25 years of democracy, the legacy of our past still poisons our interactions. Economic power still reflects that of apartheid. To a large extent, so does social power. Business after all benefitted from apartheid policy. Concentrated economic power, within the context of our peculiar racist history and present, may and does encourage abuse. If we are to take seriously the transformative injunction of our Constitution to '[i]mprove the quality of life of all citizens and free the potential of each person', then our private interactions cannot be left out of the reach of those human rights obligations that may appropriately be borne by private persons. We cannot take a "business as usual" approach and maintain the status quo insofar as our private interactions are concerned."[176]

[183] It is important to recognise that this dimension of our Constitution is also connected with developments at the international level. The United Nations Guiding Principles on Business and Human Rights[177] – a non-binding instrument which was endorsed by the United Nations Human Rights Council[178] – has, for instance, recognised both the state duty to protect fundamental rights as well as the responsibility of business to respect all fundamental rights. That instrument introduced the responsibility of businesses to conduct human rights due diligence processes which, amongst other elements, require the identification of a business's impact on fundamental rights and efforts to prevent and mitigate any such impacts.

[176] Madlanga "The Human Rights Duties of Corporations and Other Private Actors in South Africa" (2018) *Stellenbosch Law Review* 363-4.

[177] United Nations Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework ST/HR/PUB/11/4 (2011).

[178] United Nations Human Rights Council Resolution on Human Rights and Transnational Corporations and Other Business Enterprises UN Doc A/HRC/RES/17/4 (2011).

[184] The 2013 Guidelines discussed above – also non-binding – importantly also engage with this dimension.[179] There is an entire section of the commentary devoted to respecting security of tenure in business activities.[180] The general responsibility is articulated as follows:

> "The responsibility to respect the right to adequate housing requires that business enterprises avoid causing or contributing to infringements of the right, and address adverse impacts when they occur. It requires that business enterprises seek to prevent adverse impacts on, inter alia, security of tenure that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts."[181]

[185] The 2013 Guidelines proceed to re-iterate a responsibility on business enterprises to conduct a due diligence process to investigate the impact of their activities on security of tenure. Businesses must aim to prevent negative impacts and, where they cannot do so, take steps to address them. The 2020 Guidelines state the following in this regard:

> "Ensuring that businesses refrain from activities that have a negative impact on human rights in housing through common approaches to due diligence is necessary but often not sufficient. States may need to ensure, for example, not only that developers do not displace residents from affordable housing, but also that they produce needed affordable housing, that housing is not left vacant and that some of the profits from housing or other economic activities are redirected to ensure the availability of adequate housing for low-income households."[182]

[186] In the current context, the due diligence obligation on businesses would mean that if they plan to develop a project which will harm the existing access of vulnerable individuals and communities to socio-economic rights in the inner city, those

[179] *2013 Guidelines* above n 154. The United Nations Human Rights Council encourages states to consider these lines when designing policies to implement to improve security of tenure (Resolution on Adequate housing as a Component of the Right to an Adequate Standard of Living, UN Doc A/HRC/RES/25/17 (2014)).

[180] United Nations Guiding Principles on Business and Human Rights above n 177 at section H.

[181] Id at para 66.

[182] *2020 Guidelines* above n 31 at para 68.

businesses, independently, have obligations to consider how to prevent and mitigate these foreseeable impacts. That could include, for instance, specific planning to provide a component of the development for low-cost housing or contributing to another low-cost development in the vicinity. In this way, private actors can play a significant part in addressing the legacy of spatial apartheid and ensuring adequate housing for those who remain in a state of socio-economic vulnerability. Given the focus of argument in this case was on the state's actions and the developer did not actively take part in these proceedings, I do not make any definitive findings on this aspect – it is necessary however to raise, given the intricate connection between state and business activity in generating the potential homelessness of the Bromwell residents.

Remedy

[187] I agree with the declaratory and mandatory orders issued in the first judgment by my Colleague Mathopo J. However, I am of the view that two additional elements are necessary. The Court cannot order the provision of emergency accommodation at a particular location. Directing the City to provide accommodation within a geographic area as near as possible to the existing homes of the Bromwell residents contemplates a range about which the parties may need to communicate with one another in order to arrive at a compliant solution, and on which the parties may need the ruling of a court.

[188] In my view, to avoid further litigation and delay, it is necessary, firstly, to order the City to engage meaningfully with the applicants about the location of the accommodation they propose by no later than four months after the date of this judgment.[183] In several cases, this Court has elaborated upon the desirability of meaningful engagement between governmental authorities and individuals where the latter's rights are at issue. In *PE Municipality*,[184] the Court reasoned that:

[183] The underlying principles and purposes of engagement are discussed in Chenwi "'Meaningful Engagement' in the Realisation of Socio-Economic Rights: The South African Experience" (2011) 26 *SAPL* 128 and Ray "Engagement's Possibilities and Limits as a Socioeconomic Rights Remedy" (2010) 9 *Washington University Global Studies Law Review* 399.

[184] Above n 77.

> "[O]ne potentially dignified and effective mode of achieving sustainable reconciliations of the different interests involved is to encourage and require the parties to engage with each other in a proactive and honest endeavour to find mutually acceptable solutions. Wherever possible, respectful face-to-face engagement or mediation through a third party should replace arm's-length combat by intransigent opponents."[185]

[189] In *Occupiers of 51 Olivia Road*, this Court recognised meaningful engagement to be a constitutional obligation of a City when evicting individuals at its own instance flowing from a number of rights.[186] It described the process and some of its virtues as follows:

> "Engagement is a two-way process in which the City and those about to become homeless would talk to each other meaningfully in order to achieve certain objectives. There is no closed list of the objectives of engagement. . . . Engagement has the potential to contribute towards the resolution of disputes and to increased understanding and sympathetic care if both sides are willing to participate in the process."[187]

[190] In *Thubelisha Homes*,[188] this Court collectively ordered a continuing process of meaningful engagement relating specifically to the relocation process of individuals who were subject to an eviction. Whilst there were several judgments in that matter which differed on the adequacy of engagement, Ngcobo J succinctly captured the reasons for engagement in this context when he wrote as follows:

> "The requirement of engagement flows from the need to treat residents with respect and care for their dignity. Where, as here, the government is seeking the relocation of a number of households, there is a duty to engage meaningfully with residents both individually and collectively. Individual engagement shows respect and care for the dignity of the individuals. It enables the government to understand the needs and

[185] Id at para 39.

[186] *Occupiers of 51 Olivia Road* above n 50 at paras 16-7 and 22.

[187] Id at paras 14-5.

[188] *Thubelisha Homes* above n 12.

> concerns of individual households so that, where possible, it can take steps to meet their concerns."[189]

[191] In the context of this case, as I have mentioned, the nature of the order is such that it cannot identify an exact location to which the Bromwell residents are to be relocated. As a result, it is vital for the City to engage with the applicants about where they are to live. Such a process treats the applicants with dignity through inviting them to participate in a central decision concerning their lives. It can, as a result, help build trust between the City and the applicants. It also has important practical effects: it can identify the needs of the applicants and any legitimate objections to a proposed location in advance. That can enable the City to respond and reduce any further delays. In order to reach agreement between the parties, the applicants too must bear in mind the words of this Court in *Occupiers of 51 Olivia Road*:

> "It must be understood that the process of engagement will work only if both sides act reasonably and in good faith. The people who might be rendered homeless as a result of an order of eviction must, in their turn, not content themselves with an intransigent attitude or nullify the engagement process by making non-negotiable, unreasonable demands. People in need of housing are not, and must not be regarded as a disempowered mass. They must be encouraged to be pro-active and not purely defensive. Civil society organisations that support the peoples' claims should preferably facilitate the engagement process in every possible way."[190]

[192] The second dimension of relief which I would add to the order of the first judgment is a structural interdict.[191] The general duty to provide effective relief was articulated powerfully in *Fose*[192] as follows:

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[189] Id at para 238.

[190] *Occupiers of 51 Olivia Road* above n 50 at para 20.

[191] For a general discussion of when these orders are appropriate, see Roach and Budlender "Mandatory Relief and Supervisory Jurisdiction" (2005) 122 *SALJ* 325 and Maphosa "Are Judicial Monitoring Institutions a Legitimate Remedy for Addressing Systemic Socioeconomic Rights Violations?" (2020) 36 *SAJHR* 362.

[192] *Fose v Minister of Safety and Security* [1997] ZACC 6; 1997 (3) SA 786 (CC); 1997 (7) BCLR 851 (CC) (*Fose*).

> "I have no doubt that this Court has a particular duty to ensure that, within the bounds of the Constitution, effective relief be granted for the infringement of any of the rights entrenched in it. In our context an appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the right entrenched in the Constitution cannot properly be upheld or enhanced. Particularly in a country where so few have the means to enforce their rights through the courts, it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated. The courts have a particular responsibility in this regard and are obliged to 'forge new tools' and shape innovative remedies, if needs be, to achieve this goal."[193]

[193] This Court had reason to consider the implications of these sentiments for socio-economic rights in *Treatment Action Campaign*[194] where there was a dispute concerning the nature of relief that should be granted. The Court clearly recognised its duty to grant effective relief which could include both the power to issue a mandamus as well as to grant a structural interdict and exercise supervisory jurisdiction. It stated:

> "Where a breach of any right has taken place, including a socio-economic right, a court is under a duty to ensure that effective relief is granted. The nature of the right infringed and the nature of the infringement will provide guidance as to the appropriate relief in a particular case. Where necessary this may include both the issuing of a mandamus and the exercise of supervisory jurisdiction."[195]

[194] Though not confined to these circumstances, this Court has tended to utilise such orders to retain oversight of governmental action in cases where there has been a serious failure by a branch of government to give effect to a right due to "persistent and intransigent non-compliance".[196] In *Black Sash*,[197] for instance, this Court had to

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[193] Id at para 69.

[194] Above n 17.

[195] Id at para 106.

[196] Taylor "Forcing the Court's Remedial Hand: Non-compliance as a catalyst for remedial innovation" (2019) 9 *Constitutional Court Review* 247 at 251. See also *Sibiya v Director of Public Prosecutions* [2006] ZACC 22; 2007 (1) SACR 347 (CC); 2006 (2) BCLR 293 (CC).

[197] *Black Sash Trust v Minister of Social Development (Freedom Under Law NPC Intervening)* [2017] ZACC 8; 2017 (3) SA 335 (CC); 2017 (5) BCLR 543 (CC) (*Black Sash*) at para 76.

address a looming crisis in which millions of South Africans would not have received their social assistance payments by the South African Social Security Agency. Given multiple failures on the part of the government department and agency concerned, this Court put in place a number of supervisory orders designed to ensure compliance with its judgment which included utilising a high-level specialist committee.

[195] In *Mwelase*,[198] this Court had to address a failure by the Department of Rural Development and Land Reform to process thousands of land claims by labour tenants. The majority found there to be a need to appoint a Special Master as a mechanism to oversee and monitor the exercise of the department's functions in this regard. The Special Master was to exercise its functions under supervision of the Land Claims Court. Cameron J, writing for the majority, explained his reasoning for this order:

> "The vulnerability of those who suffer most from these failures underscores how important it is for courts to craft effective, just and equitable remedies, as the Constitution requires them to do. In cases of extreme rights infringement, the ultimate boundary lies at court control of the remedial process. If this requires the temporary, supervised oversight of administration where the bureaucracy has been shown to be unable to perform, then there is little choice: it must be done."[199]

[196] In this case, we are not concerned with a governmental body that demonstrates a persistent failure to meet the obligations it has undertaken. The City was also not unresponsive in any comparable way to the circumstances in *Black Sash* or *Mwelase*. Instead, the City has not correctly understood the nature of its constitutional obligations in relation to the Bromwell residents and those similarly situated and acted, consequently, in breach thereof.

[197] In a recent case, Bishop AJ neatly summarises the case for supervision as follows: "a court retains supervision because it cannot adequately resolve the dispute

[198] *Mwelase v Director-General for the Department of Rural Development and Land Reform* [2019] ZACC 30; 2019 (6) SA 597 (CC); 2019 (11) BCLR 1358 (CC) (*Mwelase*).

[199] Id at para 49.

between the parties, or adequately protect the public interest through only a once-off order".[200] Can a once-off order in this case provide effective relief?

[198] The declaration of invalidity granted in the first judgment together with the mandatory component of the order make a determination about the City of Cape Town's obligations. Yet, the mandatory component of the order allows for a range of possible locations for temporary emergency accommodation within a geographical area: this Court cannot specify a particular location for the provision of temporary emergency accommodation.[201] The notion of a geographic range "as near as possible" invites further specification – and, inevitably, may lead to further disagreement between the parties given that the location of the accommodation offered by the City was at the heart of the dispute between the parties. In order to ensure no further misunderstanding and to provide effective relief, a once-off order, in my view, is not enough. It is necessary to require the City to report back to a court on the location of the accommodation it identifies as being suitable for the applicants and indicate in what way its proposal meets the standards outlined in this Court's judgment. Upon the production of that report, the applicants should have two weeks to respond, indicating the reasons they either support or oppose the City's proposal.

[199] The question then is whether this Court should retain supervision of this matter or whether it is best to send it back to the High Court to do so. Where supervision is required, this Court has, in the past, considered it apt, where appropriate, to refer the matter back to other courts and Chapter 9 institutions. For instance, in *Grootboom*, the South African Human Rights Commission was granted the task to monitor and report on the state's efforts to comply with this Court's judgment.[202]

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[200] *Sechaba Protection Services CC (Pty) Ltd v Passenger Rail Agency of SA Ltd* [2023] ZAWCHC 280; 2023 JDR 4309 (WCC) (*Sechaba Protection Services*) at para 99.

[201] The circumstances where a mandatory order is general and does not define with precision what the government is required to do is exactly one of the circumstances where a supervisory order is justifiable: see *Roach and Budlender* above n 191 at 334.

[202] *Grootboom* above n 10 at para 97.

[200] More recently, in *LAMOSA II*,[203] this Court had to consider what to do about new land claims that had been lodged in terms of the Restitution of Land Rights Amendment Act[204] which was itself declared unconstitutional. The Court had previously preserved these claims but interdicted the Land Commission from processing them until prior older claims were finalised. After a failure by Parliament to pass revised legislation within the prescribed 24-month period, this Court put in place an order which, amongst other elements, required the Land Claims Court to receive six-monthly reports by the Chief Land Claims Commissioner relating to the processing of old claims[205] and to make "such order or orders as it deems fit to ensure expeditious and prioritised processing of old claims".[206]

[201] In my view, in the circumstances of this case, the High Court is best placed to supervise the implementation of this order for the following reasons. First, we are concerned here with the interpretation and application of a constitutional standard that has been explicated by this Court. Whilst there is a geographical range in which more than one location for temporary emergency accommodation might be compliant, there is no need for this Court to continue to be seized with this matter after laying down the geographical range and a locational criterion within that range. A High Court judge is well-placed to determine whether that standard has been applied properly in the circumstances.

[202] Secondly, the Constitution requires this Court to sit *en banc* (as a bench) with at least eight judges.[207] That requirement renders the process of supervising the implementation of an order such as this unwieldy as it requires a large number of judges continually to review this matter. That, in turn, can lead to inefficiencies and delays. Given that we are not concerned with a potential catastrophe as in *Black Sash* and

[203] *Speaker of the National Assembly v Land Access Movement of South Africa* [2019] ZACC 10; 2019 (5) BCLR 619 (CC); 2019 (6) SA 568 (CC) (*LAMOSA II*).

[204] 15 of 2014.

[205] *LAMOSA II* above n 203 at para 2(d) of the Court's order.

[206] Id at para 2(e) of the Court's order.

[207] Section 167(2) of the Constitution.

perpetual malperformance, but with ensuring the correct interpretation and application of a standard this Court has set by a responsive and capable branch of government, there is no need for an entire multi-member apex Court to remain seized of this matter.

[203] Thirdly, the High Court in Cape Town is much more accessible to the Bromwell residents who live in the inner city and the judge seized of the matter can even arrange an inspection *in loco* (on-site investigation) of the proposed accommodation with relative ease – if that is what is deemed to be required. Finally, the High Court's original order itself provided for supervision. Given this was deemed necessary by the High Court and there are no compelling reasons to adjust this aspect of the order, it should not be overturned.

[204] My order indicates that the High Court shall receive a report from the City about the accommodation it proposes to provide as temporary emergency accommodation to the applicants. The applicants will have an opportunity to respond. The High Court judge assigned to this matter[208] shall have the power to make a final determination about whether the proposed accommodation meets the standards outlined in this judgment or engage in any further follow-up procedures that may be necessary. The timelines indicate that this matter should be treated as a matter of urgency and brought to finality within a relatively short period of time.

[205] Consequently, in addition to the orders in the first judgment, and with the necessary changes, had I commanded a majority, I would have added the following orders which largely follow, with suitable modifications, the orders at paragraphs 169.3-169.5 of the High Court judgment:

1. The City of Cape Town is ordered to engage meaningfully with the applicants to find suitable accommodation as contemplated in

[208] Bishop AJ in *Sechaba Protection Services* above n 200 at paras 102-12 has recently provided a number of persuasive reasons why it is desirable for the same judge to retain supervision of a matter. He raises an important question and his reasoning deserves consideration in ensuring a matter such as this reaches finality as soon as possible but no inflexible rule should be established in this regard. The Judge President of Western Cape High Court can be entrusted to allocate a judge to follow up on the implementation of this order as a matter of urgency.

paragraph 4(c) of the order made in the first judgment within four months of the date of this order;

2. The City of Cape Town is directed to deliver a report to the High Court, within four months of the date of this order, which is confirmed on affidavit, in which it details the Temporary Emergency Accommodation or Transitional Housing that it will make available to the applicants, and the location thereof and the date when it will be made available. Such a report should deal with the proximity of such accommodation or housing to the applicants' prior residence at Units 122 to 130A Bromwell Street Woodstock, to public and private transport, and to educational and medical and health facilities, and explain why the particular location and form of accommodation and/or housing has been selected, and what steps were taken by it to engage the applicants regarding the provision of accommodation or housing in compliance with this order;
3. The applicants may serve and file affidavits, if any, responding to the contents of the report referred to in the preceding paragraph, within ten court days of the date of the service and filing of the aforesaid report;
4. The matter shall be re-enrolled urgently for determination as to such further and/or additional relief as may be necessary or appropriate with the view to finalising the accommodation to which the applicants are to be relocated within six months of the date of this order;
5. The High Court shall have the power to make further orders necessary to reach a speedy finalisation of this matter and may specify any additional reporting or relief required;
6. The High Court may, on good cause shown, extend any time period provided for in this order.

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