



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable

Case no: 1303/2021

In the matter between:

CITY OF CAPE TOWN

APPELLANT

and

CHARNELL COMMANDO

FIRST RESPONDENT

GERALDINE STEPHANIE CUPIDO

SECOND RESPONDENT

NORMAN ANDREW CUPIDO

THIRD RESPONDENT

GICILLE VANESSA COMMANDO

FOURTH RESPONDENT

WILLEM NEL

FIFTH RESPONDENT

MEESHADÉ JACOBA NEL

SIXTH RESPONDENT

DAPHNE NEL

SEVENTH RESPONDENT

PRISCILLA NEL

EIGHTH RESPONDENT

DYLAN NEL

NINTH RESPONDENT

MA-AIDA ABELS

TENTH RESPONDENT

SULAIMAN GOLIATH

ELEVENTH RESPONDENT

FAIZA FISHER

TWELFTH RESPONDENT

GEORGE FARIA RODRIGUES

THIRTEENTH RESPONDENT

NASHIET ABELS

FOURTEENTH RESPONDENT

CHRASHANNA SMITH	FIFTEENTH RESPONDENT
DELIA SMITH	SIXTEENTH RESPONDENT
BRENDA SARAH SMITH	SEVENTEENTH RESPONDENT
MACHAL SMITH	EIGHTEENTH RESPONDENT
MEGAN SMITH	NINETEENTH RESPONDENT
ROSELINE SMITH	TWENTIETH RESPONDENT
CHESLYN SMITH	TWENTY-FIRST RESPONDENT
RASHIEDA SMITH	TWENTY-SECOND RESPONDENT
MARK NEIL SMITH	TWENTY-THIRD RESPONDENT
MOGAMAT TAURIQ SMITH	TWENTY-FOURTH RESPONDENT
GRAHAM BEUKES	TWENTY-FIFTH RESPONDENT
SOFIE MASILO	TWENTY-SIXTH RESPONDENT
WOODSTOCK HUB (PTY) LTD	TWENTY-SEVENTH RESPONDENT

Neutral citation: *City of Cape Town v Commando and Others* (1303/2021)
[2023] ZASCA 7 (6 February 2023)

Coram: ZONDI, NICHOLLS and MABINDLA-BOQWANA JJA and
GOOSEN and SIWENDU AJJA

Heard: 14 November 2022

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 11h00 on 6 February 2023.

Summary: Constitutional law – right to emergency housing – constitutional duty of municipality to provide temporary emergency housing – whether case made out to find emergency housing programme and its implementation unconstitutional

– whether municipality has a duty to provide temporary emergency housing in a specific location – consideration of a just and equitable order.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Sher J, sitting as court of first instance): judgment reported *sub nom Commando and Others v Woodstock Hub (Pty) Ltd and Another* [2021] ZAWCHC 179; [2021] 4 All SA 408 (WCC).

- 1 The appeal is upheld, with no order as to costs.
- 2 The high court's order is set aside and replaced with the following:
 - '1 The City of Cape Town must provide the occupiers and their dependants with temporary emergency accommodation in a location as near as possible to where they currently reside, erf 10626, Bromwell Street, Woodstock (the property), on or before 30 May 2023, provided that they are still resident at the property and have not voluntarily vacated it.
 - 2 The date on which the occupiers are required to vacate the property is extended to 30 June 2023.
 - 3 There is no order as to costs.'

JUDGMENT

Mabindla-Boqwana JA (Zondi and Nicholls JJA and Goosen and Siwendu AJJA concurring):

Introduction

[1] Access to adequate housing remains one of the major challenges in South Africa. It is no secret that our major urban areas face a desperate shortage of adequate housing, exacerbated by increasing urbanisation. Along with that, historical patterns of settlement continue to persist. The disparities between ethnic communities are particularly pronounced in Cape Town, due to highly skewed historical spatial planning policies, which were based on racial discrimination and preference.¹ Twenty-eight years into our constitutional democracy, poor households, mainly black African and Coloured, continue to live in the outskirts of Cape Town, due to high property prices and government rates and taxes. They are, thus, forced to commute, in many instances for long distances, to their places of employment using public transport. This phenomenon is not unique to Cape Town. It is a challenge replicated in many South African cities.

[2] Each city has been shaped by particular dynamics of urban development. The forced removal of black communities from inner city areas and the resultant dislocation is one such dynamic. Despite these painful examples of historical social control, some parts of the inner city areas remained places where poor communities continued to live. Woodstock and Salt River, situated in the inner city of Cape Town, are two adjacent areas where a number of Coloured households were able to resist displacement. However, the gentrification² and commercialisation of Cape Town city centre has been highlighted as one of the threats to the communities still residing in these areas.³

¹ *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others (Centre on Housing Rights and Evictions and Another, Amici Curiae)* [2009] ZACC 16; 2010 (3) SA 454 (CC); 2009 (9) BCLR 847 (CC) (*Thubelisha*) para 264.

² Urban renewal and redevelopment for commercial and business purposes.

³ For example, see The Guardian article 'In the Cape Town enclave that survived apartheid, the new enemy is gentrification', <https://www.theguardian.com/world/2018/aug/19/cape-town-bo-kaap-muslim-enclave-gentrification>.

[3] The appellant, the City of Cape Town (the City), acknowledges that it must ‘transform its spatial and social legacy into a more integrated and compact city with mixed-use zoning areas close to public transport nodes, which will bring residents closer to their places of work and will offer opportunities to break down social barriers’. This will require ‘significant additional capital investment, together with a fundamental reconsideration of how to deliver more housing, more rapidly, in a more integrated, manner.’ The City estimates that between 2012 and 2032 some 650 000 households in greater Cape Town would be in need of support from the government in respect of housing. To this end, it has introduced a number of socio-economic programmes.

[4] An immediate challenge is the need to provide housing for people facing homelessness, due to crises such as natural disasters and evictions. The latter is the issue in the present appeal. Eviction disputes feature in our courts on a daily basis, particularly in these challenging economic times.

[5] As this Court held in *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another*,⁴ ‘[t]he right of access to adequate housing cannot be seen in isolation. It has to be seen in the light of its close relationship with other socio-economic rights, all read together in the setting of the Constitution as a whole. It is irrefutable that the State is obliged to take positive action to meet the needs of those living in extreme conditions of poverty, homelessness or intolerably inadequate housing. What is in dispute in the present case, as is frequently the case in disputes concerning housing, is the extent of the

⁴ *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* [2011] ZASCA 47; 2011 (4) SA 337 (SCA); [2011] 3 All SA 471 (SCA) (*Blue Moonlight Properties* (SCA)) para 2.

State's obligation in this regard. This usually telescopes into an enquiry concerning the State's resources to meet its constitutional obligations.'

[6] After the Constitutional Court's decision in *Government of the Republic of South Africa and Others v Grootboom and Others*,⁵ it became settled that the State is constitutionally obliged 'to provide relief for people who have no access to land, no roof over their heads, and who are living in intolerable conditions or crisis situations'.⁶ Accordingly, the provision of emergency accommodation by the government forms part of the right of access to adequate housing entrenched in s 26 of the Constitution.

[7] The central issue in this appeal is whether that constitutional obligation extends to making temporary emergency accommodation available at a specific location. The Western Cape Division of the High Court, Cape Town (the high court) made an order, inter alia, compelling the City to provide the first to twenty-sixth respondents (the occupiers) and their dependents residing with them with temporary emergency accommodation or 'transitional housing'⁷ in Woodstock, Salt River or the Inner-City Precinct. The order of the high court reads as follows:

⁵ *Government of the Republic of South Africa and Others v Grootboom and Others* [2000] ZACC 19; 2001 (1) SA 46 (CC); 2000 (11) BCLR 1169 (CC) (*Grootboom*).

⁶ Ibid para 99. See also *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* [2011] ZACC 33; 2012 (2) SA 104 (CC); 2012 (2) BCLR 150 (CC), which found that the government, including municipalities, has a constitutional duty to provide emergency housing to persons in crisis situations and that includes those who have been evicted from a property, whether instigated by a public or a private institution.

⁷ According to the Affordable Housing Prospectus for the Woodstock, Salt River and Inner-City Precinct, issued by the City on 28 September 2017, 'Transitional Housing' refers to 'accommodation for individuals or families who have to be relocated as a result of eviction, or temporarily moved as a result of the upgrading of sites on which they lived. This accommodation is an intermediate solution until such time as individuals or families can move into permanent accommodation'. The CRU Feasibility for the Development of 'Transitional' Housing Project – Pickwick Site, Cape Town, dated January 2017, envisaged that for some residents 'transitional housing' 'will provide temporary housing as they transition to more permanent options although it is recognised that, because of the shortage of the alternatives for low income households, some households are likely to remain on a semi-permanent basis.'

‘1 It is declared that the [City’s] emergency housing programme and its implementation, *in relation to persons who may be rendered homeless pursuant to their eviction in the inner City and its surrounds, and in Woodstock and Salt River in particular*, is unconstitutional.

2 The [City] is directed to provide the [occupiers] and those of their dependents as may be living with them at the time, with *“temporary” emergency accommodation or “transitional” housing in Woodstock, Salt River or the Inner-City Precinct* (as defined in the Affordable Housing Prospectus for the Woodstock, Salt River and Inner-City Precinct which was issued on 28 September 2017), *in a location which is as near as feasibly possible to where the [occupiers] are currently residing at erf 10626, Bromwell Street, Woodstock*; within 12 months of the date of this Order.

3 The [City] is directed to deliver a report to the Court, within 4 months of the date of this Order, which is confirmed on affidavit, in which it details the emergency accommodation or “transitional” housing that it will make available to the [occupiers], and the location thereof and the date when it will be made available, and in which it deals with the proximity of such accommodation or housing to 1) erf 10626, Bromwell Street, Woodstock and 2) to public and private transport, and educational and medical and health facilities, and explains why the particular location and form of accommodation/housing has been selected, and what steps were taken by it to engage the [occupiers] regarding the provision of accommodation or housing in compliance with this Order.

4 The [occupiers] may serve and file affidavits, if any, dealing with the contents of the report referred to in the preceding paragraph, within 10 court days of the date of the service and filing of the aforesaid report, whereafter the matter may be re-enrolled on a date to be determined by the Registrar in consultation with the presiding Judge, for determination as to such further and/or additional relief as may be necessary or appropriate.

5 Pending the final outcome of this matter, execution of the Order which was granted for the eviction of the [occupiers] (as extended) shall be suspended.

6 The [City] shall be liable for the costs of this application, including the costs of two counsel (insofar as two counsel may have been employed).’ (My emphasis.)

[8] The City contends that this order is inappropriate. Firstly, it offends the doctrine of separation of powers by trespassing into the heartland of policy-laden and polycentric matters of housing delivery. Secondly, its effect is overbroad. According to the City, the courts have no knowledge of, or are they required to know, 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 allocation of resources to these needs and for housing, and in which areas. The court cannot, thus, dictate to the City in which location a particular housing programme is to be implemented.

[9] The City further contends that it had identified and adopted a policy that social housing was the most appropriate form of housing for the inner city. Despite this, the high court ordered it to make available alternative emergency housing in the inner city for the occupiers. This amounted to the court instructing the City to allocate and spend its housing budget differently. Yet, it is, exclusively, the government's executive function and domain to determine how public resources are to be drawn upon and re-ordered.⁸

[10] The occupiers, on the other hand, view the order as an appropriate intervention by the high court to protect their rights, which they say have been infringed by the unreasonable and irrational conduct of the City. They fault the City for providing temporary emergency accommodation in informal settlements and on the outskirts of the city only.

⁸ *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* [2012] ZACC 18; 2012 (6) SA 223 (CC); 2012 (11) BCLR 1148 (CC) para 67.

Litigation history

[11] The high court's order was preceded by protracted litigation between the occupiers and the twenty-seventh respondent, Woodstock Hub (Pty) Ltd (Woodstock Hub). On 30 June 2014, Woodstock Hub gave notice to the occupiers to vacate the premises it had bought from Messrs Reza Syms and Erefaan Syms (the Syms brothers), situated at erf 10626, Bromwell Street, Salt River, Cape Town (the property).

[12] The occupiers had rented units in the property from the Syms brothers for amounts ranging from R300 to R2000 per month. Some of them had lived in the property for many years. In July 2015, Woodstock Hub launched five separate eviction applications in the high court against the occupiers in terms of s 4 of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE). The applications were later consolidated.

[13] On 17 March 2016, Hlophe JP granted an eviction order by agreement between Woodstock Hub and the occupiers. In terms of this order, the occupiers would vacate the property on or before 31 July 2016, failing which an eviction would be effected by the sheriff on 1 August 2016. Some of the occupiers vacated the property. Those remaining in occupation, however, brought an application to vary the terms of the order granted by Hlophe JP, by extending the date to vacate the property to 31 November 2016. Weinkove AJ dismissed that application.

[14] On 15 August 2016, Woodstock Hub and the occupiers concluded a deed of settlement, which was made an order of court by Weinkove AJ. In terms of this order, the remaining occupiers agreed to vacate the property on or before

9 September 2016. The occupiers allege that the two eviction orders were granted without the respective courts satisfying themselves that it was just and equitable to do so after taking into account all the relevant factors as required by the PIE. It has been held that even when parties consent to an eviction order, judicial officers have a duty to conduct an enquiry in terms of the PIE, because of the risk of homelessness that may result from eviction.⁹ There is, however, no appeal against these orders.

[15] While the City was cited in the proceedings between Woodstock Hub and the occupiers, no order was sought against it to provide the occupiers with temporary accommodation, should this be necessary, in the event of the occupiers' eviction from the property. The City, accordingly, did not participate in the proceedings or discussions prior to the granting of the eviction orders. It is also not clear whether the two eviction orders were served on the City.

[16] The remaining occupiers terminated the services of their erstwhile attorneys and engaged their current attorneys, a non-profit organisation specialising in housing litigation. In September 2016, the current attorneys initiated discussions with the City concerning the imminent risk of homelessness faced by the occupiers. These discussions did not result in an outcome acceptable to the occupiers. Consequently, in September 2016, they launched an application which is the subject of this appeal.

[17] The notice of motion dated 20 September 2016 was framed in two parts. In Part A, the occupiers sought an order suspending the execution of the eviction orders pending the determination of the relief sought in Part B. This aspect was settled.

⁹ *Occupiers of Erven 87 & 88 Berea v De Wet N O and Another* [2017] ZACC 18; 2017 (5) SA 346 (CC); 2017 (8) BCLR 1015 (CC) paras 39-57.

[18] In Part B the occupiers sought, inter alia, the following orders:

‘2. It is declared that the [City] is under a constitutional duty to provide the [occupiers] and their dependents residing with them with *temporary emergency accommodation in a location as near as possible to the property where the [occupiers] currently reside* at erf 10626, Bromwell Street, Cape Town (“the property”);

3. The [City] is directed to make available the temporary emergency accommodation referred to in paragraph 2 above to the [occupiers] within 3 (three) months of the date of this order;

4. It is declared that the [occupiers] may remain in occupation of their existing homes on the property pending compliance by the [City] with paragraph 3 of this order;

5. The [City] is directed to deliver a report to this Court within 2 (two) months of the date of this order, confirmed [on] affidavit, detailing the accommodation that it will make available to the [occupiers], when such accommodation will be available, the nature and proximity of such accommodation and explaining why the particular location and form of accommodation has been selected. The report must also set out the steps taken by the [City] during the two months before the report is filed to meaningfully engage with the [occupiers] and/or the [occupiers’] attorneys regarding the provision of temporary emergency accommodation to the [occupiers].’
(My emphasis.)

[19] The relief to be provided accommodation at a location as near as possible to the property in which the occupiers resided, is in line with the orders granted in previous cases, such as in *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another*.¹⁰ The motivation behind those orders is that ‘in deciding on the locality, the government must have regard to the relationship between the location of residents and their places of employment,¹¹ schools and other amenities.

¹⁰ *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* [2011] ZACC 33; 2012 (2) SA 104 (CC); 2012 (2) BCLR 150 (CC) para 104(e)(iv) (*Blue Moonlight Properties (CC)*).

¹¹ *Thubelisha* fn 1 above para 254.

[20] The City states that it responded to the relief sought by assessing the composition of various family units involved. It facilitated their applications for social housing and considered them. It advised the occupiers' attorneys that five families would qualify for social and/or GAP¹² housing and should apply immediately. The City offered emergency housing at Wolwerivier, which is approximately 30 km from the property, for the remaining family units. This consisted of 26.5 m² of prefabricated light gauge steel structures with corrugated cladding and other basic amenities. Notably, the Wolwerivier structures were accepted as suitable within the City's available resources by the Constitutional Court in *Baron and Others v Claytile (Pty) Ltd and Another*.¹³

[21] The occupiers objected to being accommodated at Wolwerivier because of the distance from the property. They enquired about a list of properties in the inner city, including the site at Pickwick Street in Salt River (Pickwick), which they said could be considered for emergency housing. The City advised them that Pickwick had already been allocated as a transitional area for housing of beneficiaries who needed to be moved from an informal settlement in Pine Road, which was one of the sites earmarked for social housing, while it was being developed. The City then offered emergency housing to all of the families, despite the fact that several could potentially qualify for home loans. The City also provided information regarding the bus routes and prices.

¹² Affordable housing to accommodate a gap in the market of those families earning between R3 501 and R15 000 per month – a housing market not served by the private market or the State – 2016/2017 Review of Integrated Human Settlements Five-Year Plan at 49.

¹³ *Baron and Others v Claytile (Pty) Limited and Another* [2017] ZACC 24; 2017 (5) SA 329 (CC); 2017 (10) BCLR 1225 (CC) para 50.

[22] During 2017, the City's Mayoral Committee Member for Transport and Urban Development (Mayoral Committee Member) made a public speech about the planned social and affordable housing developments in the inner city. He mentioned the City's intention to achieve spatial transformation by providing those facing emergencies with temporary housing as close as possible to their places of work or at least transportation. He further mentioned two sites, namely, Pickwick and St James Street in Salt River (St James), which were reserved for transitional housing to accommodate residents moved from Pine Road and Salt River Market areas, and were identified for social housing development respectively. In one of the media statements, the Mayoral Committee Member remarked that 'the development of the Pickwick site represents a new approach in terms of how the City intends to tackle the urgent demand for housing by those families who are displaced or evicted from their homes due to rapid development, among others'.

[23] On 27 September 2017, the City issued the Affordable Housing Prospectus for the Woodstock, Salt River and Inner-City Precinct (the Prospectus) in which it identified Woodstock, Salt River and the surrounds as ideal locations for the development of affordable housing, as they were well located, being close to public transport and employment opportunities. For this purpose, five sites of the City's available land were identified.

[24] In December 2017, motivated by these developments, the occupiers applied to amend their notice of motion in terms of rule 28 in the following terms:

'1. It is declared that the housing programme of the [City] and its implementation in terms of the City of Cape Town Integrated Human Settlements: Five Year Plan is inconsistent with the [City]'s constitutional and statutory obligations to the extent that:

1.1 it fails to provide *the [occupiers] and people living in Woodstock and Salt River* who are at risk of homelessness and in a crisis situation due to eviction from their homes with *access to transitional housing or temporary emergency accommodation in the immediate City centre and surrounds.*

2. It is declared that the [City] is *under a constitutional duty* to provide the [occupiers] and their dependents residing with them with temporary emergency accommodation or transitional housing:

2.1 *in the Woodstock, Salt River and inner city precinct* as identified in the Prospectus for Affordable Housing in the Woodstock and Salt River Precinct issued by the [City] on 28 September 2017; *and*

2.2 *in a location as near as possible to the property where the [occupiers] currently reside at erf 10626, Bromwell Street, Cape Town* (“the property”)

3. The [City] is directed to make available temporary emergency accommodation or transitional housing referred to in paragraph 2 above to the [occupiers] within 12 (twelve) months of the date of this order.

4. The [City] is ordered to comply with its constitutional obligations as declared in this order.

5. The [City] is directed to deliver a report to this Court within 3 (three) months of the date of this order, confirmed on affidavit, detailing the emergency accommodation or transitional housing *that it will make available to the [occupiers] in the Woodstock, Salt River and inner city precinct*, when such accommodation will be available, the proximity of such accommodation and explaining why the particular location and form of accommodation has been selected. The report must also set out the steps taken by the [City] during the three months before the report is filed to meaningfully engage with the [occupiers] and/or the [occupiers’] attorneys regarding the provision of temporary emergency accommodation or transitional housing to the [occupiers].’ (My emphasis.)

[25] It is evident from the envisaged amended notice of motion that the relief sought had changed markedly. It introduced a direct constitutional challenge against the City’s housing programme and its implementation, on the basis that it failed to provide for temporary emergency housing in the inner city and the surrounds. In

addition, it sought a declarator that the City was under a constitutional duty to provide temporary emergency accommodation to the occupiers in a specified area of either, Woodstock, Salt River and Inner-City Precinct, and that it should be directed to do so.

[26] The City had previously adopted an Integrated Human Settlements: Five Year Plan (the Five-Year Plan), which was reviewed annually to ensure that it considered a response to any significant changes in the micro- and macro-environments that may affect delivery. The occupiers alleged that the City's new approach to housing delivery announced in 2017 constituted a volte-face and an admission that the Five-Year Plan was 'in need of change in order to address displacement of persons such as the [occupiers] due [to] gentrification in the inner [c]ity areas of Woodstock and Salt River'.

[27] The City objected to the amendment of the relief sought on a number of bases, including that it introduced a completely new relief. It alleged that it had met the relief initially sought by offering temporary emergency accommodation to the occupiers in Wolwerivier. When the Wolwerivier offer was rejected, it identified land in Maitland. This option was not pursued because of objections from the community residing there.

[28] The City thereafter offered the occupiers land in Kampies, Philippi, which is approximately 15 km from the property. In terms of this offer, each household would receive one plot of 36 m² with building materials for 18 m² structures. According to the City, the services will consist of running water and waterborne sanitation (ie flushing toilets) of 1:5 used on a communal basis, with five families given a key to

a particular toilet for use by them. A portable flush toilet will be made available to the single disabled person(s). Solid waste removal would be provided per household, collected once a week from a communal container available on site. There will be no electricity provided. The Kampies site will be upgraded six months from the date of offer to 26 m² concrete slab structures, electrified by Eskom and that access to waterborne sanitation and a basin would be provided to each household. All three categories of schools – pre-primary, primary and high schools – are within 3 km of the site in Hanover Park.

[29] The hearing of the application for the amendment took place on 13 August 2018 before Sher J, who allowed the amendment. The amended notice of motion was ‘effected’ on 13 September 2018.

The legal framework

[30] Section 26 of the Constitution provides that:

- ‘(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.’

[31] In *Grootboom*, the Constitutional Court provided an in-depth analysis of what the provisions in s 26 of the Constitution entail.¹⁴ Subsection (1) defines the right, while subsection (2) imposes a positive obligation on the State to take reasonable

¹⁴ See also *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* [2011] ZASCA 47; 2011 (4) SA 337 (SCA); [2011] 3 All SA 471 (SCA) paras 26-40 for a helpful analysis of *Grootboom* and s 26 of the Constitution concerning the State’s constitutional duty.

legislative and other measures, within its available means, to achieve progressive realisation of the right. In this regard, the Constitutional Court stated that:

‘It requires the state to devise a comprehensive and workable plan to meet its obligations in terms of the subsection. However subsection (2) also makes it clear that the obligation imposed upon the state is not an absolute or unqualified one. The extent of the state’s obligation is defined by three key elements that are considered separately: (a) the obligation to “take reasonable legislative and other measures”; (b) “to achieve the progressive realisation” of the right; and (c) “within available resources.”’¹⁵

[32] To qualify as reasonable, a housing programme must clearly set out responsibilities and tasks of the different spheres of government and make available financial and human resources. The programme must be coherent and capable of facilitating the realisation of the right.

‘In any challenge based on section 26 in which it is argued that the state has failed to meet the positive obligations imposed upon it by section 26 (2), *the question will be whether the legislative and other measures taken by the state are reasonable. A court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent.* The question would be whether the measures that have been adopted are reasonable. It is necessary to recognise that a wide range of possible measures could be adopted by the state to meet its obligations. *Many of these would meet the requirement of reasonableness.* Once it is shown that the measures do so, this requirement is met.’¹⁶ (My emphasis.)

[33] Legislative measures only, are not sufficient. The executive must adopt policies and programmes, which are reasonable in both their conception and implementation.¹⁷ And ‘[a]n otherwise reasonable programme that is not

¹⁵ *Grootboom* fn 5 above para 38.

¹⁶ *Ibid* para 41.

¹⁷ *Ibid* para 42.

implemented reasonably will not constitute compliance with the state's obligations'.¹⁸

[34] The programme must be considered within its social, economic and historical context and in light of the capacity of the institution implementing the programme. It must be balanced and flexible and give attention to housing crises and to short, medium and long term needs.¹⁹

[35] It must be recognised that the right may not be realised immediately, hence the expression 'progressive realisation'. Further, housing must be made accessible to a wider range of people as time progresses.²⁰ The State is not expected to do more than is achievable within its available resources. Balance is required between the goal of realising the right expeditiously and effectively within the means available to do so. In this regard, the 'availability of resources is an important factor in determining what is reasonable'.²¹

[36] The Housing Act 107 of 1997 (Housing Act) gives effect to s 26 of the Constitution as part of the legislative measures taken by the State. Section 9(1) of the Housing Act requires that:

'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 –

¹⁸ Ibid.

¹⁹ Ibid para 43.

²⁰ Ibid para 45.

²¹ Ibid para 46.

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

[37] The National Housing Code, 2009 (Housing Code) was developed as contemplated by s 4 of the Housing Act. The Housing Code makes provision for the Emergency Housing Programme.²² This programme was designed 'to address the needs of households [which] for reasons beyond their control, find themselves in an emergency housing situation such as the fact that their existing shelter has been destroyed or damaged, their prevailing situation poses an immediate threat to their life, health and safety, or they have been evicted, or face the threat of imminent eviction'. Assistance is provided to municipalities in the form of grants to enable them to respond rapidly to emergencies by means of the provision of land, shelter and municipal engineering services. In appropriate cases, this may include the possible relocation and resettlement of people on a voluntary and cooperative basis.

²² The Emergency Housing Programme is contained in Part 3 Volume 4 of the National Housing Code, 2009.

The City's housing programme

[38] The City contends that the high court erred in not taking into account its entire housing programme and treating the emergency housing programme in isolation. It submits that it has an Integrated Human Settlements Framework (IHSF), which is aligned to legislation and policies, including the Housing Act and the Housing Code. In addition, it adopted the Five-Year Plan. In this regard, it has a number of housing programmes, namely social housing, GAP housing, finance-linked individual subsidy housing, institutional housing and emergency and transitional housing.

[39] It implements the National Emergency Housing Programme by creating incremental development areas (IDAs) and temporary relocation areas (TRAs). More recently, it has begun to develop emergency housing within existing settlements. The IDAs are incrementally upgraded to provide for permanent housing. Emergency housing 'applies to various categories of persons including persons who are evicted or threatened with imminent eviction from land'. It is intended to benefit all affected persons who are not in a position to address their housing emergencies.

[40] The emergency housing projects exist in Mfuleni, Happy Valley, Blikkiesdorp, Wolwerivier, Sir Lowry's Pass and Bardale. The TRA units are located at OR Tambo, Hangberg and Masonwabe in Gugulethu. As at March 2020, the City started constructing housing within existing settlements at Kalkfontein in Kuilsriver, Bosasa in Blue Downs, Wallacedene in Kraaifontein, Kampies in Philippi and at other places. Applicants for emergency housing are required to place their names on the housing database so as to be identified whether they could be

accommodated in other housing programmes, such as the social housing programme and GAP housing.

[41] According to the City, the social housing programme is aimed at developing affordable rental areas with bulk infrastructure. It consists of a high-density subsidised housing project, which is implemented, managed and owned by independent and accredited social housing institutions in designated restructuring zones. It accommodates persons with income levels of between R1 500 and R7 500. Social housing units include areas such as Steenberg, Brooklyn, Bothasig and Scottsdene. Developments were also being planned for Salt River and Woodstock.

[42] GAP housing is aimed at persons earning in excess of R6 500, with those earning in excess of R7 500 given preference. According to the City's assessment, some of the occupiers qualified for GAP and social housing programmes. The City alleges that it attempted to assist the occupiers within its IHSF. As earlier stated, it urged those who qualified for social and GAP housing to apply.

[43] Individual subsidy housing is finance-linked and secured by mortgage bonds. Repayments are determined according to income. It is aimed at households earning between R3 000 and R15 000 per month. In the institutional housing programme, the beneficiaries are provided with a subsidy, which may be supplemented with their own income to acquire a superior housing structure.

[44] The City concedes that it has no emergency housing developments in the immediate city centre and surrounds. However, it contends that the reasons are complex. They include: (a) the excessively high costs of developing an emergency

housing settlement in the inner city – the cost in this regard is said to be at least triple what it would be in areas further afield; (b) the very high rates on properties in the city centre; and (c) the scarcity of land in the immediate surrounds of the City and the competing demands on such land.

[45] It submits, however, that there are areas within the immediate surrounds of the City, such as Woodstock, which are targeted for affordable inner-city housing and temporary housing projects. A range of projects are envisaged for these areas. These include mixed land use development involving transportation, housing, social and economic opportunities. These would provide for affordable housing, which could bring lower-income people closer to work opportunities. Other projects aimed at overcoming the legacy of apartheid spatial planning include the Two Rivers Urban Park (TRUP) project, a joint project between the City and the Western Cape Government.

[46] The occupiers submit that they identified 45 parcels of vacant state-owned land within 5 km of the property which were suitable for development or at the very least temporary emergency accommodation. In response, the City explained that the said land parcels were too small for a housing development; and that it was not in the position to provide individual tracts of land to beneficiaries, because it was unaffordable and to do so would also create unfairness among different beneficiaries of state-assisted housing. It would entrench the exclusion of black African residents, who, owing to apartheid, were not allowed to reside in the inner city. Furthermore, properties of individual occupiers in the inner city and the surrounds would derive or attract better value than those outside the city centre. There is no dispute about the existence of these programmes.

The finding of unconstitutionality

[47] It will be recalled that the high court declared that ‘the [City’s] emergency housing programme and its implementation, in relation to persons who may be rendered homeless pursuant to their eviction in the inner City and its surrounds, and in Woodstock and Salt River in particular, is unconstitutional’. In terms of s 72(1)(a) of the Constitution, ‘[w]hen 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 its inconsistency.’ The high court did not identify the extent of invalidity for the City to rectify in its order. For this reason alone, its order of unconstitutionality cannot stand.

[48] In addition, the high court’s order does not accord with the relief sought by the occupiers in paragraph 2.1 of the amended notice of motion. It is not substantiated by the papers which served before the court or by the court’s reasoning. The occupiers had challenged the housing programme in terms of the Five-Year Plan and sought an order that it be declared 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 eviction, with temporary emergency accommodation or transitional housing in the immediate city centre and surrounds.

[49] The Five-Year Plan under attack was for the period of July 2012 to June 2017. Apart from the fact that that document had expired, no affidavit was filed as the foundation for the new notice of motion, nor any legal basis set out in support of this constitutional attack anywhere in the papers. Neither were the impugned portions of

the Five-Year Plan identified, nor the relevant constitutional or statutory provisions infringed.

[50] At the hearing of the appeal, counsel for the occupiers argued that the basis for the relief was apparent from the City's affidavit of November 2017, which he submitted led to the amendment. When pressed on this issue, counsel referred to a paragraph in the affidavit filed in support of the application for the amendment of the notice of motion. All this paragraph contained was the following:

'The [occupiers] seek to amend their relief in consequence of this 180 degree change by the City and the new evidence underpinning it as disclosed in the pre and post hearing media statements by the City and the City's affidavit dated 1 November 2017. I respectfully submit that this new evidence constitutes an admission by the City that the implementation of its Integrated Human Settlements: Five Year Plan is in need of change in order to address displacement of persons such as the [occupiers] due [to] gentrification in the inner City areas of Woodstock and Salt River.'

[51] As to the content of the impugned Five-Year Plan, there is no inconsistency between it and the City's alleged new approach. Even if there were, the City was entitled to adapt its housing programme to address the effects of gentrification, among other challenges. It did so by identifying Woodstock, Salt River and the surrounds as areas to develop affordable social housing. It is not clear what could be objectionable about the City seeking to build affordable houses in the inner city as part of addressing the legacy of apartheid spatial planning. Indeed, the occupiers do not take issue with the form of social housing. Instead, they criticise the City for not having emergency housing in the inner city as part of the Five-Year Plan. That, however, had been the position even before the amendment was sought. I am not sure how the adaptation of the Five-Year Plan would affect the initial relief sought. At no stage did the City undertake to provide emergency housing in the inner city.

In fact, it had stated that it only had emergency housing available in Wolwerivier. In any case, the impugned Five-Year Plan had expired.

[52] In the occupiers' heads of argument, the issue before this Court is identified as 'whether the City has demonstrated that its policies and programme regarding emergency housing and the implementation thereof, are reasonable and consistent with the Constitution'. It is then broadly stated that the formulation and implementation of the City's housing programme is deficient and inconsistent with the positive duties imposed on the City by s 26 of the Constitution, in that the City's housing programme does not provide for access to emergency housing and accommodation in the immediate inner city centre and surrounds, in order to meet the urgent emergency housing needs of the occupiers and people living in Woodstock and Salt River who are at risk of homelessness and in a crisis situation due to eviction from their homes.

[53] For this contention to withstand scrutiny, a source of the duty had to be identified. The legislative measures and programmes taken by the government giving effect to s 26 of the Constitution do not impose a duty on it to provide temporary emergency accommodation at a specific locality. Nor have the line of cases since *Grootboom* interpreted the duties flowing from s 26 to oblige the government to provide emergency housing at a specific location. In fact, the opposite has been suggested. In *Thubelisha*, Ngcobo J observed that 'the Constitution does not guarantee a person a right to housing at government expense at the locality of his or her choice. Locality is determined by a number of factors including the availability of land. However, in deciding on the locality, the government must have

regard to the relationship between the location of residents and their places of employment'.²³

[54] The high court recognised that ‘to ascribe such a power to itself . . . would place an impossible burden on the State, as it would result in it having to accommodate evictees who are going to be rendered homeless, in virtually every suburb or area in which they live. For obvious reasons this is untenable.’ The court, however, went on to make the very order that it found it could not grant. It justified its finding on the basis that this matter had to be decided ‘on the basis of whether it is rational or reasonable for the [occupiers] to be told that they must take up emergency housing either in a TRA or an IDA on the outskirts of the City, or alternatively in an informal settlement, whilst other similarly-placed persons do not face the same choice, because they may have the good fortune of being afforded “transitional” housing or (as was promised by the City’s Mayoral Member for urban development), “temporary” housing, in the inner City and its surrounds.’

[55] The occupiers do not impugn the City’s offer to relocate them (to Kampies in Philippi, among other places) in relation to them per se. Rather, they impugn the City’s plan or emergency housing programme and its implementation for not providing emergency accommodation in the specific locality of the city centre and surrounds. This is a broader attack.

[56] Having failed to identify the source of the constitutional duty in the Constitution or the Housing Act, the occupiers resorted to relying on s 26 of the Constitution in general terms. However, the principle of subsidiarity prohibits direct

²³ *Thubelisha* fn 1 above para 254.

reliance on the Constitution where specific and detailed legislation giving effect to a right sought to be enforced has been passed. In any event, as I have demonstrated, none of the legal framework or programmes guarantees such a right or imposes the suggested duty on the State.

Reasonableness of the City's emergency housing programme

[57] In order to establish whether the measures taken by the City to address the obligations in s 26 of the Constitution are reasonable, a balanced enquiry as outlined in *Grootboom* would have to be taken into account. This, being mindful of the fact that the courts are not at large to set aside a programme merely for the reason that there may be other measures which it considers more favourable or desirable.²⁴

[58] It was aptly put in *Thubelisha* thus:

‘It is for the government to decide how to allocate houses in the new area. If the government, in its wisdom, decides to allocate some of the houses in the newly developed Joe Slovo to backyard dwellers from Kwa-Langa, which is close to Joe Slovo, this cannot be faulted unless it is unreasonable. . .

. . .

In considering reasonableness, the enquiry is not “whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent.” Rather, the enquiry should be confined to the question whether the measures that have been adopted are reasonable, bearing in mind “that a wide range of possible measures could be adopted by the State to meet its obligations.” Thus in determining whether the government has complied with its obligations to provide access to adequate housing, courts must acknowledge that the government must determine and set priorities but must ensure that, in setting those priorities, it has regard to its constitutional obligations. In short, the obligation of government must not be

²⁴ *Blue Moonlight Properties (CC)* fn 10 above para 88.

construed in a manner that ties its hands and makes it impossible to comply with its constitutional obligations.

...

It is not for the courts to tell the government how to upgrade the area. This is a matter for the government to decide. The fact that there may be other ways of upgrading the area without relocating the residents does not show that the decision of the government to relocate the residents is unreasonable. It is not for the courts to tell the government how best to comply with its obligations. If, in the best judgment of the government it is necessary to relocate people, a court should be slow to interfere with that decision, as long as it is reasonable in terms of s 26(2) of the Constitution and just and equitable under PIE.

Some of the reasons advanced by the residents for refusing to relocate to the TRUs in Delft are a lack of schools and other amenities and a lack of employment. What must be stressed here is that relocation is necessary to develop Joe Slovo so that decent housing can be built there. This will benefit the residents. Moreover, the Constitution does not guarantee a person a right to housing at government expense at the locality of his or her choice. Locality is determined by a number of factors including the availability of land. However, in deciding on the locality, the government must have regard to the relationship between the location of residents and their places of employment.

...

In the past we have stressed that the government faces an extremely difficult task in addressing the injustices of the past. This is compounded by the limited availability of resources, including the availability of land where decent houses can be built.²⁵

[59] The City has taken a policy decision to designate certain areas of the inner city, including Woodstock and Salt River, for social housing. The high court suggested that the implementation of the City's housing programme in the inner city was 'to give undue preference to social housing, at the expense of the City's constitutional obligations in relation to the provision of emergency housing.' The

²⁵ *Thubelisha* fn 1 above paras 249, 252-254 and 256.

introduction of social housing in the inner city has not been challenged as being unreasonable. The high court has not found this decision to be unreasonable either. That being so, the issue is not before us.

[60] As to emergency housing, the City demonstrated unequivocally that its policy provides for an emergency housing programme by way of IDAs, TRAs and developments in existing informal settlements. These are considered mechanisms created to meet emergency housing needs when they arise. The fact that no provision is made for such emergency housing needs in the inner city, does not render the choices made by the City irrational or unreasonable.

[61] One of the arguments advanced to suggest that the policy is unreasonable is that the occupiers cannot afford social housing because they are unemployed. The argument is flawed. It conflates temporary emergency housing, which by its nature is provided by the State to meet emergency needs, with the progressive realisation of the right to adequate permanent housing. The latter, as the discussion set out above demonstrates, involves the provision of housing that is subsidised in various respects, and may involve some amount paid by residents or fully or partially subsidised by the government. As the Constitutional Court recognised, ‘[i]ndividuals may have a range of incomes – some may be able to afford subsidised housing while others may be completely destitute. . . . [Accordingly,] the Occupiers have a myriad of personal circumstances to be taken into account in considering their eligibility for housing’.²⁶ Thus, differentiation in housing delivery by the City between emergency housing needs and housing needs that do not constitute emergency might well be reasonable in the circumstances.²⁷

²⁶ *Blue Moonlight Properties (CC)* fn 10 above para 92.

²⁷ *Ibid* para 95.

[62] The distinction between permanent and emergency housing has been recognised. This Court in *City of Johannesburg v Dladla and Others*,²⁸ referred with approval to the judgment of *City of Cape Town v Hoosain N O*,²⁹ in which the following was observed:

‘Once it is recognised that emergency accommodation by its very nature will invariably fall short of the standards reasonably expected of permanent housing accommodation, it follows that those who need to occupy such accommodation must accept less than what would ordinarily be acceptable. The apparent harshness of an acceptance of this recognition has to be seen against the realities imposed by the vast scale of the housing backlogs with which the state, in general, and the City, in particular, are having to engage.’

[63] The high court concluded that ‘the City does not appear to have a comprehensive, workable and coherent emergency housing plan or program, at least not its own one, and appears to have adopted inconsistent and contradictory stances and policies. And its implementation of its emergency housing program, such as it is, in relation to such persons, appears to be inconsistent and arbitrary’. The high court found this because the Mayoral Committee Member and the Prospectus had mentioned a change in approach on the housing delivery programme. It hardly need be stated that a political speech by a municipal politician does not constitute policy, carefully considered and adopted by a policy-maker. What the high court was called upon to consider was the rationality and reasonableness of the policy approach set out by the City in its deliberations on the challenge. As to the new approach articulated in the Prospectus, it made no undertaking to the occupiers to provide

²⁸ *City of Johannesburg v Dladla and Others* [2016] ZASCA 66; 2016 (6) SA 377 (SCA) para 20.

²⁹ *City of Cape Town v Hoosain N O and Others* [2011] ZAWCHC 391 (WCC) para 14.

emergency or ‘transitional’ housing in the inner city. It is also important to bear in mind that a programme must be flexible and adaptive.

[64] The high court found that the overall housing delivery programme was not the issue in the matter. It erred by disregarding the broad range of permanent housing programmes that the City implements, since these are directly affected by the order directing the City to make available emergency housing in the city centre and surrounding areas. The City’s obligation is wide ranging and is not confined to the provision of emergency housing accommodation.

[65] The housing delivery question is not an easy one to answer. Temporary emergency accommodation has in many instances turned into semi-permanent or permanent homes due to shortage of government housing. According to the City, permanent housing is the ideal that the government is pursuing. It is, thus, imperative to ensure that while occupiers of emergency accommodation wait for permanent sites, a balance is achieved in ensuring that their settlements do not perpetuate poverty and human indignity.

Differentiation and the irrationality issue

[66] The occupiers contend that they were treated differently from the residents of Pine Road and Salt River Market by not being offered transitional housing. In this regard, they allege that the City was arbitrarily implementing its housing delivery programme in the same way as in *Blue Moonlight Properties*. This argument is erroneous. *Blue Moonlight Properties* dealt with a completely different situation, that of an emergency programme that excluded occupiers that were evicted by private landowners from their properties. In other words, there was no programme

in place for those people evicted by private property owners as opposed to those who were evicted by the State from its property. That kind of programme was clearly discriminatory. In this case, conversely, there is an emergency housing programme, which applies to all residents who are faced with housing crises and need immediate help.

[67] The City's solution of relocating people from informal settlements to transitional housing with a view to developing the land they occupied does not render the policy unreasonable or arbitrary. It is clear that those sites were reserved for a specific purpose and not generally for those that were in a similar position as the occupiers in Woodstock and Salt River.

[68] There is no evidence that any evictees in a position similar to the occupiers were accommodated in the transitional housing sites within the inner city. It is worth mentioning that transitional housing differs from the temporary emergency accommodation, in that a rental fee would be charged in the earmarked transitional housing sites. To the extent that the recipients were not able to pay the full rental, the City would subsidise the shortfall in operating expenses of the social housing company that would be developing the sites. The City explained that a formal policy in respect of its transitional housing was yet to be developed. The City has alleged that due to scarcity of land, and the cost of development, it is unlikely that any further transitional housing units would be developed in the city centre.

[69] It was not disputed that the reason the City committed to transitional housing was to ensure that vacant land could be obtained in order for social housing to be developed. If transitional housing in Pickwick were to be used for the occupiers, it

will not be available for its intended purpose. That would mean that vacant occupation in Pine Road would not be obtained and social housing development would be impeded or would not proceed. The City alleges that it was possible for the Pickwick housing to be made available more broadly in future, but as the issues of relocation were still underway, it was premature to do so at this stage.

[70] An order directing the City to house the occupiers in the transitional accommodation would mean the eviction of the informal dwellers from Pickwick (who are not party to these proceedings). The high court acknowledged that ‘there was no spare accommodation in the Pickwick “transitional” housing development as all its rooms were occupied, and the St James development was still in progress’. Another effect of the order would be to re-direct the City’s resources from the social housing programme to temporary emergency housing within the inner city and the surrounds, whereas, according to the City, there was presently no land available. Those choices are not for the Court to make. The high court’s order, therefore, put the City in an invidious position, by making an order without knowing, or being in a position to know, if land would be found specifically in the inner city and surrounds. In light of all the reasons above, the high court’s order must be set aside.

Appropriate relief

[71] While a case has not been made out for the declaration of unconstitutionality of the City’s housing programme and its implementation as sought by the occupiers, and for the provision of temporary emergency housing at a specific locality, the Court still has to make a just and equitable order, so as not to render the occupiers homeless. This is because of the extended eviction orders made which are yet to be implemented and have not been appealed against.

[72] The City bears a duty to provide the occupiers with suitable temporary emergency accommodation. It is appropriate that an order be made that such accommodation be at a location as near as possible to the area where the property is situated.³⁰ The City's counsel informed us that the offer to provide temporary emergency accommodation at Kampies in Philippi still stands and it was rejected primarily because of the COVID-19 pandemic and the likely exposure of the vulnerable occupiers.

[73] The suitability of Kampies is not an issue squarely before us. It is, however, imperative for the City to realise that it has the responsibility of ensuring that the occupiers are treated with dignity and care when choosing an appropriate location. In doing so, the City should take into account the occupier's places of employment and children's schooling, hospitals, transportation and other important amenities that their relocation may require. In this regard, the vulnerabilities of the occupiers must be considered.

[74] To this end, it is essential that the City be provided with reasonable time to find the temporary emergency accommodation. It follows that the date of eviction stipulated in the eviction orders should also be extended to a reasonable date after the City has to provide accommodation.

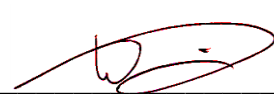
[75] As to costs, the *Biowatch* principle applies. In light of this, we are obliged to replace the high court's order with one of no order as to costs. Notwithstanding that

³⁰ See *Blue Moonlight Properties (CC)* fn 10 above and *Thubelisha* fn 1 above.

the appeal succeeds, the costs of appeal should also land where it falls, in accordance with the *Biowatch* principle.

[76] For these reasons, the following order is made:

- 1 The appeal is upheld, with no order as to costs.
- 2 The high court's order is set aside and replaced with the following:
 - '1 The City of Cape Town must provide the occupiers and their dependants with temporary emergency accommodation in a location as near as possible to where they currently reside, erf 10626, Bromwell Street, Woodstock (the property), on or before 30 May 2023, provided that they are still resident at the property and have not voluntarily vacated it.
 - 2 The date on which the occupiers are required to vacate the property is extended to 30 June 2023.
 - 3 There is no order as to costs.'



N P MABINDLA-BOQWANA
JUDGE OF APPEAL

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