IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: **21101/2022**

In the matter between:

CITY OF CAPE TOWN	Applicant
and	
THOSE PERSONS IDENTIFIED IN ANNEXURE "A" TO THE NOTICE OF MOTION WHO ARE UNLAWFULLY OCCUPYING THE ERVEN WITHIN THE CITY OF CAPE TOWN CENTRAL BUSINESS DISTRICT AND SURROUNDS AS MORE FULLY DESCRIBED IN PARAGRAPH 2 OF THE NOTICE OF MOTION	First Respondent
THOSE PERSONS (WHOSE FULL AND FURTHER PARTICULARS) ARE UNKNOWN TO THE APPLICANT WHO ARE UNLAWFULLY OCCUPYING THE ERVEN WITHIN THE CITY OF CAPE TOWN CENTRAL BUSINESS DISTRICT AND SURROUNDS, AS MORE FULLY DESCRIBED IN PARAGRAPH 2 OF THE NOTICE OF MOTION	Second Respondent

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RESPONDENTS' HEADS OF ARGUMENT

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A. INTRODUCTION

1. This matter concerns the complex social phenomenon and crisis of homelessness in Cape Town. The City recognises that the application and the issues that it presents are "*unprecedented*".

2. Unprecedented it may be, but homelessness is unique neither to Cape Town nor to South Africa. Other societies have grappled with the state's obligations to people living on the streets, including India's jurisprudence on "*pavement dwellers*" and the Canadian decisions on "*tent cities*". In its iconic judgment dealing with Bombay "*pavement dwellers*" in ***Olga Tellis v Bombay Municipal Corporation***, the Indian Supreme Court characterised the challenge as follows:

> "*There is no short term or marginal solution to the question of squatter colonies, nor are such colonies unique to the cities of India. Every country, during its historical evolution, has faced the problem of squatter settlements and most countries of the under-developed world face this problem today. Even the highly developed affluent societies face the same problem, though with their larger resources and smaller populations, their task is far less difficult*."[1]

3. The City of Cape Town ("**the City**") – in an attempt to address the crisis of homelessness – seeks to evict around 100 people who currently live and sleep on public streets in terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 ("**the PIE Act**").

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[1] *Olga Tellis & Others v Bombay Municipal Corporation & Others* 1985 SCR Supl (2) 512, 1986 AIR 180 para 55. The decision has been cited over 1,000 times by Indian courts, and widely followed.

3.1. The City has instituted this eviction proceedings against people – both identified people (first respondent) and unidentified people (second respondent) (collectively, "**the occupiers**" or "**the respondents**") - living on public roads at seven sites within the inner city. The eviction order sought is unconditional – not being linked in any way to the provision of alternative accommodation.

3.2. The City further seeks an interdict against (re-)occupation of the seven sites as well as any other property owned or controlled by the City.

4. The cumulative effect of the relief sought is to seek to clear all homeless people from the inner city, without providing alternative accommodation to them upon eviction, and barring them from the inner city indefinitely.

5. The respondents do not dispute that they are unlawful occupiers. However, they do submit that an unconditional eviction order in terms of prayers 1 and 2 of Part B of the Notice of Motion would not be just and equitable in terms of the PIE Act because it will render them homeless if they were to be forced to leave their current homes in the absence of assistance from the City of suitable alternative accommodation.

6. The City eschews its constitutional and statutory obligations towards the occupiers to find suitable alternative accommodation for the occupiers, and the alternative accommodation that was previously mooted – in the form of the "*Safe Spaces*" shelters operated by the City, has not been accepted by the occupiers and many other people living on the streets because of the conditions and rules of those shelters.

7. The City is also obliged to conduct meaningful engagement between itself and the occupiers prior to the institution of the proceedings to ensure that attempts to resolve the matter are made with the occupiers prior to involving the courts. The City failed to make any meaningful attempts to engage before litigating. After being reminded of the need to meaningfully engage in the answering papers, the City ostensibly conducted the meaningful engagement but was actually involved in gathering evidence to support this eviction application, not genuine listening, trust-building and negotiation.

8. The City is not entitled to the extensive interdict that it seeks in Prayer 4 of Part B of the Notice of Motion. It is submitted that the interdict sought by the City is overbroad and unconstitutional and unlawful to the extent that it seeks to authorise future evictions of any person on any property owned or controlled by the City in the absence of judicial scrutiny.

9. The current application – in practical terms, an eviction without provision of alternative accommodation and an all-purposes interdict in perpetuity against people living in structures on public roads – amounts to the City throwing up its hands on the issue of homelessness.

10. The City has prioritised a policing response to homelessness over a housing response. This is reflected in the prioritisation of policing of homelessness in expenditure; the experience of the individual respondents of repeated police and law enforcement raids; and the use of by-laws to evict, even of some of the specific respondent groups while this application was pending.

11. The disputes between the parties have narrowed as a result of concessions made both by the City and the occupiers.

12. The City has, appropriately, conceded:

    12.1. Eviction will leave the occupiers homeless and that, absent assistance from the City, the consequences of eviction for the individual occupiers will be "*dire*";[2]

    12.2. There was merit to some of the concerns raised by the occupiers regarding the rules of the Safe Spaces, and accordingly the City has standardised and revised the rules to address the concerns;[3]

    12.3. The Streets By-law may not lawfully sanction evictions without judicial supervision and compliance with the PIE Act, and any such eviction would be unlawful;[4]

13. In the light of the City's concession in reply regarding the Streets By-law, and because the constitutionality of the By-law is already before this court for hearing shortly after the present matter, the respondents have agreed to stay the counter-application challenging the Streets By-law. It therefore does not arise for determination by the court at this stage.

14. The occupiers, for their part, have conceded:

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[2] RA p 1140 paras 18.1 – 18.2.

[3] RA p 1151 para 29.4

[4] RA p 1165 para 57.

14.1. The City is the owner of the properties;

14.2. The occupiers have no right to occupy and are unlawful occupiers in terms of the PIE Act;

14.3. Living on the streets is inimical to their health and safety.

15. The central issues that remain in dispute are therefore:

15.1. whether it is just and equitable at this stage to grant an eviction order and, if so, on what terms or conditions;

15.2. if it is not just and equitable to order eviction (as the respondents submit), what relief would be appropriate at this stage in the proceedings;

15.3. whether the City is entitled to the interdict against occupation.

16. The remainder of these heads are structured as follows:

16.1. First, we set out the factual background in respect of homelessness in Cape Town, the circumstances of the occupiers and the history of the litigation;

16.2. Second, we address the City's constitutional and statutory obligations;

16.3. Third, we address the inadequacy of engagement that has taken place;

16.4. Fourth, we address the failure to provide for alternative accommodation in the court order;

16.5. Fifth, we address the inadequacies of the Safe Spaces shelters as alternative accommodation;

16.6. Sixth, we deal with the interdict sought by the City.

B. FACTUAL BACKGROUND

Homelessness in Cape Town

17. Homelessness in Cape Town presents a challenge of significant scale and complexity, making the present matter quite different from an 'ordinary' eviction application in relation to a single, defined group of people from a specific building or site.

18. In respect of the scale, three pieces of expert research on the papers provide the following estimates:

18.1. The 2019 Hope Exchange report referred to a Western Cape Government estimate of approximately 4,682 street people, 700 of whom were living in the central business district (CBD) ("**the Hope Exchange Report**").[5]

18.2. The "Street People Enumeration Final Report" by the City's Social Development and Early Childhood Development Department in 2019 ("**the Enumeration Report**") provided an estimate of 6 175 people.[6]

[5] Annexure LM12 to AA p 869.

[6] Annexure FA3 to FA p 190.

18.3. According to the "Cost of Homelessness Cape Town" report authored by UTurn in 2020 ("**Cost of Homelessness Report**"), there were approximately 14 357 street people in Cape Town in 2020;[7]

19. All three reports – and the parties to the present application – acknowledge that the true number of people living on the streets is difficult to ascertain.

20. The founding papers identified 114 individual occupiers by name.[8] The respondents in turn provided personal circumstances of 55 individuals in the answering affidavit.[9] Accordingly, the court has before it only a sample of the broader homeless population of Cape Town. It is likely that the number of people living on the streets of the CBD is at least 700, as estimated by the Hope Exchange Report in 2019, and may amount to several thousand individuals.

21. Notably, the second respondent – as cited by the City – includes all persons occupying the seven CBD sites in issue who are unknown to the City. Because people living on the streets are nomadic, moving from site to site, the second respondent is an open-ended category potentially including all the homeless people in the CBD.

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[7] Annexure FA4 to FA pp 205-236.

[8] Annexure "A" to NoM pp 13-15.

[9] AA pp 745-780.

The individual occupiers

22. We do not intend on setting out all the personal circumstances of each and every individual. However, it is crucial to point out the common threads among the occupiers. The personal circumstances were obtained by the occupiers' attorneys, the Socio-Economic Rights Institute of South Africa ("**SERI**"). SERI, working steadily and methodically to identify the relevant households in all the sites and to take instruction from them, attended to the sites on five occasions since the matter was instituted.

23. As stated above, the occupiers often take up casual jobs so it is not that easy to find them when one visits their home. The attorneys had to visit the seven sites at different times of the day and night in order to fit into the schedule of the occupiers.

24. The common pattern amongst the occupiers is as follows: [10]

    24.1. They are unemployed and survive on informal work.

    24.2. They earn between R10 to R100 per day.

    24.3. They work in the informal economy or semi-skilled jobs such as car guards, recycling or informal trade.

[10] AA pp 745 – 779.

24.4. They ended up in the streets for different reasons e.g. unstable homes due to abuse of drugs and alcohol, financial strain, etc.

24.5. They have been living on the streets for a long period of time – some as long as twenty years.

24.6. Several of them currently live in a family unit, with their loved ones.[11]

24.7. They have been offered temporary shelter by the City in the City's Safe Spaces. However, most of them left the Safe Spaces because of the conditions and rules. Some of the rules involve not allowing children and the separation of families; the Safe Spaces have lock-out times and there is no privacy. Most of the occupiers find these rules to be unbearable and as a result they do not consider it to be suitable for them to live in these spaces.

25. As Lucky Mgoqa, deponent to the answering affidavit, explains:

> *"[T]he most important thing the municipality could assist us with is employment and well-located affordable housing that affords us privacy and dignity."*[12]

26. The City complains that the allegations of ill-treatment at the Safe Spaces by individual respondents are unsubstantiated. Without conceding that is so, the complaints do demonstrate the lack of trust between the City and people living on the streets.

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[11] We address this in more detail in below in relation to the gender segregation rule.

[12] AA P 738 para 30.

27. The City's Safe Spaces have only served as a revolving door where the occupiers agree to go in hopes of having a different but soon leave to return to the streets. The City itself acknowledges that, if evicted, the respondents are likely simply to return to the properties from which they have been evicted.[13]

The history of this litigation

28. The application was launched on 12 December 2022. The City sought, and obtained, a service order in terms of Part A of the notice of motion. The respondents do not contest service, save to submit that the open-ended citation of the second respondent creates the likelihood that any order granted in terms of Part B would be enforced against persons who had not received service of the application.

29. During the course of the proceedings – as had previously been the frequent experience of the occupiers – the City's Law Enforcement twice carried out evictions without a court order of some of the specific respondents in this application. Those two incidents took place on 16 May 2023 and 7 June 2023.

[13] RA p 1169 para 61.7.2.

The 16 May 2023 incident

30. The first incident took place on 16 May 2023 when, at around 8pm, the law enforcement officials attended to the sites and demolished about 15 structures.[14]

30.1. When the occupiers asked them about the demolition they said that it was in terms of the By-laws.[15] They took the occupiers' cell phones, power banks and some cash that they had earned on that day. As such the occupiers were unable to contact their attorneys.[16]

30.2. The affected occupiers were able to contact their attorneys on 18 May 2023 and the their attorneys immediately wrote to the City's attorneys.[17]

30.3. The City's attorneys initially responded by denying that the demolition of the occupiers' homes took place but saying that it would investigate further.[18] The occupiers' attorneys responded to the City's attorneys reiterating that their homes were demolished and attaching photographs depicting the site before the demolition, during the demolition with law enforcement clearly visible on the site and after the demolition.[19]

[14] AA p 741 para 40.

[15] AA p 741 para 40.

[16] AA p 741 para 40.

[17] AA p 741 para 41 and Annexure "LM1" to AA p 814.

[18] The City's initial response is at Annexure "LM2" to AA p 817.

[19] Annexure "LM3" to AA p 818.

30.4. The City responded by stating that the demolition was conducted on the strength of a court order under case number 3537/2022.[20] However, they said that in order to avoid litigation, they offered an amount of R1 700 for each of the affected households and shelter at the safe spaces subject to availability. They further undertook that no demolitions would take place in the CBD on the sites that are subject of this litigation.

30.5. The occupiers instructed their attorneys to accept the money and the shelter as they desperately needed to rebuild their homes.[21] However, they had no knowledge of the court order mentioned in their letter, so they instructed their attorneys to request a copy of the order.[22]

30.6. The City's attorneys responded by saying that because of the engagement between the parties, the City had not investigated the matter further and could "*not admit or deny*" the allegations, but gave the occupiers details of the Safe Spaces on offer and their contact details.[23]

30.7. The occupiers' attorneys addressed an email to the people in charge at the safe spaces, asking to come and view the safe spaces.[24] The City never responded to this request, although the email was read by the recipient.[25]

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[20] AA, Annexure "LM4" to AA p 826.

[21] AA p 742 para 43.

[22] AA, Annexure "LM5" to AA p 828.

[23] AA, Annexure "LM6" to AA p 833.

[24] AA, Annexure "LM7" to AA p 834.

[25] AA p 742 para 46.

31. This incident was simply the latest instance of Law Enforcement actions against the people living on the streets of the CBD. It took place despite the pending eviction proceedings in this matter.

The 7 June 2023 incident

32. The second incident took place the following month. On 7 June 2023 at 13h00, law enforcement officers went to the site on Strand Street next to the Castle and demolished a structure of one of the occupiers there.

32.1. The occupiers recorded the demolition and immediately forwarded it to their attorneys. Their attorney, Ms Bhengu, then addressed a letter to the City's attorneys regarding the demolition and stating that it was unlawful.[26]

32.2. The City's attorneys responded, denying that the demolitions took place. And stating that they were enforcing By-laws, cleaning the area and removing waste build up (human and otherwise) as they are obliged to.[27]

32.3. On a regular basis, the City's Law Enforcement approach and issue the occupiers with Notices for illegal dumping, unlawful occupation or starting a fire on open space or they conduct a random search and charge us for

[26] Annexures "LM8" and "LM9" to AA, respectively, pp pp 835-840 and 841-843.

[27] Annexure "LM10" to AA pp 844-845.

being in possession of drugs. Their main purpose in doing so is to chase the occupiers away from the streets.[28]

33. All of this leaves the occupiers caught in a cycle of precarious living, brief and unsuccessful diversion to shelters, and constant police harassment. The relief sought in the present application does not offer any possibility of breaking that cycle for them.

The gaps in the information before the court

34. The court has an obligation to have regard to the personal circumstances, that give them due weight in making its judgment as to what is just and equitable. The court cannot fulfil its responsibilities in this respect if it does not have the requisite information at its disposal.

35. Although it is incumbent on the interested parties to make all relevant information available, technical questions relating to onus of proof should not play an unduly significant role in its enquiry.[29]

36. In view of the broad scope of the eviction order and interdictory relief sought by the City, the following relevant information is not available to the court:

36.1. The number of "*unknown*" persons who would fall within the citation of the second respondent; and

[28] A copy of one example of the notices is at Annexure "LM11" to AA pp 846-853.

[29] *Port Elizabeth Municipality v Various Occupiers* 2004 (12) BCLR 1268 (CC) para 32.

36.2. The current availability of accommodation, including number of available beds and rooms, at the City's Safe Spaces and its temporary alternative accommodation sites;

36.3. What alternative land the City has that might be made available to the respondents. (In this regard, the City simply states, without more, that it has "*no land available in the CBD or other business districts*" for this purpose.)[30]

37. The significance of these gaps in information for the just and equitable inquiry and the relief to be granted is addressed below.

C. CONSTITUTIONAL AND STATUTORY OBLIGATIONS

38. The City seeks an order evicting the named individual occupiers and all other unknown persons living in the seven sites of the CBD, without the provision of any alternative accommodation in the order. This is coupled with an interdict in perpetuity against this indeterminate population of homeless people against occupying those seven sites or <u>any other property</u> owned or controlled by the City. The order sought is framed in the broadest terms.

39. It is submitted that the order sought by the City fails to give effect to its constitutional and statutory obligations – both in respect of the *process* followed and the *substantive* relief proposed.

[30] RA pp 1142-1143 para 21.1.

40. South Africa is a party to the International Covenant on Economic, Social and Cultural Rights, which guarantees the right to housing in art 11, which provides:

> "*The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.*"

41. It is submitted that, in terms of section 39(1)(a) of the Constitution, the provisions of ICESCR, General Comments and decisions of the Committee on Economic and Social Rights (CESCR) must be considered when interpreting the Constitution and any legislation enacted to give effect to section 26(3) of the Constitution.

42. Section 26(3) of the Constitution provides that:

> *"no one may be evicted from their home, or have their home demolished, without an order of the court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions."*

43. The PIE Act gives legislative texture to guide the courts in determining the approach to eviction now required by section 26(3) of the Constitution. The central operative provisions of PIE are section 4, which deals with evictions sought by owners or persons in charge of property, and section 6, which is concerned with eviction proceedings brought by organs of state.

44. Section 6 provides:

> *"6. Eviction at instance of organ of state.—*

> *(1) An organ of state may institute proceedings for the eviction of an unlawful occupier from land which falls within its area of jurisdiction, except where the unlawful occupier is a mortgagor and the land in question is sold in a sale of execution pursuant to a mortgage, and the court may grant such an order if it is just and equitable to do so, after considering all the relevant circumstances, and if—*
>
> *(a) the consent of that organ of state is required for the erection of a building or structure on that land or for the occupation of the land, and the unlawful occupier is occupying a building or structure on that land without such consent having been obtained; or*
>
> *(b) it is in the public interest to grant such an order.*
>
> *(2) For the purposes of this section, "public interest" includes the interest of the health and safety of those occupying the land and the public in general.*
>
> *(3) In deciding whether it is just and equitable to grant an order for eviction, the court must have regard to—*
>
> *(a) the circumstances under which the unlawful occupier occupied the land and erected the building or structure;*
>
> *(b) the period the unlawful occupier and his or her family have resided on the land in question; and*
>
> *the availability to the unlawful occupier of suitable alternative accommodation or land."*

45. Section 6 emphasise that the central role of Courts is to ensure equity after considering all relevant circumstances.

46. Section 6(3) of PIE states that the availability of a suitable alternative place to go is one factor that must be considered. A Court should be reluctant to grant an eviction against relatively settled occupiers unless it is satisfied that reasonable alternative accommodation is available.[31]

[31] *Port Elizabeth Municipality* para 28.

47. It is important that the actual situation and personal circumstances of the persons affected are taken into account. It is not sufficient for the City to propose alternative accommodation in a manner that only works in theory.

48. The Constitution Court in *Occupiers of Erven 87 and 88 Berea v De Wet N.0. and Another ("Berea")*[32] held:

> "*The court will grant an eviction order only where: (a) it has all the information about the occupiers to enable it to decide whether the eviction is just and equitable; and (b) the court is satisfied that the eviction is just and equitable having regard to the information in (a). The two requirements are inextricable, interlinked and essential. An eviction order granted in the absence of either one of these two requirements will be arbitrary. I reiterate that the enquiry has nothing to do with the unlawfulness of occupation. It assumes and is only due when the occupation is unlawful*."[33]

49. In ***Port Elizabeth Municipality***, the Constitutional Court held that it would not be enough for the Municipality merely to show that it has a program that is designed to house the maximum number of homeless people in the shortest period of time in the most cost effective way.[34] The existence of such a program would go a long way towards establishing a context that would ensure that those evictions would just and equitable.[35] It will "*fall short,*

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[32] 2017 (8) BCLR 1015 (CC); 2017 (5) SA 346 (CC) ("*Berea*").

[33] *Berea* para 48; see also *Port Elizabeth Municipality* para 32 where Sachs J stated: "*The court is not resolving a civil dispute as to who has rights under land law; the existence of unlawfulness is the foundation for the enquiry, not its subject-matter*."

[34] *Port Elizabeth Municipality* para 29.

[35] *Port Elizabeth Municipality* para 29.

however, from being determinative of whether and under what conditions an actual eviction order should be made in a particular case".[36]

50. The interpretation of section 6 in ***Port Elizabeth Municipality*** is that the ordinary prerequisites for the City to be in a position to apply for an eviction order are that the occupation is unlawful, and the structures are either unauthorised, or unhealthy or unsafe. Contrary to the pre-constitutional position, however, the mere establishment of these facts does not automatically mean the Court should grant an eviction order. The Court held:

> "*The presence of these factors merely trigger the court's discretion. If they are proved, the court then may (not must) grant an eviction order if it is just and equitable to do so. In making its decision it must take account of all relevant circumstances, including the manner in which occupation was effected, its duration and the availability of suitable alternative accommodation or land."*[37] (our emphasis)

51. Sachs J emphasised that

> "*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 in a principled way and 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.*"[38]

52. The Court held further:

> *"the inherited injustices at the macro level will inevitably make it difficult for the courts to ensure immediate present-day equity at the micro level.*

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[36] *Port Elizabeth Municipality* para 29.

[37] *Port Elizabeth Municipality* para 25.

[38] *Port Elizabeth Municipality* para 37.

> *The judiciary cannot of itself correct all the systemic unfairness to be found in our society. Yet it can at least soften and minimise the degree of injustice and inequity which the eviction of the weaker parties in conditions of inequality of necessity entails."*[39]

53. Section 6 does not provide an exhaustive list personal circumstances that should be taken into account by Court. It is only a guideline of what the court may refer in deciding what is just and equitable. The Court has a very wide mandate and must give due consideration to all circumstances that might be relevant.[40] The term also implies that a court, when deciding an application of this nature, is obliged to break away from a purely legalistic approach and have regard to broader considerations of morality, fairness, social values and the implications of granting an eviction order.

54. Just and equitable relief is about balancing the balancing two diametrically opposed fundamental interests.[41] In the context of large-scale homelessness in Canada, the Court of Appeal for British Columbia described this tension as "*an inevitable conflict between the need of homeless individuals to perform essential, life-sustaining acts in public and the responsibility of the government to maintain orderly, aesthetically pleasing public parks and streets.*"[42]

55. In the present matter the balancing act involves the needs of the occupiers who are in dire need of adequate accommodation against those of the

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[39] *Port Elizabeth Municipality* para 38.

[40] *Port Elizabeth Municipality* para 30.

[41] *Port Elizabeth Municipality* para 33.

[42] Victoria (City) v. Adams, 2009 BCCA 563 (CanLII) paras 3-4. quoting *Pottinger v. City of Miami*, 810 F. Supp. 1551 at 1554 (S.D. Fla. 1992).

general public and the City. It is the duty of the court in applying the requirements of the PIE to balance these opposing interests and bring out a decision that is just and equitable.

56. Each case has to be decided not on generalities but in the light of its own particular circumstances.[43]

57. In terms of section 7(1) of the PIE Act, a municipality (in this instance the City) may at its discretion appoint a mediator to mediate and settle any dispute in terms of the PIE Act.

58. Sach J interpreted section 7 as follows:

> *"[S]ection 7 of PIE is intended to be facilitative rather than exhaustive. It does not purport, either expressly or by necessary implication, to limit the very wide power entrusted to the court to ensure that the outcome of eviction proceedings will be just and equitable. As has been pointed out, section 26(3) of the Constitution and PIE between them give the courts the widest possible discretion in eviction proceedings, taking account of all relevant circumstances. One of the relevant circumstances in deciding whether an eviction order would be just and equitable would be whether mediation has been tried. In appropriate circumstances the courts should themselves order that mediation be tried."*[44]

59. In accordance with the above constitutional imperatives, the National Housing Act 107 of 1997 requires the City to–

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[43] *Port Elizabeth Municipality* para 31.

[44] *Port Elizabeth Municipality* para 45.

59.1. Ensure that the inhabitants of their areas of jurisdiction have access to adequate housing on a progressive basis;[45]

59.2. Set housing delivery goals in respect of their areas of jurisdiction; [46]and

59.3. Initiate, plan, co-ordinate, facilitate, promote and enable appropriate housing development in their areas of jurisdiction.[47]

60. The National Housing Code (2009) contains an Emergency Housing Programme in Volume 4 Part 3.[48] The Emergency Housing Programme requires the City to investigate and assess the need for emergency housing within its areas of jurisdiction and to plan proactively for it.

61. The Emergency Housing Programme makes provision for the City to access funding, through the Provincial Government, for categories of persons within its area of jurisdiction who qualify for emergency housing. These categories include persons who are threatened with eviction. The occupiers fall within this category.

62. The funding is available for the provision of temporary shelter to persons who qualify for emergency housing.

63. The Emergency Housing Programme further requires a *"Local Level Steering Committee"* to be formed in an emergency housing situation. Such a

[45] Section 9(1)(a) of the National Housing Act 107 of 1997 ("the National Housing Act").

[46] Section 3(2)(1) of the National Housing Act.

[47] Section 9(1)(f) of the National Housing Act.

[48] Annexure "LM13" to AA pp 916-1009.

committee must include representatives of the Provincial Department of Housing, the relevant municipality, the affected community and, where applicable, the community where the affected community will be resettled. The Committee is responsible for communication, negotiation and local decision-making pertaining to all aspects of the emergency housing situation.

64. In terms of the Emergency Housing Programme, the provision of temporary shelter to persons who qualify for emergency housing should represent only an initial phase towards a permanent housing solution. The Emergency Housing Programme , the National Housing Code and the National Housing Act all explicitly require the City to plan and develop such permanent housing solutions.

65. We submit that the City is incorrect to assert that the Emergency Housing Programme does not find application in respect of people living on the streets of Cape Town. The City's position appears to be that it considers the Safe Spaces to be more appropriate for the needs of all persons living on the street (regardless of what they themselves may say) and that it will only consider them for longer-term housing under the Emergency Housing Programme after they have been "*remove[d] from residing on the streets*".[49] It makes no promises in that regard.

66. The Emergency Housing Programme has its origins in the ***Grootboom*** decision. One of the reasons that the state was held to have fallen short of

[49] City's heads of argument pp 52-54 para 95.

its constitutional obligations in ***Grootboom*** was its failure to make provision for the "most desperate". The Court held:

> "*To be reasonable, measures cannot leave out of account the degree and extent of the denial of the right they endeavour to realise. Those whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril, must not be ignored by the measures aimed at achieving realisation of the right. It may not be sufficient to meet the test of reasonableness to show that the measures are capable of achieving a statistical advance in the realisation of the right. Furthermore, the Constitution requires that everyone must be treated with care and concern. If the measures, though statistically successful, fail to respond to the needs of those most desperate, they may not pass the test.*"[50]

67. The City is effectively reverting to that pre-*Grootboom* position by refusing to apply the Emergency Housing Programme to the most marginalised.

68. Against the backdrop of the constitutional obligations discussed above, it is submitted that it is not just and equitable to grant an order simply evicting the respondents, as the City seeks, for the following main reasons:

    68.1. The City has failed to meaningfully engage;

    68.2. The order does not link the eviction to the provision of alternative accommodation; and

    68.3. In any event, the Safe Spaces are not adequate alternative accommodation.

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[50] *Government of the Republic of South Africa and Others v Grootboom and Others* [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169 para 44.

69. Each of these aspects is addressed in turn.

D. THE CITY FAILED TO MEANINGFULLY ENGAGE

70. The PIE Act, as interpreted by the courts, offers two procedural mechanisms to deal with complex eviction scenarios: mediation and meaningful engagement.

71. The City has refused to engage in mediation in terms of section 7 of the PIE Act on the basis that it has nothing else to offer the occupiers beyond the Safe Spaces and that mediation is time-consuming and costly.[51]

72. In respect of meaningful engagement, the City contends that it engaged meaningfully both before the application was instituted and, further, after receiving the answering papers.

73. It is submitted that such engagement as took place is insufficient in the context of this application.

74. While there were interactions between the City before the launch of the application and a process of verifying the personal circumstances of the named respondents after the answering papers were delivered, the engagement has fallen short of what is required.

[51] RA pp pp 1141-1143 paras 19-23.

75. The Constitutional Court explained the nature of meaningful engagement in the case of ***Occupiers of 51 Olivia Road***:[52]

> *"[14] Engagement is a two-way in which the City and those who are to become homeless would talk to each other meaningfully in order to achieve certain objectives.*
>
> *[15] This is precisely to ensure that the City is able to engage meaningfully with the poor, vulnerable illiterate people that the engagement process should preferably be managed by careful and sensitive people on its side.*
>
> *[19] Indeed the larger the number of people potentially to be affected by eviction, the greater the need for structured, consistent and careful engagement."*[53]

76. Although they are not a closed list, key topics on which engagement must take place are the following:

76.1. What the consequences of the eviction are likely to be;

76.2. Whether the City could help in alleviating the dire consequences;

76.3. Whether it was possible to render the building / the land concerned relatively safe and conducive for health for an interim period;

76.4. Whether the City has an obligation to the occupiers in the prevailing circumstances; and

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[52] *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* 2008 (5) BCLR 475 (CC).

[53] *Olivia Road* paras 14, 15 and 19.

76.5. When and how the City could, or would fulfil the obligations.[54]

77. ***Occupiers of Olivia Road*** further confirmed that in any eviction proceedings at the instance of a municipality, the provision of a complete and accurate account of the process of engagement, including at least the reasonable efforts of the municipality within that process, is crucial.[55]

78. The absence of any engagement or the unreasonable response of a municipality in the engagement process is a weighty consideration against the grant of an eviction order. Section 26(2) of the Constitution mandates that the response of any municipality to potentially homeless people with whom it engages must also be reasonable.[56]

79. The City accepts the obligation to meaningfully engage with the occupiers before evicting them.[57]

80. The City argues that it has meaningfully engaged the residents – both before the application was launched and after the answering papers were delivered. This is disputed. The main form of interaction between the respondents and the City before the institution of the application entailed Law Enforcement invoking by-laws to fine them, demolish homes and chase them from one site to another.[58]

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[54] *Olivia Road* para 14.

[55] *Olivia Road* para 21.

[56] *Olivia Road* para 28.

[57] City's heads of argument p 56 para 97.

[58] AA p 795 paras 274-275.

81. The engagement that took place under the shadow of the present application, after the delivery of the answering affidavits, was also deficient.

82. SERI and the City agreed that the meaningful engagement would be conducted on 16 August 2023 up to 19 August 2023.

83. On 16 August 2023, upon commencement of the meaningful engagement, SERI communicated concerns about how the process was being conducted. The City was conducting a verification process which involved coercing the occupiers to provide specific answers to bolster the City's application for eviction and to sign forms that the City's representatives refused to provide to the respondents' attorneys.

84. SERI's immediately communicated its concerns in writing on 16 August 2023.[59] The concerns included that the City's representatives were requiring individuals to sign two forms, one relating to their personal circumstances and the other to the Safe Spaces. The first form appears to be tailored to elicit information to show that an individual has a family home that may constitute alternative accommodation. The second form contained the revised, standardised rules of the Safe Spaces, and individuals were asked to sign to confirm that they understood the rules. Neither form had been provided to the respondents' attorneys at this stage.

[59] Annexure "RA8" to RA pp 1999-1201.

85. There was no response to this letter from the City's attorneys, and the engagement continued in a similar fashion for the remainder of the scheduled period.

86. We submit that the occasions of 17-19 August 2023 where the parties were scheduled to meaningfully engage were nothing but a box ticking exercise in that, the City's took this as an opportunity conduct a verification process of personal circumstances that had already been provided in the answering affidavit. This is information that the City representatives could have easily obtained from the respondents' legal representatives. The Supreme Court of Appeal in ***City of Johannesburg v Changing Tides 74 (Pty) Ltd and Others*** emphasised that represented occupiers can provide their personal circumstances to the City through their legal representatives.[60]

87. In order for the court to grant just and equitable relief it must consider *the extent to which serious negotiations had taken place with equality of voice for all concerned.*[61] In this case, we respectfully submit that there was no *"serious negotiation"*. The City approached the engagement with a pre-determined outcome and has never been prepared to seriously listen to the occupiers' concerns and needs and to build the trust necessary to find a workable solution. The City's reports of the engagement, although providing a partial picture alongside the answering papers, fall far short of the information that the court requires in order to determine a just and equitable order. In particular, the reports fail to quantify the total number of respondents

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[60] *City of Johannesburg v Changing Tides 74 (Pty) Ltd and Others* 2012 (6) SA 294 (SCA) para 46.

[61] *Port Elizabeth Municipality* para 30.

and fail to quantify the need for family accommodation, as addressed in more detail below.

88. Under the circumstances, we submit that the City has failed to meaningfully engage with the respondent genuinely and adequately. Therefore, the eviction sought by the City is premature.

E. ORDER NOT LINKED TO ALTERNATIVE ACCOMMODATION

89. The City submits that the only questions for this court to adjudicate are whether to grant an eviction order and, if so, what date to attach to it.[62]

90. It is submitted that the just and equitable inquiry is significantly broader than this, and requires the court to consider all the conditions that would render an eviction just and equitable – most notably, the provision of alternative accommodation.

91. The City seeks an unconditional eviction order that makes no provision for alternative accommodation and does not link the date of eviction to the respondents securing alternative accommodation. The most that the City offers is that, after an eviction order is granted, the respondents be given an opportunity to accept shelter at the Safe Spaces before a final eviction date is set. The order sought offers no protection for the respondents and would not be just and equitable.

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[62] City's heads of argument p 8 paras 10.4-10.5 and p 63 para 115.

92. The eviction order fails to make any provision for alternative accommodation or to link the date of eviction to the provision of such accommodation, as is required.

93. The City takes this approach ostensibly because some of the Respondents have been offered shelter at the Safe Spaces. However, the fact that that some (and not all) have been made such an offer does not make it permissible to grant an eviction order that simply evicts, without more.

94. The Constitutional Court and the Supreme Court of Appeal have confirmed in a line of cases that, even where it is just and equitable to grant an eviction order, the relevant municipality has a duty to provide temporary alternative accommodation to occupiers who face homelessness if evicted. Most recently, the Constitutional Court reaffirmed this principle in ***Occupiers of Erven 87 and 88 Berea v De Wet NO***:

> "*An order that will give rise to homelessness could not be said to be just and equitable, unless provision had been made to provide for alternative or temporary accommodation.*"[63]

95. Importantly, the courts require that the dates of the eviction and the provision of alternative accommodation should be linked, so that there is no intervening period of homelessness.[64] Accordingly, it is not appropriate to grant an eviction order without regard to questions of homelessness and alternative accommodation and then leave it to the evicted occupiers to bring fresh

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[63] *Occupiers of Erven 87 and 88 Berea v De Wet* NO 2017 (5) SA 346 (CC) para 57.

[64] *Blue Moonlight* para 100; *Skurweplaas 353 JR v PPC Aggregate Quarries (Pty) Ltd* [2011] ZACC 36 para 13; *City of Johannesburg v Changing Tides 74 (Pty) Ltd & others* 2012 (6) SA 294 (SCA) para 25; *Occupiers of Erven 87 and 88 Berea v De Wet* NO 2017 (5) SA 346 (CC).

proceedings against the municipality, while in the meantime being rendered homeless.

96. As the situation of the respondents demonstrates, their eviction will render them homeless. Indeed, it will push an already marginalised group further to the margins.

97. The City is obliged to provide them with temporary emergency accommodation under Chapter 12 of the National Housing Code. Section 12.3.1 defines "*emergencies*" to include situations in which persons are evicted or threatened with imminent eviction or are in a situation of "*exceptional housing need*".

97.1. Other provisions of Chapter 12 indicate a legislative purpose that the City plan proactively and budget for emergency situations.

97.2. Section 12.4.1 states that municipalities must "initiate, plan and formulate applications for projects relating to emergency housing situations".

97.3. Section 12.6.1(b) states that "the provision for possible emergency housing needs must be identified through pro-active planning or in response or reaction to a request for assistance from other authorities or the public";

97.4. Section 12.6.1.(c) states:

"The municipality must immediately investigate and assess the identified need giving due consideration to the following aspects:

- *If the situation requires intervention, and if so, whether the municipality can itself address the situation utilising its own means;*
- *If the situation requires immediate or emergency assistance beyond the means of the municipality, in which case the provincial housing department must be notified immediately and be requested to assist".*

98. In ***Blue Moonlight***, the Constitutional Court emphasised that Chapter 12 must be interpreted in the light of the relevant constitutional and statutory framework, to find that the City has the power and the concomitant obligation to fund itself in the sphere of emergency housing, and to "*react to, engage with and prospectively plan around the needs of local communities"*.[65]

99. With regard to <u>when</u> temporary emergency accommodation ought to be provided, in the recent judgment of the Supreme Court of Appeal in ***City of Johannesburg v Changing Tides*****,**[66] Wallis JA (writing for the full bench) held that, although the municipality may be entitled to review who is entitled to temporary emergency accommodation following an eviction, the municipality should <u>first</u> provide the accommodation and then conduct the review.[67]

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[65] *Blue Moonlight Properties* at para 53.

[66] *City of Johannesburg v Changing Tides 74 (Pty) Ltd & others* 2012 (6) SA 294 (SCA) ("*Changing Tides*"). [67] *Changing Tides* at para 53.

[67] *Changing Tides* at para 53.

100. It is accordingly submitted that it would not be just and equitable to order eviction without providing in the order for the provision of alternative accommodation by the City and linking the provision of accommodation to the date of eviction. Given the complexity and scale of the matter, the City should be required to develop a relocation plan that links specific individuals to specific alternative accommodation.

F. SAFE SPACES DO NOT CONSTITUTE ADEQUATE ALTERNATIVE ACCOMMODATION

101. It is submitted that the Safe Spaces do not constitute adequate alternative accommodation for three main reasons:

101.1. Lack of security of tenure;

101.2. Unconstitutional gender segregation and day-time lockout rules;

101.3. For some Safe Spaces, location is unsuitable.

Lack of security of tenure

102. One of the rules applicable to the Safe Spaces is that they provide only for a period of six months' accommodation. Rule 3 of the 'revised and standardised' rules of the Safe Spaces still provides:

> *"Period of initial stay is 6 months."*[68]

[68] Annexure "RA16" to RA p 1247.

103. The City, in its replying affidavit and heads of argument, has sought to explain that this rule is not applied literally, and that persons who are not ready to move out after 6 months will not be evicted.[69] However, despite actively revising the text of the rules in the face of the concerns of the respondents, the City retained this wording that, on the face of it, allows neither flexibility nor exceptions.

104. It is submitted that it is inadequate to retain a rule that, on the face of it, provides no security of tenure but to claim that the rule is not applied in rigidly practice. Decision-makers tasked with enforcing the rule require adequate guidance to ensure that their discretion is exercised without infringing constitutional rights.[70] The City should be directed to amend the rule to make clear that a person who moves into a Safe Spaces shelter will not face summary eviction after 6 months.

105. More importantly, however, the City is required to provide alternative accommodation beyond the limited emergency provision of Safe Space Shelters.

106. The City submits that it is effectively overwhelmed by the housing backlog and is unable to provide anything other than emergency, short-term shelter at the Safe Spaces.

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[69] RA p1152 paras 30.2-30.2.2; City's heads of argument pp 42-43 para 80.

[70] *Dawood and Another v Minister of Home Affairs and Others ; Shalabi and Another v Minister of Home Affairs and Others ; Thomas and Another v Minister of Home Affairs and Others* [2000] ZACC 8; 2000 (3) SA 936; 2000 (8) BCLR 837 para 46.

107. In ***Community of Hangberg and Another v City of Cape Town***,[71] Salie-Hlophe J pointed that even though the City may be overwhelmed by what it is required to do as a municipality, it is not an basis to eschew its constitutional obligation. The court held:

> *"The City as a municipality is strained and under pressure to service in accordance with its constitutional obligations, amongst others, to provide housing. However, they need to go about their affairs and utilise the manpower and infrastructure in a constitutional and lawful manner to achieve their goals. Trampling the bill of rights in its efforts to do so is not permitted."*[72]

108. In *Blue Moonlight*, the Constitutional Court held as follows in relation to the invocation by the City of Johannesburg of budget constraints as a barrier to providing emergency housing:

> "*The City provided information relating specifically to its housing budget, but did not provide information relating to its budget situation in general. We do not know exactly what the City's overall financial position is. This Court's determination of the reasonableness of measures within available resources cannot be restricted by budgetary and other decisions that may well have resulted from a mistaken understanding of constitutional or statutory obligations. In other words, it is not good enough for the City to state that it has not budgeted for something, if it should indeed have planned and budgeted for it in the fulfilment of its obligations.*"[73]

109. It is submitted that the City bears a constitutional duty to provide alternative accommodation to people living on the streets of Cape Town and to budget and plan appropriately in order to do so. It does not suffice to say that the

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[71] *Community of Hangberg and Another v City of Cape Town* [2020] ZAWCHC 66 ("*Hangberg*").

[72] *Hangberg* para 10.

[73] *Blue Moonlight* para 74.

respondents *may* be eligible for consideration for the Emergency Housing Programme after they have spent six months in the Safe Spaces.

Unconstitutional rules

110. The City's Safe Spaces impose two further rules that individual respondents have identified as key reasons why they have not taken up offers to move to the Safe Spaces – gender segregation and day-time lockout.

111. The City, after the delivery of the answering papers, has "*revised and standardised*" the rules of the Safe Spaces in order, it says, to address these concerns. The upshot of the revision, as alleged by the City, is that it now claims that both rules are applied with a degree of flexibility or willingness to make exceptions if there is a sound basis to do so.

112. Both rules – as applicable in shelters in Johannesburg – were declared to be inconsistent with the Constitution and invalid in ***Dladla***.[74]

Gender segregation

113. The gender segregation rule is not a written rule. It is simply the enforced practice at the Safe Spaces.

114. As concerns the gender segregation rule, the City responds by claiming that there are no family units among the respondents that require family

[74] *Dladla & Another v City of Johannesburg & Others* [2017] ZACC 42; 2018 (2) SA 327 (CC).

accommodation (except for one family) and that, in respect of couples accommodation, Culemborg I does have some couples rooms and Paint City "*can be reconfigured*" to provide some in future.[75]

115. The City is wrong on the facts regarding the need for family units for at least two reasons:

    115.1. Several of the individual respondents have partners and at least two have confirmed that they live with children.

    115.2. In any event, the broader group of respondents falling within the second respondent inevitably include family groups with children.

116. Despite the respondents raising the need for family and couples accommodation in the answering papers, the reports on the further engagement by the City from 17-19 August 2023 did not record whether individuals spoken to at the seven sites have partners or children.[76] Accordingly, the City's reports fail to provide the court with the necessary information to quantify this need. A partial picture of this need is provided by the answering papers and the table prepared by the City to summarise personal circumstances.

117. The City's own summary table[77] confirms that at least 38 people (out of a total of 54 in the table) indicated that live with a partner or family members.

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[75] RA p 1157 para 33.

[76] City's reports on engagement on 17, 18 and 19 August 2023: Annexures "RA12", "RA13" and "RA14" to RA pp 1222-1246.

[77] Annexure "RA12" to RA p 1216.

This represents 70% of the people included in the City's summary table. For several people, the table records that the relationships involved are "*unclear*". For several of the family members listed, no age is given and it is unclear whether they are children. However, at least the following are recorded as living with children:

117.1. Petros Burger – complained that children not allowed at Safe Spaces but "*does not indicate that he has children*"; [78]

117.2. Abigail Van Wyk – lives with Patrick (14) and Jayden (no age given);[79]

117.3. Yanick Tshiseya – lives with son Isha Mpohi (no age given);[80]

117.4. Dean Theron – lives with two unnamed sons (aged 17 and 22); [81]

118. The City's claim in the heads of argument that there is only one family with children among the individual respondents[82] is not consistent with their own (already incomplete) data.

119. These entries – in the City's own summary report – confirm that there is a significant need for family accommodation and that the City has not as yet been able to accurately quantify that need. The City's report suggests, for

[78] Annexure "RA12" to RA p 1216.

[79] Annexure "RA12" to RA p 1218.

[80] Annexure "RA12" to RA p 1218.

[81] Annexure "RA12" to RA p 1221.

[82] City's heads of argument pp 37-38 para 69.

example in the case of Mr Petros Burger,[83] that respondents asking for family units were not even asked to confirm whether they have children and how many children they have.

120. However, this data is not comprehensive and does not reflect the full need for couples and family accommodation.

121. Accepting that there is a need – within the respondent group – for both family and couples accommodation, and that these respondents will have nowhere else to live if evicted from where they currently sleep, it is submitted that the City is required to do more than simply point to the possibility of limited and unquantified couples accommodation that might be available at Culemborg I and, if it is "*reconfigured*", at Paint City. The City is required to report to the court *specific alternative accommodation* that will ensure that the respondents who live in family units will not face separation. The report needs to indicate specifically how many couples and family units are available.

122. In ***Lopez Alban v Spain***, the Committee on Economic, Social and Cultural Rights considered a right to housing matter in which the Alban family were evicted and placed in a shelter that separated them according to sex and provided for only a three-month stay.[84] The Committee concluded that Spain

[83] Annexure "RA12" to RA p 1216. The summary table records that Mr Burger complained that the Safe Spaces do not allow children but the report adds that "*Mr Burger did not indicate that he has children*". This suggests that he was not asked.

[84] *Lopez Alban v Spain* (Committee on Economic, Social and Cultural Rights) communication No. 37/2018, UN Doc E/C.12/66/D/37/2018.

that Spain had failed to provide adequate housing as required by art 11 of ICESCR.[85] South Africa is a party to ICESCR.

123. It is submitted that section 26(3) of the Constitution would be violated by ordering an eviction that subjects those evicted to insecure 6-month tenure in sex-segregated shelters.

Day-time lockout

124. The day-time lockout rule is set out in rule 14 of the 'revised and standardised' rules of the Safe Spaces. It provides:

> "*Residents will be encouraged to vacate the site between 8:30 and 17h00 every day unless the personal circumstances of any resident makes this unreasonable on a day or for a period of time.*"[86]

125. The City amended the rule to introduce a level of flexibility in light of the respondents' concerns conveyed in the answering papers.

126. The respondents accept that, as amended, the rule is now consistent with the Constitution.

The location of alternative accommodation

127. It is crucial that such vulnerable people are placed in a location where jobs of this nature are accessible for the sake of their livelihood. There is a real need for the occupiers to be closer to the inner city or to be placed in the

[85] Ibid para 13.3.

[86] Annexure "RA16" to RA p 1247.

inner city. This is not a matter of "*preference*" as the City has suggested, but it is a matter that is closely linked to the livelihood of the occupiers.

128. The principle that alternative accommodation for poor people in inner cities must take into account their need to sustain livelihoods has been established in international law, comparable foreign jurisdictions and indeed under South African law.

128.1. The Committee on Economic, Social and Cultural Rights stated as follows regarding the importance of 'location' as one element of 'adequate' housing:

> *"**Location**. 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"*.[87]

128.2. The Supreme Court of India emphasised the importance of relocation to seeking lasting solutions to homelessness, when dealing with the eviction of "*pavement dwellers*" in Bombay, stating:

> "*They do not contend that they have a right to live on the pavements. Their contention is that they have a right to live, a right which cannot be exercised without the means of livelihood. They have no option but to flock to big cities like Bombay, which*

[87] General Comment No. 4: The right to adequate housing (Committee on Economic, Social and Cultural Rights) UN Doc E/1992/23 para 8(f).

> *provide the means of bare subsistence. They only choose a pavement or a slum which is nearest to their place of work.*"[88]

128.3. The Indian Supreme Court held further:

> "*The forcible eviction of squatters, even if they are resettled in other sites, totally disrupts the economic life of the household. It has been a common experience of the administrators and planners that when resettlement is forcibly done, squatters eventually sell their new plots and return to their original sites near their place of employment*."[89]

128.4. The Supreme Court ultimately made an order – among other relief granted – directing that alternative accommodation be provided to the "*pavement dwellers*" of Bombay "*not further away in terms of distance*" from their current dwellings.[90] The court noted that there was a dispute about what land was available, and held that whatever the correct position, "*the highest priority must be accorded by the State Government to the resettlement of these unfortunate persons by allotting to them such land as the Government finds to be conveniently available*".[91]

129. It is submitted that the Indian approach is consistent with the foundational principle laid down in ***Grootboom***, and developed in our subsequent jurisprudence, that the state must prioritise those in the most desperate position.

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[88] *Olga Tellis* para 2.

[89] *Olga Tellis* para 55.

[90] *Olga Tellis* para 57.

[91] *Olga Tellis* para 53.

130. In order to meet its obligations in relation to the people living on the streets of Cape Town in this matter, the City must develop a relocation plan that:

130.1. Provides security of tenure beyond a six-month emergency period;

130.2. Eliminates unconstitutional sex segregation rules that risk separating families, and ensure that there is adequate provision for family groups;

130.3. Provide alternatives whose location is viable for those relocated to maintain livelihoods.

131. The City has failed to do so and should be ordered to develop a plan that meets these basic constitutional requirements.

G. THE INTERDICT SOUGHT BY THE CITY

132. The City seeks an interdict in perpetuity against (re-)occupation of the seven sites and <u>any other property owned or controlled</u> by the City, as against not only the named respondents (first respondent) but against any other "*unknown*" persons unlawfully occupying the seven sites.

133. The City is not entitled to the interdictory relief it seeks, firstly, because the City does not meet the requirements for a final interdict in the broad terms sought; and secondly because the relief sought by the City is unconstitutional and unlawful because it would circumvent the PIE Act and section 26(3) of the Constitution.

134. In order to obtain an interdict, the Court must be satisfied that the following requirements have been met:

134.1. Clear right;

134.2. Reasonable apprehension of harm;

134.3. No alternative relief.

135. The relief is overbroad in respect of both the respondents sought to be interdicted and the properties covered by the order sought.

136. The City seeks to obtain an interdict against two categories of people – the named respondents (first respondent) and the unnamed respondents (second respondent). The City has failed to meet the requirements for an interdict in both cases.

137. With regards to the named respondents:

137.1. If they are indeed evicted, the City accepts that they risk being left homeless. The effect of an interdict that covers all property owned or controlled by the City is that their very existence in the city would be rendered unlawful.

137.2. The City intends to enforce the interdict, if granted, against any of the respondents who erects a structure constituting their home anywhere on City-owned or controlled properties.

137.3. The City has failed to satisfy the requirement of *"no alternative relief".* The present application demonstrates that the alternative relief available to the City is to bring eviction proceedings, after having meaningfully engaged and upon discharging its obligations to provide temporary alternative accommodation and, ultimately, affordable housing. An eviction application meets the requirements for an alternative remedy as it is adequate, ordinary and reasonable, it is a legal remedy which is capable of granting similar protection.

138. With regards to the second respondent category of "*unknown*" persons, an interdict cannot be obtained against them because the City has failed to establish a link between the unnamed individuals and the specific unlawful conduct.[92] A person can only be restrained by interdict if the evidence demonstrates that he or she (specifically) is likely to commit the act in question (specifically) within the period encompassed by the proposed order.

139. In these circumstances, the City has failed to draw the required link between the persons sought to be interdicted and the unlawful conduct.

140. Finally, we submit that the Applicant is not entitled to the relief sought in prayer 4 of Part B of the Notice of Motion because it is unconstitutional and

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[92] *Commercial Stevedoring Agricultural and Allied Workers' Union and Others v Oak Valley Estates (Pty) Ltd and Another* [2022] ZACC 7; [2022] 6 BLLR 487 (CC); 2022 (7) BCLR 787 (CC); 2022 (5) SA 18 (CC).

unlawful. It is, in substance, an anticipatory eviction order – granted without hearing the affected persons or considering their circumstances.

141. It is not open to the City *"to interdict and restrain the respondents and any other person from re-erecting the shacks or structure on the sites".* No interdictory relief can be granted that contravenes the Constitution. Section 26(3) of the Constitution provides that *"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".*

142. The Court cannot grant an order of this nature in the absence of considering the relevant circumstances of each of the affected people. The object of this prayer is to interdict any future erecting of structures and by implication occupations on the properties or any other property owned or controlled by the City. The terms of this proposed interdict contravene the Constitution.

H. CONCLUSION

143. The City contends that the respondents oppose the application without providing any workable alternative. The respondents, to the contrary, have striven to identify the conditions that would provide a lasting solution to homelessness in Cape Town.

144. It is submitted that an unconditional eviction order coupled with a perpetual and universal interdict against occupation of public roads in the CBD does not constitute either a just and equitable order nor offer any promise of a

lasting solution. The City seeks a simple solution to a complex and deep social problem.

145. It would not be just and equitable in terms of the PIE Act to grant the extensive eviction order sought by the City at the present time. If granted, the eviction order coupled with the universal interdict in perpetuity would not 'solve' the problem of homelessness but simply exacerbate the vulnerability of people living on the streets of the City.

146. In order to move towards providing a durable solution, the City should be directed to:

146.1. Meaningfully engage, or conduct mediation, in order to build trust regarding alternative accommodation options for people living on the streets of Cape Town;

146.2. Ensure that the rules of the Safe Spaces are substantively constitutionally compliant, beyond providing for notional 'flexibility' or 'exceptions' to otherwise unconstitutional rules limiting a stay to six months at a shelter and imposing gender segregation;

146.3. Provide adequate temporary alternative accommodation under the Emergency Housing Programme that confers adequate housing, in viable locations and with security of tenure.

146.4. To this end, the City should be directed, following a structured process of engagement and/or mediation, to deliver a plan that:

146.4.1. Proposes dates for possible phased relocation of identified individuals among the respondents, beginning with those who have agreed to move to Safe Spaces or other identified accommodation;

146.4.2. Identifies the specific alternative accommodation allocated to each individual both in the short-term (potentially Safe Spaces) and in the longer term (under the Emergency Housing Programme);

146.4.3. Provides for the respondents to respond to these proposals.

147. In respect of costs, the respondents seek their costs if they are substantially successful in respect of the eviction and interdictory relief sought. If the City is substantially successful, it is submitted that there should be no order as to costs, consistent with the ***Biowatch*** rule regarding litigation to vindicate constitutional rights against the state.[93]

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20 September 2023

[93] *Biowatch Trust v Registrar Genetic Resources & Others* [2009] ZACC 14; 2009 (6) SA 232 (CC).

LIST OF AUTHORITIES

Legislation

- Constitution of the Republic of South Africa, 1996
- National Housing Act 107 of 1997
- National Housing Code (2009)
- Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998

South African cases

- *Biowatch Trust v Registrar Genetic Resources & Others* [2009] ZACC 14; 2009 (6) SA 232 (CC)
- *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* 2012 (2) SA 104 (CC)
- *City of Johannesburg v Changing Tides 74 (Pty) Ltd and Others* 2012 (6) SA 294 (SCA)
- *Commercial Stevedoring Agricultural and Allied Workers' Union and Others v Oak Valley Estates (Pty) Ltd and Another* [2022] ZACC 7; [2022] 6 BLLR 487 (CC); 2022 (7) BCLR 787 (CC); 2022 (5) SA 18 (CC)
- *Community of Hangberg and Another v City of Cape Town* [2020] ZAWCHC 66
- *Dawood and Another v Minister of Home Affairs and Others ; Shalabi and Another v Minister of Home Affairs and Others ; Thomas and Another v Minister of Home Affairs and Others* [2000] ZACC 8; 2000 (3) SA 936; 2000 (8) BCLR 837
- *Dladla & Another v City of Johannesburg & Others* [2017] ZACC 42; 2018 (2) SA 327 (CC)
- *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* 2008 (5) BCLR 475 (CC)

- *Occupiers of Erven 87 and 88 Berea v De Wet N.0. and Another* 2017 (8) BCLR 1015 (CC); 2017 (5) SA 346 (CC)
- *Port Elizabeth Municipality v Various Occupiers* 2004 (12) BCLR 1268 (CC); 2005 (1) SA (CC)
- *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes & Others (Centre on Housing Rights and Evictions & Another, Kommetjie* 2010 (3) SA 454 (CC)
- *Skurweplaas 353 JR v PPC Aggregate Quarries (Pty) Ltd* [2011] ZACC 36

International authorities

- International Covenant on Economic, Social and Cultural Rights (1966) adopted by the United Nations General Assembly on 16 December 1966 through GA. Resolution 2200A (XXI), and came into force on 3 January 1976
- General Comment No. 4: The right to adequate housing (Committee on Economic, Social and Cultural Rights) UN Doc E/1992/23
- *Lopez Alban v Spain* (Committee on Economic, Social and Cultural Rights) communication No. 37/2018, UN Doc E/C.12/66/D/37/2018

Foreign cases

- *Olga Tellis & Others v Bombay Municipal Corporation & Others* 1985 SCR Supl (2) 512, 1986 AIR 180 (India)
- *Pottinger v. City of Miami* 810 F. Supp. 1551 at 1554 (S.D. Fla. 1992) (United States)
- *Victoria (City) v. Adams* 2009 BCCA 563 (CanLII) (Canada)