

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

Case Number: **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 UNKOWN 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

APPLICANT’S HEADS OF ARGUMENT

TABLE OF CONTENTS

A.	INTRODUCTION	3
B.	THE EVICTION: COMPLIANCE WITH CONSTITUTIONAL PRESCRIPTS AND PIE	7
	COMPLIANCE WITH THE PROCEDURAL REQUIREMENTS UNDER PIE	8
	THE CITY IS THE OWNER / ENTITY IN CHARGE OF THE PROPERTIES	9
	THE RESPONDENTS ARE ‘UNLAWFUL OCCUPIERS’	10
	The respondents do not have the City’s consent to occupy the properties.....	10
	The respondents have no other right in law to occupy the properties	11
	JUSTICE, EQUITY AND THE PUBLIC INTEREST: THE BROAD LEGAL PRINCIPLES	12
	AN EVICTION ORDER IS JUST, EQUITABLE AND IN THE PUBLIC INTEREST: THE EVIDENCE	17
	(a) The health and safety risks for the respondents	17
	(b) Impact on the persons living, working or travelling in the affected areas	18
	(c) Damage to State infrastructure and natural resources	20
	(d) The properties are not fit for human habitation.....	22
	(e) The City has embarked on a multi-faceted and targeted response to meet the needs of the respondents.....	27
	(f) The alternative accommodation offered at the Safe Spaces is suitable.....	33
	(g) The respondents’ complaints about the Safe Space Rules and conditions are without merit.....	35
	(h) The City has acted reasonably and within its available resources	46
	(i) The demand for housing in Cape Town is overwhelming	48
	(j) The emergency housing programme is not the answer to the needs of the respondents.....	52
	(k) The City has meaningfully engaged with the respondents.....	54
	(l) The consequences for the respondents, the City and the people of the City of Cape Town if the challenges presented by homeless people are not properly addressed and an eviction order is refused.....	62
	A JUST AND EQUITABLE DATE FOR EVICTION.....	63
C.	THE INTERDICTIONARY RELIEF	64
	A CLEAR RIGHT	65
	A REASONABLE APPREHENSION OF HARM.....	66
	NO ALTERNATIVE REMEDY.....	67
	THERE IS NO MERIT TO THE RESPONDENTS’ GROUNDS OF OPPOSITION.....	67
D.	CONCLUSION.....	69

A. INTRODUCTION

1. The unique evidential matter underpinning this application renders it unprecedented in the realm of litigation pertaining to evictions. The stark facts are that the respondents do not have a fixed place of abode. They are part of the ever-increasing homeless population trying to eke out a living on the streets of Cape Town. They are poor, they are vulnerable and they are desperate. The applicant (**‘the City’**) recognises this and has developed a targeted, holistic and multi-faceted response aimed at providing the respondents with dignified alternative accommodation together with a range of measures aimed at their reintegration back into their families, their communities and society at large. This, the City has done at substantial cost notwithstanding its many constraints in respect of land, resources and capacity.
2. While the City’s intervention, *albeit* in limited respects, has been criticised by the respondents, it meets the constitutional threshold of being reasonable particularly when regard is had to the needs of homeless persons and the City’s available resources. In the adjudication of this matter, this Court will be guided by the following injunction of the Constitutional Court: *“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.”¹

3. The City has embarked on a careful balancing of the competing demands presented by the factual underpinnings of this matter. It has concluded that the respondents cannot continue living in the conditions that they do on pavements, road reserves, traffic islands and other public spaces in and around the seven subject sites within the Central Business District (**‘CBD’**). To allow this to continue unabated is not only inhumane to the respondents but also threatens the public interest in a fundamental and serious way.
4. This application for eviction has been brought as a measure of last resort. It was preceded by extensive engagement with the respondents, who have repeatedly resisted the City’s offers of social assistance (including alternative accommodation at the Safe Spaces).
5. An order for eviction is necessary. It is also undoubtedly in public interest and just and equitable in that:
 - 5.1. The respondents are living in unhealthy and life-threatening surroundings risking disease, contamination and fire.
 - 5.2. There is a serious threat to the safety of the users of the public spaces which the residents have taken occupation of.

¹ *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) at para [41].

- 5.3. The health², safety and security risks posed by the ongoing occupation of the streets of Cape Town are clear³, and not credibly disputed by the respondents.
- 5.4. There is a grave risk to the City's infrastructure if the occupation is allowed to continue unabated⁴. Of particular concern is the degradation of the structural integrity of bridges⁵ and open fires near the City's Gas Turbines in Roggebaai.⁶
- 5.5. The unlawful occupation results in lack of access to the pavement for pedestrians, is often in high-volume traffic areas, and constitutes a risk to the respondents, pedestrians and motorists.⁷
- 5.6. The unlawful occupation is inimical to the maintenance of law and order and the ordinary (and orderly) provision of housing or services and protection of property and services infrastructure. Moreover, there are threats to health and safety given that the land is not suitable or prepared for occupation. For example, there are no toilets on the site, running water or sewage removal.⁸
- 5.7. There is a serious risk to economic interests of businesses in the City, tourism and employment.⁹
- 5.8. The City's has engaged meaningfully with the respondents (despite the disputes raised in this regard), and this engagement has come to naught.

² Founding Affidavit ("FA"), para 45, rec. 58 – 60.

³ FA, para 51, rec. 62 – 64.

⁴ FA, paras 54 – 55, rec. 65 – 69.

⁵ FA, para 56, rec. 69.

⁶ FA, para 55.13, rec. 69.

⁷ FA, para 68.12, rec. 75.

⁸ FA, para 68.1, rec. 74.

⁹ FA, paras 51.9 to 51.14, rec. 63.

- 5.9. The City submits, contrary to the stance taken by the respondents, that it has offered them suitable alternative accommodation.
6. To refuse such an order or to impose conditions on the City that it is not in a position to meet will result in the respondents remaining where they are and their continued occupation under intolerable and inhumane conditions.
7. It is in this context that the City seeks an order for the eviction of the respondents¹⁰ in terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (**‘PIE’**) as well as an interdict regulating their future reoccupation of the subject properties (**‘the interdict’**).
8. The properties to which this application relates (**‘the properties’**) are all located within the CBD and are fully described in paragraph 2 of the notice of motion.¹¹ In summary, the properties are:¹²
- 8.1. The pavement of Buitengracht Street (inclusive of the corner of Rose Lane and Buitengracht Street, behind the wooden bollards along the edge of the pavement);
- 8.2. Either side of FW De Klerk Boulevard (inclusive of the pavements, centre island and road reserve);
- 8.3. The corner of FW De Klerk Boulevard and Heerengracht, leading into the harbour area (inclusive of Foregate Square, the taxi rank and the foreshore, as

¹⁰ In these heads of argument, we refer to the first and second respondents collectively as ‘the respondents’.

¹¹ NoM, para 2, rec. 2 – 4.

¹² NoM, para 2, rec. 2 – 4.

well as outside of, and opposite Customs House, Heerengracht and the pavements and road reserves in front of, opposite and along Heerengracht);

- 8.4. Helen Suzman Boulevard (inclusive of the pavements and road reserves on either side of the road and the centre island);
 - 8.5. Strand Street (inclusive of the pavements and road reserve on both sides of the road after the station outbound, and over the entire width of the pavement on both sides of the road), and the Strand Street side of the Castle on the pavement, road reserve and grass area outside the Castle;
 - 8.6. Foreshore N1 (near the Roggebaai Gas Turbines) inclusive of the pavement, road reserve and the area surrounding the Roggebaai Gas Turbines; and
 - 8.7. Virginia Avenue and Mill Street Bridge (inclusive of the pavement and road reserve).
9. Against this brief background, in the remainder of these Heads of Argument:
- 9.1. First, we show compliance with the requirements for an eviction under PIE.
 - 9.2. Second, we show compliance with the requirements for the interdictory relief sought.
- B. THE EVICTION: COMPLIANCE WITH CONSTITUTIONAL PRESCRIPTS AND PIE**
10. It is now well-established that there is a five-fold threshold that the City must meet in order to obtain an eviction order under PIE, *viz*:

- 10.1. First, it must show compliance with the procedural requirements under PIE.
- 10.2. Second, it must show that it is the owner or person in charge of the properties.
- 10.3. Third, it must show that the respondents are unlawful occupiers.
- 10.4. Fourth, it must show that an eviction is just and equitable.
- 10.5. Fifth, it must show that the date for the eviction is just and equitable.

Compliance with the procedural requirements under PIE

11. In **Cape Killarney Property Investments (Pty) Ltd v Mahamba**¹³ the SCA held that that the requirements of s 4(2) of the PIE Act are peremptory.
12. Service of a s 4(2) notice is a peremptory requirement of PIE and is intended to afford the respondents in an application in terms of PIE an additional opportunity, apart from the opportunity they already have under the rules of court, to put all the circumstances they allege to be relevant before the court.¹⁴ The object of s 4(2) is to ensure that the unlawful occupiers and the municipality are fully aware of the proceedings and that the unlawful occupiers are aware of their rights referred to in s 4(5).¹⁵
13. On 15 February 2023, this Court granted a special service order in terms of s 4(2) and 4(5) of PIE (“**the s 4(2) Order**”) which required that service be effected as follows:

¹³ *Cape Killarney Property Investments (Pty) Ltd v Mahamba* 2001 (4) SA 1222 (SCA) at 1227E-F.

¹⁴ *Unlawful Occupiers, School Site v City of Johannesburg* 2005 (4) SA 199 (SCA) para [23].

¹⁵ *Moela v Shoniwe* 2005 (4) SA 357 (SCA) para [9].

- 13.1. By the Sheriff reading aloud the contents of the Notice of Motion, and the s 4(2) notice at each of the properties by loudhailer in English, Afrikaans and isiXhosa which shall be before 9 a.m. and after 6 p.m.;
 - 13.2. By the Sheriff erecting two notice boards at each of the properties, where the erection of such notice boards was possible, and affixing thereto copies of the notice of motion, and the s 4(2) notice in English, Afrikaans and isiXhosa;
 - 13.3. Where the erection of a notice board was not possible, (due to the nature and size of the property), by affixing at least 3 copies of the notice of motion, and the s 4(2) notice to any wall and/or permanent structure/s on the properties; and
 - 13.4. Directing that any person requiring a copy of the application could contact the offices of the City attorneys, to request a copy of the eviction application.
14. As explained in the service affidavit filed of record, as read with the relevant returns of service, service has taken place in accordance with the s 4(2) Order.¹⁶

The City is the owner / entity in charge of the properties

15. In terms of PIE:
- 15.1. ‘Unlawful occupier’ means ‘*a person who occupies land without the express or tacit consent of the owner or person in charge, or without any other right in law to occupy such land, excluding a person who is an occupier in terms of the Extension of Security of Tenure Act, 1997, and excluding a person whose*

¹⁶ Service affidavit, rec. 616 – 639.

informal right to land, but for the provisions of this Act, would be protected by the provisions of the Interim Protection of Informal Land Rights Act, 1996 (Act 31 of 1996).'

15.2. 'Owner' means *'the registered owner of land, including an organ of state'*.

15.3. 'Person in charge' means *'a person who has or at the relevant time had legal authority to give permission to a person to enter or reside upon the land in question.'*

16. It is common cause that the City is the registered owner of the property and/or the entity in charge of the property.¹⁷ The City is also an organ of state.¹⁸

17. It follows that the City has the requisite *locus standi* to seek the eviction of the respondents in terms of PIE. The City asserts standing on three bases: (a) in its own interest as the municipality in whose jurisdiction the affected properties fall and as the owner and/or person in charge of the properties; (b) on behalf of those members of the public whose use of and access to the properties is impeded on account of the conduct of the affected street people; and (c) in the public interest.¹⁹

The respondents are 'unlawful occupiers'

The respondents do not have the City's consent to occupy the properties

18. It is not in dispute that the respondents occupy the properties without the express or tacit

¹⁷ FA, para 95, rec. 98 as read with AA, para 331, rec 812.

¹⁸ FA, para 95, rec. 98.

¹⁹ FA, para 14, rec. 46.

consent of the City as the owner and entity in charge of the properties.²⁰

The respondents have no other right in law to occupy the properties

19. The occupation of the properties which constitute road reserves, is in any event unlawful under the national, provincial, and municipal framework in that the occupation of the properties also contravenes s 17 of the Roads Ordinance 19 of 1976 (**‘the Roads Ordinance’**); and the Streets, Public Places and the Prevention of Noise Nuisance By-law (**‘the By-law’**).

20. Section 17 of the Roads Ordinance 19 of 1976 reads as follows:

“17 Erection of structures on or near public roads

- (1) *Notwithstanding the provisions of any other law no person shall erect or install or cause or permit to be erected or installed on land owned by him or under his management or control any structure the whole or any portion of which falls within –*
- (a) *the statutory width, or*
- (b) *five metres from the boundary of the statutory width of any public road except with the permission of and in accordance with plans, standards and specifications approved by the road authority and, in the case of a road authority which is a council, of and by the Administrator.*
- (3) *Any person who contravenes any provision of subsection (1) shall be guilty of an offence and on conviction be liable to a fine not exceeding two hundred rands or to imprisonment for a period not exceeding six months or to such imprisonment without the option of a fine or to both such fine and such imprisonment.*
- (4) *Any permission or approval granted under this section shall –*
- (a) *not legalise the doing of anything which is unlawful under any other provision of this ordinance or any other law, and*

²⁰ FA, para 96.2, rec. 99.

(b) *not be construed as derogating from the provisions of section 34(2).*

(5) *The owner of the land on which a structure has been erected or installed in contravention of subsection (1) shall, if so directed by notice served on him by the road authority, remove the entire structure so erected or installed within such time as may be specified in such notice, failing which such road authority may take all measures (including legal action) necessary to ensure that such structure is removed and shall recover the costs thereof from such owner.”*

21. A “*public road*” is defined to mean a public road proclaimed as such in terms of section 3. The properties which are roads and streets are proclaimed public roads as defined in s 3 of the Roads Ordinance.
22. Consequently the respondents are in breach of s 17(1) of the Roads Ordinance. They manifestly do not have a right to occupy the properties.

Justice, equity and the public interest: the broad legal principles

23. The present eviction is one in terms of section 4 and/or 6 of PIE. It therefore requires that this Court be satisfied that:
- 23.1. After considering all relevant circumstances, an eviction is just and equitable.
- 23.2. In terms of section 6 if an eviction is in the public interest.
24. In terms of section 6(2) of PIE, 'public interest' includes the interest of the health and safety of those occupying the land and the public in general.
25. Pursuant to section 6(3), in deciding whether it is just and equitable to grant an order for eviction, the court must have regard to-

- 25.1. the circumstances under which the unlawful occupier occupied the land and erected the building or structure;
 - 25.2. the period the unlawful occupier and his or her family have resided on the land in question; and
 - 25.3. the availability to the unlawful occupier of suitable alternative accommodation or land.
26. It is now trite that a court must consider an open list of factors in the determination of what is just and equitable.²¹
27. The Constitutional Court has recently held in **Grobler v Phillips and Others**²² “*the question whether the constitutional rights of the unlawful occupier are affected by the eviction is one of the relevant considerations, but the wishes or personal preferences of the unlawful occupier are not relevant.*” According to the Constitutional Court, an unlawful occupier does not have a right to refuse to be evicted on the basis that she prefers or wishes to remain in the property that she is occupying unlawfully. According to the Constitutional Court, in terms of s 26 of the Constitution, everyone has the right to have access to adequate housing; the Constitution does not give an unlawful occupier the right to choose exactly where she wants to live.
28. In **Port Elizabeth Municipality v Peoples Dialogue on Land and Shelter and Others**²³ the Constitutional Court observed that an offer of alternative accommodation is

²¹ *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* 2012 (2) SA 104 (CC) at para [39]

²² 2023 (1) SA 321 (CC) at para 36

²³ 2001 (4) SA 759 (E) ([2001] 1 All SA 381) at p [769C]

not a precondition for the granting of an eviction order but rather one of the factors to be considered by a court. In **City of Johannesburg v Changing Tides 74 (Pty) Ltd and Others**²⁴, the Supreme Court of Appeal held that “*an eviction order in circumstances where no alternative accommodation is provided is far less likely to be just and equitable than one that makes careful provision for alternative housing*”.

29. In the assessment of justice and equity, this Court must engage with the judgment of the Constitutional Court in **Dladla and Another v City of Johannesburg and Others**²⁵ where the Constitutional Court considered two key questions (a) whether shelters constituted suitable alternative accommodation as envisaged in **Blue Moonlight**²⁶ and s 26(2) of the Constitution; and (b) whether or not the rules which governed the shelter accommodation in **Dladla** were constitutionally appropriate. At the outset, we make the following observations in relation to **Dladla**:

- 29.1. As a point of departure, it is vastly distinguishable from the present matter in that it concerned the position of households that had been evicted from formal housing structures. The position of the occupiers in that matter arose as a result of the Constitutional Court’s judgment in **Blue Moonlight**. According to the order in **Blue Moonlight**, anyone subject to an eviction order, whether from private or public property, must be provided temporary accommodation by the City. As a result, the occupiers could not be evicted until the City had provided them with temporary accommodation.²⁷

²⁴ 2012 (6) SA 294 (SCA) ([2013] 1 All SA 8; 2012 (11) BCLR 1206; [2012] ZASCA 116) at para [15]

²⁵ *Dladla and Another v City of Johannesburg and Others* 2018 (2) SA 327 (CC).

²⁶ *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2012 (2) SA 104 (CC).

²⁷ At para [37].

- 29.2. The City decided not to give the occupiers housing in a temporary residential area, as provided for in terms of the Emergency Housing Policy in the National Housing Code. It concluded that the best solution entailed a facilitation of what it viewed to be an 'empowered' transition that would discourage a 'dependency relationship' with it. The City envisaged that this programme would ensure that the evictees would at some stage move to rental accommodation and 'take responsibility for their own lives'. As a result, the City developed what it termed an institutional accommodation, which was a 'managed-care policy', or temporary accommodation provision. According to the City, this facility would be temporary and was not intended to be a step in the realisation of the applicants' right of access to adequate housing.²⁸
30. As to whether the shelter provided for in **Dladla** constituted alternative temporary accommodation that was constitutionally compliant, the Constitutional Court held as follows:

“[41] The City complied, by providing temporary accommodation in the form of the Shelter, as required by section 26(2). However, the Shelter rules do not themselves constitute a measure in terms of section 26(2). Despite the fact that the Shelter rules were imposed by the Shelter, and were intended to form a part of the City’s managed-care policy, they cannot be deemed measures for purposes of section 26(2). As the applicants note, were the Shelter rules removed, the resultant accommodation provided by the Shelter would be satisfactory. Thus, the Shelter rules can be separated from the provision of accommodation at the Shelter itself, which, again, satisfies section 26(2). Instead, the Shelter rules should be analysed separately, insofar as they implicate any other rights in the Constitution.”

[Emphasis added].

²⁸ At para [6].

31. It is clear from **Dladla** that just as the shelter constituted constitutionally compliant temporary accommodation, we submit that the Safe Spaces are constitutionally compliant. Based on the reasoning in **Dladla**, the only question that remains is whether the rules governing the Safe Spaces are constitutionally compliant. We address this issue elsewhere in these Heads of Argument.
32. As the Constitutional Court found in **Baron v Claytile (Pty) Ltd**²⁹, in assessing the demands of an occupier, regard must be had to the City's duty to progressively realise socio-economic rights (including housing rights). According to the Constitutional Court, unlawful occupiers cannot delay their eviction each time by stating that they find the alternative accommodation offered by the City unsuitable. The ultimate question is whether the City has acted reasonably in the circumstances.
33. Having regard to the imperatives of section 26 of the Constitution and section 6 of PIE, we submit that in the present instance, this Court must consider the following factors in determining whether it is just and equitable to grant an order for eviction:
- 33.1. First, the health and safety risks for the respondents.
- 33.2. Second, the impact on persons living, working and travelling in the affected areas.
- 33.3. Third, the damage to State infrastructure and natural resources.
- 33.4. Fourth, the properties are not fit for human habitation.

²⁹ 2017 (5) SA 329 (CC) at para [50].

- 33.5. Fifth, the City's multi-faceted and targeted response to meet the needs of the respondents.
- 33.6. Sixth, the alternative accommodation offered at the Safe Spaces is suitable.
- 33.7. Seventh, the complaints raised about the rules and conditions at the Safe Spaces are without merit.
- 33.8. Eighth, the City has acted reasonably and within its available resources.
- 33.9. Ninth, the demand for housing in Cape Town is overwhelming.
- 33.10. Tenth, the Emergency Housing Programme is not an answer to the specific needs of the respondents.
- 33.11. Eleventh, the City has meaningfully engaged with the respondents.
- 33.12. Finally, the consequences for the respondents, the City and the people of the City of Cape Town are dire if the challenges presented by homeless people are not properly addressed and an eviction order is refused.

An eviction order is just, equitable and in the public interest: the evidence

(a) The health and safety risks for the respondents

34. As explained in the founding affidavit, homeless persons are exposed to heightened health risks.³⁰

³⁰ FA, paras 45.1 – 45.16, rec. 58 – 60.

35. The City has provided no less than sixteen instances of how persons living on the streets are exposed to heightened health risks. By way of example, the City has explained that the absence of secure housing (that permits proper protection from the elements and provides a measure of personal safety) renders street people vulnerable to ill health, safety threats and, in many instances, emotional and mental trauma. Given that the structures in which street people live are, by their nature, mobile and in many instances made out of plastic and cardboard, these structures provide very limited protection from the elements. This results in increased physiological and physical stresses on the body which can result in the immune system becoming compromised which, in turn results in increased susceptibility to illness and even death.³¹
36. The respondents do not address the health risks to which homeless persons are exposed, in their answering affidavit. More specifically, they do not dispute any of the allegations made by the City in this regard.
37. It must therefore be accepted that it is common cause that the current living conditions of the respondents present a risk to their health, safety and well-being for the reasons comprehensively set out in the founding affidavit.³²

(b) Impact on the persons living, working or travelling in the affected areas

38. When people live on the streets, they have little choice but to conduct in public, almost all of their daily activities that would ordinarily take place in the privacy of a home. This

³¹ FA, para 45.2, rec 58.

³² FA, paras 45.1 – 45.16, rec. 58 – 60.

adversely affects their dignity and privacy as well as that of the general public who are exposed to what is, essentially private conduct.³³

39. Examples of such conduct are set out in the founding affidavit and include, urinating and defecating in public, bathing and washing in public and having sex in public.³⁴ The meagre structures that residents occupy provides little privacy and as such, does not shield them from the public eye.
40. The respondents characterise the conduct that the City refers to, as “*normal human behaviour*” and contend that the “*City has numerous by-laws which criminalise such behaviour*”.³⁵ This demonstrates a fundamental misunderstanding of the City’s stance. The City accepts that as a fact homeless people conduct certain aspects of “*normal human behaviour*” in public. The majority of homeless persons do not do so by choice – they are compelled by their living circumstances. However, the fact that they are so compelled strikes at their dignity and privacy. It also impacts on other persons who use those areas.
41. Further, certain conduct that the City refers to such as the consumption of drugs and alcohol leading to anti-social conduct such as verbal abuse, physical altercations, violence and death; alcohol consumption in and around road reserves, public roads and traffic islands posing a risk of serious injury or death to both homeless persons and members of the public in particular in areas of high-volume vehicular traffic; sex (and sometimes sex work) resulting in used condoms being left behind in public places,

³³ FA, para 48, rec. 60.

³⁴ FA, para 49, rec. 61 – 62.

³⁵ Answering Affidavit (“AA”), para 323, rec. 810.

constitutes criminal or antisocial behaviour when conducted in public.³⁶ The respondents do not dispute that such conduct occurs.

42. The numerous complaints received by the City demonstrates that the CBD the adverse impact of the increase in homelessness on the viability and investment potential in many of the CBD's business districts.³⁷
43. The complaints received by the City in this regard include: (a) an inability to utilise MyCiti bus stops as they are occupied by drug users; (b) an increase in attacks on residents and tourists; (c) the proliferation of litter; (d) open drug use; (e) the depreciation of property values, (f) businesses moving out of the CBD; (g) tourists avoiding the CBD; (h) local businesses closing down, with consequent job losses; (i) and vandalism of public infrastructure.³⁸
44. The respondents cannot and do not meaningfully dispute or even engage with either the complaints received by the City or the adverse impact of the increase in homelessness. Instead, the respondents resort to emotive language.³⁹ This aspect of the case must be approached on the City's version.

(c) Damage to State infrastructure and natural resources

45. The City has provided various instances of damage to State infrastructure and natural resources. By way of example, it has referred to⁴⁰:

³⁶ FA, paras 49.4, 49.6, 49.7, rec. 61 – 62.

³⁷ FA, para 51, rec. 62 - 64.

³⁸ FA, para 51, rec. 62 - 64.

³⁹ AA, paras 324 and 325, rec. 810 . Replying Affidavit (“RA”), para 108, rec. 1180.

⁴⁰ FA, para 54, rec. 65 – 67.

- 45.1. The risks posed by the making of fires.
- 45.2. Signage, open air gym equipment, fencing and streetlights are regularly stolen for use in makeshift structures or onward sale.
- 45.3. Infrastructure is vandalised in order to gain access to a particular area (such as a fence).
- 45.4. Waterpipes are destroyed either while street people are trying to erect structures or in order to gain access to water.
- 45.5. Drain covers are stolen and used for makeshift structures or for sale.
- 45.6. Drains (and manholes in particular) are used to store the belongings of street people. This causes serious damage to the piping and infrastructure.
- 45.7. Used cooking liquid and contents of night soil buckets (if in use) are sometimes disposed of in the storm water drains. This impacts the water quality of rivers and receiving coastal recreational waters.
- 45.8. Material used to construct shelters is abandoned on pavements, in road reserves and other areas where shelters are constructed which if not removed has the potential to impact on rodent activity and cause mess and obstruction.
- 45.9. Green electrical boxes in business areas are often used to urinate against and provide some privacy if defaecation is required. This results in potential health risks to City staff who must clean the boxes.

- 45.10. There is major infrastructure under the roads and road reserves for water and sanitation, electricity, telecoms etc. There is a real threat that the infrastructure will be damaged. If a pipe burst, this would be life threatening to occupiers and the public. Due to many of these areas being occupied unlawfully and, as a result, inaccessible, officials would not be able to access the area easily to repair same and there may also be major water losses.
46. Save for a claim of no knowledge and a bald denial, the respondents do not engage with these allegations at all.⁴¹ We submit that in these circumstances, the City's evidence must be accepted.

(d) The properties are not fit for human habitation

47. The City has explained that none of the properties occupied are suitable for human settlement purposes and as a result⁴²:
- 47.1. City infrastructure intended for the benefit of the people of Cape Town is being damaged and destroyed. By way of example, personal possessions are stored in manholes (which causes blockages in piping systems); piping infrastructure for water and/or electricity is damaged on account of fires being started; signage and CCTV camera are being damaged, electrical boxes are vandalised.
- 47.2. Pavements, bridges and other City infrastructure show signs of damage from both open fires and from vandalism.

⁴¹ AA, para 326, rec 810.

⁴² FA, para 92, rec. 87 – 88.

- 47.3. The street and pavement where some of the respondents are in occupation are also strewn with litter, dumped goods and there is a strong smell of human and other waste. This is a clear health and safety issue for the affected street people and the public.
- 47.4. Drains are also blocked and have human and other waste contaminating the stormwater system, which has to be dealt with at a huge cost to the City. It also means there is no access to the drains so that the City can unblock them. This, in turn, presents health risks and the risk of flooding which may result in injury and even death to the public and the occupiers.
48. The City has explained in painstaking detail, the conditions pertaining at the various properties. By way of summary:
- 48.1. Buitengracht Street: This street is one of the oldest and, as such, it is a historic street in the CBD. Most of the respondents occupying Buitengracht Street have structures on the pavement. It is practically impossible to walk on the pavement as the make-shift structures stretch across the width of the pavement, which is narrow and often bounded by walls on the Bo- Kaap side. This forces the affected street people and pedestrians to walk in the road adjacent to where the affected street people occupy the pavement, thereby presenting a safety risk to themselves, pedestrians and passing motorists.⁴³
- 48.2. FW De Klerk Boulevard: This site is a particularly busy hub for public transport used extensively by the taxi industry for cleaning, parking and pick up

⁴³ FA, para 93.1, rec. 88 – 90.

of passengers. The erection of structures by the respondents is causing the taxis to have to weave in and out of the access and egress points to avoid obstacles. On the other side of the road is the main MyCiti Trunk Station, where the same situation exists. The metal barricades on each side of the highway in this area means that obstruction by the structures cannot be overcome, without walking in the road itself. As the road is used as a main exit from the City and onto the N1, the majority of vehicles are travelling at considerable speed along this portion of the road. These conditions pose an inevitable and serious risk to the affected street people and other persons using the areas.⁴⁴

- 48.3. Foregate Square, Foreshore: Foregate Square is the access point to Custom's House and the harbour area on the Foreshore and is extremely busy from a pedestrian and vehicle point of view as a result of this. The proximity to Customs House is concerning as open fires are common, causing damage to infrastructure and limiting access to Customs House. Informal hawkers set up stalls selling food, beverages and other goods due to the high volume of traffic. The respondents have established structures in between the stalls thereby making pedestrian mobility even more restricted and challenging. It is almost impossible to walk on the pavement or side of the road where the affected street people are in occupation. This forces the respondents and pedestrians to walk on the road adjacent to where the respondents occupy the pavement/ side of the road or centre island. This is a huge safety concern for them and passing motorists.⁴⁵

⁴⁴ FA, para 93.2, rec. 90 – 91.

⁴⁵ FA, para 93.3, rec. 91 – 92.

48.4. Helen Suzman Boulevard: Helen Suzman Boulevard is a major access and egress route between the CBD and the Atlantic Seaboard and is extremely popular with tourists and residents. It also is the main route to the Waterfront, Green Point Urban Park and the Cape Town Stadium and in close proximity to the Gallows Hill traffic department and many other public and private buildings. Vehicles travel at extremely high speed in this area and there is a consistent flow of heavy traffic. The respondents people occupy structures along various portions of this road and on either side thereof very close to the road itself. The make-shift structures stretch across the width of the pavement. These structures obstruct pedestrian access severely and make it almost impossible for pedestrians to walk through this area on the pavements. This forces the respondents and pedestrians to walk on the road adjacent to where the respondents occupy the pavement, thereby posing a significant risk to the safety of the affected street people, pedestrians and passing motorists. The part of Helen Suzman Boulevard which is described as under the cut off freeway, is of particular concern to the City. This is so as the open fires and erection of structures utilising the columns of the bridge are causing the integrity of the concrete columns to be compromised. This area is particularly narrow and occupation of the island under the bridge is extensive. It presents a serious risk of accident given that vehicles travel at speed in an area where there are a number of people residing very close to the road.⁴⁶

48.5. Strand Street: Strand Street traverses the historic entrance to Cape Town in front of the Castle. The area in front of the Castle, before the moat is owned by

⁴⁶ FA, para 93.4, rec. 93 – 94.

the national government and has been extensively occupied. It is not the subject of this application. The moat itself is now highly polluted and contains extensive human waste. The Castle is a primary tourist destination and National Monument but is currently almost entirely inaccessible from Strand Street. The Castle is adjacent to the City Hall and National Library which has been recently restored. These buildings form a nexus of historic buildings on this side of the CBD, frequented by tourists and City residents.⁴⁷

- 48.6. Foreshore , N1 (near turbines): At this site the respondents occupy structures dangerously close to the Roggebaai Gas Turbines, located near Table Bay Harbour, between Dock Rd and the Roggebaai Canal and the N2. Kerosene is delivered in road tankers and it is pumped into the aboveground pipes and then stored below ground. The turbines are for the storage and handling of kerosene, a chemical which has the potential to result in harmful consequences and is highly flammable. The kerosene fuels the turbines so that they can drive a centrally mounted Brush Electrical Generator which is used when the demand on the power grid is high. This is a vital resource for the whole of the City. The proximity of the respondents and their structures to the turbines poses an immediate and serious risk. This risk is significantly enhanced by: (a) open fires (which risk the ignition of kerosene) that are regularly made by the respondents; (b) the proximity of the structures to traffic; and (c) that no evacuation plan will be able to do justice to the persons in many structures in

⁴⁷ FA, para 93.5, rec. 94 – 96.

the area. There is also a major waterline there which, if damaged, would have a serious effect on water contamination and services.⁴⁸

48.7. Virginia Avenue and Mill Street Bridge: This site is also under a bridge. The pavement or centre island under the bridge is occupied by the respondents and the section of the roadway under the bridge shows signs of damage from both open fires and from vandalism. At this site too, the support pillars for the overhead freeway are being compromised by fire and excavation.⁴⁹

49. Quite remarkably, the respondents do not engage with the City's evidence in this regard in any meaningful way in that: (a) they make a bare denial without any explanation in support thereof; and (b) they speak to the alleged inadequacies of the Safe Spaces.⁵⁰ Neither of these allegations speak to the City's detailed and pointed evidence as to why the properties are not fit for human habitation.

(e) The City has embarked on a multi-faceted and targeted response to meet the needs of the respondents

50. As explained in the founding affidavit, homelessness is an exceptionally complex issue, as is the appropriate response to addressing homelessness.⁵¹

51. The City accepts that homelessness in South Africa is caused by a multiplicity of factors, some which are the result of (a) the proliferation of organised criminals in the illicit drug trade preying on vulnerable people, leading to a surge in serious drug addiction, (b) the stress and anxiety of worsening national economic hardship leading to substance abuse

⁴⁸ FA, para 93.6, rec. 96 – 97.

⁴⁹ FA, para 93.7, rec. 97 – 98.

⁵⁰ AA, para 330, rec. 811.

⁵¹ FA, para 23, rec. 50.

as a form of self-medication, (c) the generally inadequate levels of mental health care in the public sector, (d) the prevalence of domestic violence, (e) persistent levels of poverty and inequality. Not all street people are homeless. Some people who are homeless have homes but choose to live on the streets, at least on certain days, mainly for income-generating purposes.⁵²

52. The City recognises that a holistic, multi-faceted approach is needed to successfully address the challenges presented by homelessness.
53. To this end, SD&ECD has established the Street People Programme Unit (**“the Programme Unit”**) which seeks to effectively reduce the number of people living, sleeping and surviving on the streets, and to ensure that homeless people are given the necessary developmental assistance to achieve reintegration, accommodation and employment.⁵³
54. In 2016, the then Mayor gave an instruction to open Safe Spaces for homeless people. Homeless people were engaged to determine what should be provided at the Safe Spaces. An initial site was identified under the Culemborg bridge for up to 230 clients. This first Culemborg Safe Space opened on 29 June 2018 and includes access to ablution facilities, lockers, Expanded Public Works Programme (**‘EPWP’**) work opportunities, social and health services. Social workers also offer social services and referrals on site.⁵⁴

⁵² FA, para 24, rec. 50.

⁵³ FA, para 73, rec. 79.

⁵⁴ FA, para 74, rec. 79.

55. Since then further Safe Spaces have been opened at Culemborg and in Bellville and more are in the planning phase, the aim of increasing the capacity of the City to assist homeless persons across the City.⁵⁵
56. The City's field workers engage with homeless people on a daily basis to establish the reasons behind persons ending up on the street, conduct needs assessments and offer assistance. Those accepting assistance are referred to shelters, reunited with their families (where possible) and given access to available EPWP opportunities.⁵⁶
57. Reintegration and rehabilitation are two key pillars underlying the City's response to homelessness⁵⁷:
- 57.1. Reintegration refers to reintegrating / re-immersing homeless people back into the community. Reintegration occurs through measures such as employment, reunification with family, skills development among other things.
- 57.2. Rehabilitation is aimed at developing skills, treatment, or therapy that allows persons with mental health challenges or substance abuse issues to become stable, healthy, functional and self-sufficient. Rehabilitative forms of intervention include recovery from drug addiction, medical treatment for mental health concerns, and therapy.

⁵⁵ FA, para 75, rec. 79.

⁵⁶ FA, para 76, rec. 80.

⁵⁷ FA, para 79, rec. 80 – 81.

- 57.3. While rehabilitation and reintegration measures are underway, measures are put in place to ensure that homeless persons are presented with accommodation as an alternative to residing on the streets.
- 57.4. The City's approach is targeted at each of the abovementioned pillars, namely: (a) rehabilitation; (b) reintegration; and (c) an immediate alternative to living on the streets. This approach allows for the reintegration of homeless people and for support to different communities and their use of public spaces, while creating a sense of ownership and belonging among the different communities that make up Cape Town.
58. The City and various partner NGOs provide a range of developmental programmes that are aimed at reintegrating homeless people into society, in the form of group work sessions which deal with, *inter alia*, the following issues⁵⁸:
- 58.1. Self-esteem / self-confidence;
- 58.2. Coping mechanisms;
- 58.3. Job readiness and interview skills;
- 58.4. Financial management;
- 58.5. Substance abuse and mental well-being; and
- 58.6. Relationship building / family work.

⁵⁸ FA, para 77, rec. 80.

59. The City seeks to ensure the reintegration of the individual into society and, to this end, several initiatives are adopted. In summary, these include⁵⁹:

59.1. First, access to necessities and a safe sleeping space is provided.

59.2. Second, a number of job opportunities are made available under the EPWP. These may be short-term or long-term job opportunities. In addition, the City plays an active role in seeking to link street people with particular job opportunities. It has had an excellent success rate in this regard.

59.3. Third, there is a specific initiative that is aimed at assisting street people to obtain identity documents. In light of the dire circumstances that many street people find themselves in, access to funding in order to obtain an identity document often presents a serious constraint. It is for this reason that the City has collaborated with other organisations so as to facilitate access to funding, which will, in turn, allow these individuals to obtain access to identity documents.

59.4. Fourth, there is also the Matrix substance abuse rehabilitation programme, which is a further measure that is specifically geared at addressing the high levels of substance abuse amongst street people. The City has determined that intervention in this regard is a crucial step towards the reintegration of an individual into society.

59.5. Fifth, a large emphasis is placed on development programmes that are specifically targeted at reintegrating an individual into society. By way of

⁵⁹ FA, para 117, rec. 111 - 112.

example and without being exhaustive in this regard, the City has explained, these include art and trauma therapy, substance abuse programs and family strengthening programs. The City has determined that each of the areas present a particular constraint to street people becoming reintegrated into society and has therefore targeted its development interventions to specifically address these constraints. Part of the success of this initiative is apparent from the large numbers who have acquired basic computer skills training, skills in how to develop their own CVs and how to apply for jobs online. Furthermore, once clients are invited to interviews, the Safe Space Programme provides them with appropriate clothing for an interview and provides them with transport to the interview.

60. The results of the City's efforts are most starkly shown in the last financial year, from July 2021 to June 2022, in which the direct efforts of the City have resulted in⁶⁰:

60.1. **1 813** people being helped off the streets, through shelter placements, reunifying families, and other forms of reintegration.

60.2. **2 799** people participating in development programmes at City-run safe spaces.

60.3. **936** EPWP work placements to help those staying at the safe spaces and in shelters get back on their feet.

60.4. **566** referrals for social grants, identity documents, specialised care facilities, and substance abuse treatment – with an 80% Matrix drug rehabilitation

⁶⁰ FA, para 84, rec. 83.

programme success rate to address addiction as a key driver of why people end up or remain on the streets.

61. In addition, with funding made available by the Executive Mayor, SD&ECD provided developmental programmes to **545** persons living on the street across the City.⁶¹

62. It is important that when assessing the reasonableness of the Safe Spaces as alternative accommodation, this case is not telescoped only into the accommodation element. The City's holistic intervention must be considered.

(f) The alternative accommodation offered at the Safe Spaces is suitable

63. The City has explained the key features of Safe Spaces as follows⁶²:

63.1. The only criterion for accessing a Safe Space is that the person is homeless and is willing to accept social support.

63.2. There is no fee charged to stay at a Safe Space.

63.3. Clients receive toiletries (including shampoo and washing powder), blankets, waterproof sleeping bags, thick winter blankets, towels, stands for running water, access to substance abuse rehabilitation programmes, social support, access to development opportunities, and EPWP opportunities. Clients get allocated locker space.

⁶¹ FA, para 85, rec. 83.

⁶² FA, para 116, rec. 109 – 111.

- 63.4. Two meals are available daily. No fires or cooking is allowed on site due to the zoning constraints and the risks of fire hazards.
- 63.5. Many organisations such as the Cape Town City Improvement District provide additional assistance.
- 63.6. All clients with substance abuse problems are assisted in attending the substance abuse rehabilitation programme.
- 63.7. All clients are assisted to attend development programmes aligned to the Safe Space.
- 63.8. Pop-up clothing shops are available on a regular basis according to the donations received.
- 63.9. Portable toilets are available and bucket shower systems in an enclosed shower space are available. There is access to water. The sites are cleaned on a daily basis by volunteers residing in the Safe Space.
- 63.10. Social assistance is provided on site daily by a registered social worker.
- 63.11. The site has 24-hour security personnel supported by law enforcement.
- 63.12. Five emergency bays are available on site which are held open in case of an emergency placement or urgent request.
- 63.13. Mainly bunk beds but occasionally a sleeping pallet that is raised off the ground is provided to each occupant of Safe Space 1 and individuals place mattresses

and blankets on these structures. Safe Space 2 and Paint City both have bunk beds available to clients within dormitory style accommodation.

63.14. There is an immediate response to emergency medical needs.

64. The Safe Spaces are undoubtedly superior in form, structure and services to the accommodation that the respondents currently reside in (which are structures that are generally very small, flimsy, permeable, provide little to no protection against the elements, have no services and are generally located in areas that present a very high risk to the safety and security of the occupiers).

(g) The respondents' complaints about the Safe Space Rules and conditions are without merit

65. The respondents have raised the following main concerns with the Rules at the Safe Spaces:

65.1. There is no couples accommodation;⁶³

65.2. There is a cut-off time for returning to the Safe Spaces⁶⁴;

65.3. The accommodation appears to be only for a period of six months⁶⁵;

65.4. There is a rule which entitles the City to presume that a person has left a Safe Space if they have absented themselves for more than 3 days⁶⁶;

⁶³ AA, para 280.1, at rec. 796.

⁶⁴ AA, para 280.2, rec. 797.

⁶⁵ AA, para 280.3, rec. 797.

⁶⁶ AA, paras 210 – 211, rec 779 (personal circumstances of Samantha Brown)

- 65.5. There is a rule which requires persons to leave the safe spaces between 08h30 and 17h00⁶⁷;
- 65.6. There are no drugs or alcohol permitted on site⁶⁸;
- 65.7. There is a general complaint about gender segregation⁶⁹;
- 65.8. There are non-specific complaints about ill-treatment⁷⁰;
- 65.9. There is a requirement of payment for services⁷¹.
66. At the outset, there is a fundamental point to be emphasised. It is this: the City has invested extensively in the Safe Space programme. It is genuinely committed to making it work. Its Rules are therefore not aimed at excluding the respondents and similarly placed persons from the Safe Spaces – on the contrary, it is aimed at their inclusion and the system being a workable one. This context is fundamentally distinguishable from that the context of **Dladla**.
67. The City has explained:

⁶⁷ AA, para 280.2, rec. 797.

⁶⁸ AA, paras 212 – 214, rec. 779 (the personal circumstances of Mr Mandyeke) in respect of the alcohol complaint, as for the Drug complaint, the Founding Affidavit makes it clear that no drugs and alcohol are permitted on site (FA, para 123, rec. 113); AA, para 330, rec. 811 denies the model as being predicated upon “strict and paternalistic rules”, the City addresses the Rule pertaining to the prohibition of drugs and alcohol at RA, para 30.5, rec. 1155 – 1156.

⁶⁹ AA, para 280.1, rec. 796.

⁷⁰ AA, paras 100 – 102, rec. 755 – 756 (personal circumstances of Bronwyn Williams); AA, paras 113 – 115, rec. 758 – 759 (personal circumstances of Abigail Van Wyk); AA, paras 122 – 124, rec. 760 (personal circumstances of Ricardo Adams); AA para 204 – 206, rec. 777 (personal circumstances of Tersia Townsend)

⁷¹ AA, para 280.4, rec. 797 – 798.

- 67.1. First, rules are necessary. Absent any rules, the Safe Space model will fail. This is so because, it will result in unwieldy behaviour that will undermine its entire purpose and existence.
- 67.2. Second, the City accepts that the Rules must be reasonable and constitutionally compliant.⁷² It has explained that every single one of the Rules that have been adopted serve a legitimate purpose and are aimed at meeting the City’s broader objectives.
- 67.3. Third, the Rules meet the threshold for constitutionality. Most importantly, the Rules were revised in certain respects because the City accepts that there was merit to some of the concerns that the respondents had raised.⁷³

Couples’ accommodation and gender segregation

68. As a point of departure, this Court will be guided (as the City was) by the following determination of the Constitutional Court in **Dladla**:

“49. The right to dignity includes the right to family life. This right in turn consists of the right to marry and the right to raise a family. The family separation rule creates a vast chasm — between parents and children, between partners and between siblings — where there should be only intimacy and love. As the High Court notes, the family separation rule erodes the basic associative privileges that inhere in and form the basis of the family. Therefore, in so many ways, the lockout and family separation rules limit the dignity of the applicants.

69. In the present instance, there is no family separation rule. There are also no family units amongst the respondents. The City accepts that some respondents require couples’ accommodation. With the exception of there having been one child (17 years old), all of

⁷² The current Rules are contained in Annexure “RA16”, rec. 1247 – 1248.

⁷³ RA, para 29.4, rec. 1151.

the respondents are single persons or persons who require couples accommodation. The City has provided a detailed explanation of how it deals with children, emphasising that it is always guided by the best interests of the child.⁷⁴ On the evidence in this matter, the issue of family structures and children do not arise subject to the one exception. This, the City will deal with on the following basis: (a) if the minor becomes a major by the time that an eviction order is granted, he will be accommodated at the Safe Space⁷⁵; (b) alternatively, they will be relocated to a family shelter.⁷⁶

70. As regards couples accommodation, the City has explained that⁷⁷:

70.1. The Safe Spaces do cater for married persons or persons who are in partnerships or who require “*couples accommodation*”. These accommodation options will be made available on request and subject to availability.

70.2. Culemborg I does cater for couples and Paint City can be reconfigured on a limited basis to cater for couples’ accommodation.

70.3. As regards the availability of couples accommodation, the City has explained that it undertakes a complex balancing exercise in a context of limited resources whereby it seeks to maximise output on its available resources. It accepts that some couples accommodation is necessary, which it provides for. However, in so providing, it is mindful of the fact that additional space is required for couples accommodation, thereby reducing the available space for single persons.

⁷⁴ RA, para 36, rec. 1158.

⁷⁵ RA, para 41, rec. 1158 – 1159.

⁷⁶ RA, para 37, rec. 1158.

⁷⁷ RA, para 33, rec.1157.

71. The City has provided a compelling justification for gender segregation, viz⁷⁸:
- 71.1. The vast majority of persons living on the streets are single persons.
- 71.2. In a country with endemic levels of sexual violence, particularly against women, it would be wholly inappropriate and irresponsible not to separate persons residing at the Safe Spaces by gender, in the first instance.
- 71.3. Gender segregation minimises the risk of gender based violence and any other forms of violence (including sexual offences).
- 71.4. It also ensures that residents are more comfortable, particularly given that made of them had, in the past, been victims of violence and abuse.

Vacating the Safe Space in the mornings

72. Rule 14 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.”

73. As a point of departure, this Court will be guided (as the City was) by the following determination of the Constitutional Court in **Dladla**:

[48] The lockout and family separation rules limit the applicants' right to dignity. The lockout rule limits the right to dignity because it is cruel, condescending and degrading. It forces the applicants out onto the streets during the day with no place whatsoever to call their own and to rest. As a result, people seek refuge on the street while they wait for the Shelter to reopen. The lockout rule also disproportionately affects people who work the night shift and sleep during the day. They have nowhere to rest and get ready for the next shift. For them in particular

⁷⁸ RA, para 32, 1156 – 1157.

the Shelter is no shelter at all. The lockout rule also treats people like children. It undercuts the ability of the applicants to make plans and to make use of their time as they see fit. Clearly, the implication is that the applicants cannot manage their own affairs and have to be shepherded to and fro.

74. We submit that the present rule is distinguishable in any least two material respects: (a) it is much more flexible as we explain below; (b) the purpose of the rule (when considered with the other initiatives of the safe spaces) is to facilitate reintegration. The latter purpose is severely undermined in the absence of a rule of this nature. Understandably, the analysis in **Dladla** was a very different one in that issues of reintegration did not feature.

75. The City has explained⁷⁹:

75.1. The underlying purpose of this Rule is to facilitate the reintegration of residents to become functioning members of society. As a result, the Safe Spaces do not encourage residents to remain idle at the Safe Spaces. (There was no such imperative in **Dladla**.)

75.2. There is a discretion given to the Safe Space management to depart from this Rule. This discretion is to be exercised on a case by case basis. In the exercise of their discretion, the Safe Space management will have regard to, *inter alia*, the following: (a) the reason given by the resident for wanting to depart from the Rule; (b) the model encourages residents, during the day to either continue their informal employment or attend the programmes provided by the City as part of its Safe Spaces offering, such as substance abuse rehabilitation programmes, social support programmes, access to development opportunities,

⁷⁹ RA, para 30.4, rec. 1154 – 1155.

and EPWP opportunities – as part of their reintegration; (c) the purpose of the Safe Spaces is to assist people with, *inter alia*, access to work and reintegration.

76. In light of the specific objectives of reintegration and rehabilitation we submit that on the evidence in this matter, this Rule is eminently reasonable.

Cut off time for returning to the Safe Spaces

77. Rules 1 and 2 provide:

- “1. Access hours: 8h00 – 20h00.
2. People arriving after 20h00 will not be allowed into the site, unless prior arrangements have been made with the management of the Safe Space, and such late access agreed.”

78. The City has explained⁸⁰:

78.1. There must be a cut-off time by which persons must return to the Safe Spaces in the evenings. The City has determined 8 p.m. is an appropriate cut off. This is to ensure that residents have sufficient flexibility to engage in their activities, while ensuring that they do not return at a time that is disruptive to the others at the Safe Space.⁸¹

78.2. This is not a hard and fast rule. In the event that persons need to return later (for example, they have a job that finishes later), they may do so subject to prior arrangements being made with the management and late access being agreed to. The City has engaged with the management of the Safe Spaces to impress upon

⁸⁰ RA, para 30.1, rec. 1151 – 1152.

⁸¹ RA, para 30.1, rec. 1151 – 1152.

them that consent should not be unreasonably withheld and further that particularly in instances where the person has a job that requires that they return later, flexibility must be allowed.⁸²

The initial 6-month stay at Safe Spaces

79. Rule 3 provides: “*Period of initial stay is 6 months.*”

80. The City has explained:

80.1. While there is provision for an initial stay of six months, the effect of this is not to evict a person after six months if they have not been reintegrated and have no options to go to. Should this be done, it would be self-defeating of the entire programme.⁸³

80.2. Instead, the approach is for Social Services to engage on a regular basis with the residents, assess where they are in terms of their Personal Development Plan (“PDP”) and to ascertain whether they are ready to move out after six months.⁸⁴

80.3. In the event that persons are not ready to move out after six months (i.e. they have no options of alternative places to stay at), they will remain at the Safe Space, subject to ongoing and regular engagement and assessment as to when they are ready to leave.⁸⁵

⁸² RA, para 30.1.3, rec.1152.

⁸³ RA, para 30.2 – 30.2.2, rec. 1152.

⁸⁴ RA, para 30.2 – 30.2.2, rec. 1152.

⁸⁵ RA, para 30.2 – 30.2.2, rec. 1152.

80.4. The reason for imposing the initial six month limit is that the City seeks to ensure as far as is reasonably possible, a prompt turn-around time for reintegration (to the extent that this is possible) in an effort to maximise the use of its resources and to free up space for other persons in need of assistance. However, the City accepts that it may not be possible for all of the residents of the Safe Spaces to meet the 6-month initial period goal depending on their individual circumstances. Consequently, as explained, no one is compelled to leave the Safe Spaces after 6-months if they have not reintegrated and/or secured some other form of accommodation.⁸⁶

The three-day absenteeism rule

81. Rule 15 provides:

“Staying away from the site for three consecutive nights or more, without prior written agreement with the Safe Space site management will result in a presumption that the occupant vacated the Safe Space site permanently. In such instances, the City will, depending on the demand, reallocate the sleeping space which has been previously reserved for the occupant in question. In the event that the resident returns to the Safe Space after having stayed away for three consecutive nights without agreement and seeks accommodation, they will be accommodated subject to compliance with these rules and the availability of space.”

82. The City has explained:

82.1. The purpose of this Rule is to ensure that the City utilises its resources effectively and that available spaces are not wasted when other persons may wish to use such spaces. This is not a hard and fast rule in that a person will never be allowed to return to the Safe Space. They will be permitted to return

⁸⁶ RA, para 30.2.4, rec. 1153.

to the Safe Space subject to what the rule provides. Should the Safe Space unreasonably refuse access on return, it would be self-defeating of the programme.⁸⁷

- 82.2. Residents must advise the management in advance and provide a reasonable explanation. Should this occur, management will not unreasonably withhold consent and agreement may be reached. Even if they failed to comply with this aspect of the rule, they may be accommodated again subject to the requirements of the rules. Subject to a reasonable explanation and the availability of space, the person will be accepted. Again, unreasonable conduct by the City in this regard would be self-defeating.⁸⁸

Alcohol and drugs:

83. Rules 6 and 8 provide:

“6. No illegal substances or alcohol allowed on site.

...

8. Coming onto the site under the influence of alcohol, or any other drugs will not be permitted.”

84. The City has explained: (a) the Safe Spaces are designed to provide individuals with a safe environment which is weapon-free, drug-free and alcohol-free; (b) the Safe Space model is designed to assist in some form of rehabilitation and reintegration – the rules in respect of alcohol and illegal substances are directed at serving this purpose; (c) The Rules are designed to ensure the safety of all residents; (d) alcohol and drug abuse is a

⁸⁷ RA, para 30.3.2, rec.1154.

⁸⁸ RA, para 30.3.3., rec. 1154.

serious concern among the homeless population. It would be profoundly inappropriate to permit the consumption of alcohol on site, in circumstances where many of the residents are involved in programmes to address alcohol and drug abuse. The prohibition against alcohol (and/or drug use) in the Safe Spaces is an appropriate one, which is reasonable and justifiable. Furthermore, drug use in general is, in any event illegal.⁸⁹

Allegations of ill treatment at the Safe Spaces

85. As addressed in the City's replying affidavit, these allegations/complaints are not specific in that they are not underpinned by factual allegations which the City can respond to. Consequently, the City cannot meaningfully respond to these allegations. The City denies the allegation and has explained: (a) the Safe Spaces are extremely well run and governed by rules and processes; (b) in the event that there is ill-treatment or a complaint, there are processes by which it ought to be managed (through engagement with the authorities at the Safe Spaces). When pursued through this channel, the City has explained, it will then be investigated and dealt with (for example, in the past, there were complaints related to pest control, this was taken seriously and addressed). None of the Safe Spaces have any records of the ill-treatment complained of. There have been complaints about the enforcement of the rules for example. These complaints too were taken seriously. Where it was found that they had merit, the City has amended the Safe Space Rules. No complaints have been laid by the respondents who complain of ill treatment in this matter.⁹⁰

⁸⁹ RA, para 30.5.2, rec.1156.

⁹⁰ RA, para 27.2. rec. 1146 – 1149.

86. In light of the foregoing, it bears repeating that there can be no credible complaint that the Safe Spaces are not suitable alternative accommodation.

87. For these reasons we submit that the Safe Spaces constitute suitable alternative accommodation for the respondents.

(h) The City has acted reasonably and within its available resources

88. The City has explained that the Safe Space model is a far more cost effective intervention for the following reasons: (a) it is a holistic intervention aimed at the reintegration and rehabilitation of the affected persons; (b) it operates as a revolving door in order to ensure optimal efficiency – i.e. once persons become reintegrated they leave the Safe Space which then becomes available to other persons; (c) given that the EHG is not available for emergency housing of the affected persons, it avoids the City having to utilise resources from its DORA allocation (which will result in a reduction of available funds for the delivery of other municipal services).⁹¹

89. The City has also explained that it has committed to making the Safe Space model work. The City spends approximately R41 000 per occupant per annum. As stated in the replying affidavit, the City has committed substantial funding over the next three years (R 142 million) to expanding and operating Safe Spaces.⁹²

90. The City has explained its financial constraints in great detail in Section K of the founding affidavit. More particularly:

⁹¹ FA, para 153, rec. 125.

⁹² RA, para 29.1, rec. 1149 – 1150.

- 90.1. The City has spent R448.2m (96.3%) of its R465.6m USDG budget allocation and R359.3m (98.6%) of its R364.5m ISUPG budget allocation for the 2021/2022 financial year.⁹³
- 90.2. It has emphasised that: (a) the City has a limited and finite pool of financial resources; (b) the demands against the City for basic services and housing are extensive and growing at an ever-increasing rate; (c) the City must therefore make sure that its current resources are most effectively deployed so as to reach a larger breadth of people. One of the ways in which the City has determined that the latter objective can best be met is to do better with what it has – the effective utilisation of the safe space model in instances such as the present being one such intervention.⁹⁴
- 90.3. In spite of its financial constraints, plans are gaining momentum within the City to now further expand the Care Programme to help more people off the streets, and an extra R10 million has already been made available in the current financial year for more shelter beds, more than tripling the grant funding for NGO's.⁹⁵
- 90.4. The City has now increased the City's Care Programme budget to R77 million for 2022/23.⁹⁶
- 90.5. Over the next 3 years, R142 million will also go to further expanding and operating City-run safe spaces, including a large new safe space in the CBD, as

⁹³ FA, para 148, rec. 123.

⁹⁴ FA, para 156, rec. 126.

⁹⁵ FA, para 157, rec. 127.

⁹⁶ FA, para 158, rec. 127.

well as additional safe spaces thereafter, so as to enable persons on the streets to be accommodated in different areas, with or without NGO support too.⁹⁷

(i) The demand for housing in Cape Town is overwhelming

91. In its founding affidavit, the City has explained in some detail:

91.1. Cape Town currently finds itself in an unprecedented position with respect to housing demands.⁹⁸

91.2. Shortly after absorbing the impacts of a sustained drought, and economic crisis, its residents were forced to navigate the further crippling socio-economic crisis created by Covid 19.⁹⁹

91.3. Even before Covid 19, the policy and fiscal landscape of state-delivered subsidy housing was changing in that the National Minister of Human Settlements had indicated that the Breaking New Ground (“**BNG**”) programme of large-scale housing developments was to be significantly curtailed, with greater emphasis being placed on the upgrading of informal settlements and support for incremental home-building by households who receive tenure security.¹⁰⁰

91.4. Even prior to Covid 19, over the past two decades there has been a significant increase in the number of people migrating to the City’s area of jurisdiction. The population of Cape Town has escalated considerably during this period and

⁹⁷ FA, para 159, rec. 127.

⁹⁸ FA, para 136, rec. 116.

⁹⁹ FA, para 137, rec. 116.

¹⁰⁰ FA, para 138, rec. 116 – 117.

is predicted to continue increasing. By 2028, the City's population is expected to have grown to just short of 5 million people.¹⁰¹

92. The City's current housing policies and programmes are contained in various legislated and policy documents, the most relevant one for purposes hereof being the City's recent Integrated Human Settlements Sector Plan, prepared for the period ending 1 July 2027 ("**the Sector Plan**"). This document informs the City's approach to Human Settlements for the next 5 years at least, and is also contained in its Integrated Development Plan ("**the IDP**"), and which the City adopts every five years in terms of section 25 of the Local Government: Municipal Systems Act, No. 32 of 2000 ("**the Municipal Systems Act**").¹⁰²

93. The City has explained that the following assumptions underpin the Sector Plan¹⁰³:

93.1. Housing demand will outstrip the supply (by both State and private sector) of formal housing.

93.2. While ownership is important for household wealth generation, rental housing enables the mobility of younger urban populations, and is a vital tenure option for the many households who are unable to afford ownership options.

93.3. A post-Covid decrease in household employment and income levels will lead to more pressure on the State to provide housing and basic services.

¹⁰¹ FA, para 139, rec. 117.

¹⁰² FA, para 142, rec. 117 – 118.

¹⁰³ FA, para 143, rec. 118 – 119.

- 93.4. A post-Covid fiscal decline will lead to increased pressure on grant funding for human settlements, meaning that innovation in human settlements interventions will be required.
- 93.5. National grant funding will continue to shift away from BNG subsidised houses towards a focus on upgrading informal settlements, as is notable in the creation of the dedicated national grant for the upgrade of informal settlements.
- 93.6. Informality will increase: An estimated 53% of all new dwellings per annum between 2020-2040 are projected to be informal (informal dwellings – 46%, multi-residential informal boarding houses – 7%).
- 93.7. Unlawful occupation of land is likely to increase.
- 93.8. Another consequence of the devastating effect of the Covid 19 pandemic and the economic and social destruction caused in its wake is that the City has experienced increases in unlawful occupation of land during the period 2020 – 2022. This has resulted in at least 186 new informal settlements, of substantial size, being added to the City’s database of Informal Settlements. These settlements are the result of incursions of public land in the main and are located across the City on various types of land parcels, which are not in all cases suitable for human habitation.
- 93.9. The City has determined it currently has 835 areas of informality in its jurisdiction, which amounts to approximately 286 500 structures, or families (this is inclusive of 186 new informal settlements).

94. As an example of what this means for the City in terms of costing for 186 new settlements with 69 318 structures, the City has explained¹⁰⁴:
- 94.1. To provide new water installations at a ratio of 1:25 will require $\pm 2\ 772$ taps at an average cost of R7 500/tap. Thus a capital budget of R20.8m.
- 94.2. To provide sanitation at a ratio of 1:5 will require $\pm 13\ 863$ additional toilets. The capital cost for full flush toilets will be R242.6m and thereafter a yearly operational cost of R89.9m. However, if container toilets are provided, the capital cost will be R110.9m with a yearly operational cost of R176.3m.
- 94.3. Thus, to provide all 186 new areas of informality with a full basic service package of water and sanitation the initial capital required will be an estimated **R263m**. The estimated operating cost will be an estimated R176m per year.
- 94.4. While the City has measures in place to respond to the housing demand, it is in no position to ensure immediate delivery on the scale of the growing demand. The result is that with the best will and commitment to resources, the demand for housing in the City outstrips the current rate of delivery (or indeed any reasonable expected rate of delivery), thereby resulting in an inevitable and significant disparity between what is required and what the City can reasonably deliver.
- 94.5. What this does mean is that the City must ensure the most effective use of its resources. In the context of the current housing demand, the City is in no

¹⁰⁴ FA, para 144, rec. 119 – 120.

position to offer the respondents emergency housing units which are in any event not suited to their needs and circumstances.

(j) The emergency housing programme is not the answer to the needs of the respondents

95. The City has provided compelling reasons for not using the Emergency Housing Programme for the respondents at this stage. According to the City's evidence¹⁰⁵:

95.1. First, in order to meet its obligations in respect of emergency housing, the City has, in the past, established a number of emergency accommodation areas, almost all of which are still fully subscribed and unable to accommodate any further households. That remains the position.

95.2. Second and in any event, more importantly, the structures under the Emergency Housing Programme are not suitable for the respondents, all of whom are individuals with very specific needs that require specialist interventions that extend beyond housing. The Emergency Housing Programme is targeted (in the main) at households (as opposed to individuals or individuals in casual and/or intermittent relationships) facing eviction. In light of the City's current constraints it is simply not in a position to provide an emergency housing unit to every individual facing eviction from the streets of Cape Town. The City has funding constraints.

95.3. Third, based on interactions and engagement with the respondents, it is clear that in any event, emergency housing is not an appropriate intervention for their particular circumstances. What is key from the feedback that was received

¹⁰⁵ RA, para 25, rec. 1144 – 1146.

during the engagement process is that the respondents want to be able to readily access certain areas in business districts. The proximity to income-generating potential is generally the paramount consideration applied by most street persons when determining where they sleep and any relocation away from such options or areas, which renders it impossible for them to try to generate income on a daily basis, will be rejected. While the City does not have a legal obligation to provide accommodation in accordance with the location dictates of the affected persons, it accepts that on the facts of this matter the request is understandable given the nature of the respondents' existence as street people which includes begging, car guarding or "skarelling". There are no emergency housing units available in the business districts, including the CBD. In any event, even if the respondents had to be placed in emergency housing structures (assuming that they were available), it would not in any way address the matter. This is because they would, in all likelihood leave those units to get back into areas in close proximity to their economic activities as street people. The offer that the City is making, of Safe Space accommodation, does not detract from their ability to continue with these activities.

95.4. Fourth, in addition to the Safe Spaces being targeted to provide dignified accommodation, they offer far more in respect of the specific services that are needed by street people. For instance, the Emergency Housing Programme has no access to social services in the form that the City currently provides.

95.5. Fifth, the City does not seek to use Safe Spaces to the exclusion of the Emergency Housing Programme to the respondents. The intention is first and foremost, to remove the respondents from residing on the streets, to provide

them with dignified accommodation and to reintegrate them into society and communities. Once this has been done, these persons are eligible for all housing programmes, including the Emergency Housing Programme, provided they qualify.

- 95.6. Sixth, the appropriateness of Safe Spaces is highlighted when regard is had to the “*Hope Exchange Study*” on which the respondents rely, which in fact recommends, *inter alia*, that the City builds more Safe Spaces.

(k) The City has meaningfully engaged with the respondents

The law

96. As a point of departure, this Court (like the City) will be guided by the jurisprudence of the Constitutional Court in respect of the duty to meaningfully engaging with the respondents. The following imperatives are of relevance in this regard:

96.1. Engagement is a two-way process in which the City and those about to become homeless would talk to each other meaningfully in order to achieve certain objectives.¹⁰⁶

96.2. There is no closed list of the objectives of engagement. Some of the objectives of engagement in the context of a city wishing to evict people who might be rendered homeless consequent upon the eviction would be to determine: (a) what the consequences of the eviction might be; (b) whether the city could help in alleviating those dire consequences; (c) whether it was possible to

¹⁰⁶ *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* 2008 (3) SA 208 (CC) at para [14]

render the buildings concerned relatively safe and conducive to health for an interim period; (d) whether the city had any obligations to the occupiers in the prevailing circumstances; and (e) when and how the city could or would fulfil these obligations.¹⁰⁷

96.3. The process of engagement does not require the parties to agree on every issue. What is required is good faith and reasonableness on both sides and the willingness to listen and understand the concerns of the other side.¹⁰⁸

96.4. Engagement must be approached “*in good faith and with a willingness to listen and, where possible, to accommodate one another. Mutual understanding and accommodation of each others’ concerns, as opposed to reaching agreement, should be the primary focus of meaningful engagement. Ultimately, the decision lies with the government. The decision must, however, be informed by the concerns raised by the residents during the process of engagement.*”¹⁰⁹

96.5. If engagement between an occupier and owner or person in charge gives rise to a stalemate, that must be resolved by a court. The occupier cannot resort to self-help.¹¹⁰

¹⁰⁷ *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* 2008 (3) SA 208 (CC) at para [14].

¹⁰⁸ *Residents of Joe Slovo Community Western Cape v Thubelisha Homes and Others* 2010 (3) SA 454 (CC) at para [243].

¹⁰⁹ *Ibid* at [243].

¹¹⁰ *Daniels v Scribante* 2017 (4) SA 341 (CC) at para [65].

The City accepts its duty to meaningfully engage with the respondents

97. The City accepts that it is required to engage meaningfully with the respondents.¹¹¹
98. The respondents contend that the City has not done so, and instead, has embarked upon nothing more than a “*census*” of the sites with “*no interest of engaging [the Respondents] as individuals and as a collective*”.¹¹² This is not correct. The City engaged the respondents meaningfully prior to the institution of this application. The City engaged the respondents further after receipt of the answering affidavit.

The initial engagement that predated the institution of this application

99. As to the engagement that preceded the institution of this application, in its founding affidavit, the City explained all of the interventions which it had conducted prior to the institution of the present application.¹¹³ What appears from the founding affidavit is that the affected street people were: (a) engaged with regularly; (b) were asked to provide details as to their personal circumstances; and (c) were asked whether or not they were desirous of residing in the Safe Spaces.
100. As to its initial engagement, the City has explained the following:
- 100.1. SD&ECD had liaised with the persons occupying the properties on multiple occasions over the last two and a half years making offers of alternative accommodation at the Safe Spaces as well as social assistance.¹¹⁴ Many of the persons occupying the properties took up the offers of social assistance and

¹¹¹ *City of Johannesburg v Changing Tides 74 (Pty) Ltd and 97 others (The Socio-Economic Rights Institute of South Africa intervening as amicus curiae* 2012 (6) SA 294 at para [40].

¹¹² AA, para 270, rec. 794.

¹¹³ FA, para 103, rec. 103 – 104.

¹¹⁴ FA, para 102, rec. 103 and para 106.1, rec. 105.

alternative accommodation made.¹¹⁵ Those persons who did not take up the City's offers are the respondents.¹¹⁶

100.2. In spite of the City's regular and ongoing engagement with the persons occupying the properties, its endeavours are entirely dependent on the co-operation of the individuals concerned and absent such co-operation, the City has no recourse other than to approach the Courts.¹¹⁷

The further engagement after receipt of the answering affidavit

101. In light of the contention in the answering affidavit that the City had not meaningfully engaged, the City advised the respondents' legal representatives ('**SERI**') that in light of the factual information contained in the answering affidavit, the City intended to engage further with the respondents, without conceding that it had not meaningfully engaged prior to instituting these proceedings.¹¹⁸

102. The further engagement took place from 17 to 19 August 2023.¹¹⁹

The substance of the engagement

103. The City has prepared a table of the respondents' personal circumstances, their employment details, whether they were desirous of living with their partners, and the basis upon which they object or accept relocation to the Safe Spaces.¹²⁰ The City has also prepared reports in respect of the further engagements ('**the Engagement Reports**').¹²¹

¹¹⁵ FA, para 106.2, rec. 105.

¹¹⁶ FA, para 105, rec. 105.

¹¹⁷ FA, para 106.3, rec. 105.

¹¹⁸ RA, para 12.1, rec.1131, as read with "RA1" at rec.1181.

¹¹⁹ RA, paras 12.3 and 12.4, rec. 1132, as read with "RA2" and "RA3" rec. 1184-1185 and rec. 1186 respectively.

¹²⁰ RA, "RA12", rec.1216-1221.

¹²¹ RA, "RA13" to "RA15", rec.1222 – 1246.

104. The Engagement Reports explain that:¹²²

104.1. The further engagement occurred in light of the factual information contained in the answering affidavit;

104.2. The City engaged the respondents on: (a) the accommodation being offered at the Safe Spaces; (b) any issues the respondents raised in these further engagements; (c) whether they have any vulnerabilities; (d) whether they live with a partner; (e) whether they worked after 8pm; (d) whether they understand the Rules and (f) whether they have concerns about the initial 6-month period of accommodation offered as the Safe Spaces.

The City took seriously and responded to the issues that were raised during the engagement

105. As is apparent from the City's replying affidavit, it took the engagement seriously. It amended the Safe Space Rules attendant on the engagement process. The City also made every endeavour to ensure that the respondents understood the City's approach.

106. Attached to the Engagement Reports are two schedules indicating who the City engaged with and whether those persons understood the Rules as well as the nature of the offer of accommodation at the Safe Spaces and whether they wished to take up the offer of the Safe Space in light of the further engagement. The two schedules are separated according to those who are named in the answering affidavit and who could be located and those who were not named in the answering affidavit but who were nonetheless engaged with by the City.

¹²² RA, para 16, rec. 1138 to 1139.

107. As regards the overall further engagement that occurred:

107.1. In respect of those respondents who contend that they have partners, the City has engaged with a view to establishing the nature of the partnerships that they have and how this could be accommodated at the Safe Spaces.

107.2. In respect of those respondents who contend that they are employed, the City has engaged with a view to establishing: (a) the nature of their employment, (b) the times at which they finish work, and (c) the measures that could be put in place so as to ensure that the respondents are able to continue to earn a living while residing at the Safe Spaces.

107.3. In respect of the initial six-month period the City has engaged with a view to explaining:

107.3.1. The reasons for the initial six-month period, namely: (a) the Safe Spaces are intended to operate on a short-term basis so as to ensure optimal utilisation; (b) if people reside indefinitely at the Safe Spaces, these facilities will not be able to be utilised to assist in addressing the challenges with people who are homeless more broadly; (c) the six-month period is not a hard and fast limit.

107.3.2. The options available to the respondents at the end of initial six-month period, namely: (a) reintegration with their families and communities; (b) voluntary relocation to other accommodation; (c) continued living in the Safe Spaces.

108. The City has established by way of its initial engagements, its further engagements as well as the content of the answering affidavit, and in accordance with the requirements contained in *Changing Tides*:¹²³

108.1. The number of respondents.

108.2. The respondents' personal circumstances.

108.3. Whether there are disabled persons, children or elderly people among the respondents.

108.4. Whether there are female headed households among the respondents.

108.5. Whether an order for eviction would render the respondents homeless.

108.6. What their concerns were in respect of the Safe Spaces and seeing how best the City could address any valid concerns raised.

108.7. The implications of a delay in the eviction of the respondents.

109. The respondents unjustifiably take issue with the engagement process. We maintain that the City has met the requirements of meaningful engagement. The following is of particular relevance in this regard¹²⁴:

109.1. The City has established that an eviction would result in homelessness of the respondents. This is confirmed in the answering affidavit.

¹²³ *City of Johannesburg v Changing Tides 74 (Pty) Ltd and 97 others (The Socio-Economic Rights Institute of South Africa intervening as amicus curiae)* 2012 (6) SA 294 at para [40].

¹²⁴ RA, para 18, rec. 1140 – 1141.

- 109.2. The City has established that absent some form of assistance by the City, the consequences for the respondents would be dire.
- 109.3. The City has determined that it is not possible to provide land and/or building materials to the affected individuals. It bears emphasis in this regard that the respondents insist on proximity to the CBD so that they may continue with the income generating activities that they are currently engaged in. While the City does not accept that respondents have an entitlement to dictate the precise location in which they seek State assisted accommodation,¹²⁵ it has nevertheless sought (as best it can and within its current available resources) to meet this request. However, in so doing, it must again be emphasised that the City does not have land available in the CBD for the relocation of the respondents. As the City has explained in the founding affidavit, emergency housing as contemplated in the National Housing Code does not constitute a reasonable and appropriate response for the respondents as a consequence of the nature of their homelessness.
- 109.4. The City's offer of accommodation at the Safe Space is both reasonable and constitutionally sound as explained in detail below.
- 109.5. The City has sought to address the respondents' concerns in respect of the Safe Spaces insofar as such concerns were reasonable.

¹²⁵ *Baron v Claytile* 2017 (5) SA 539 (CC) at para [50].

110. The respondents' repeated complaints about the purported lack of meaningful engagement does not bear scrutiny. It appears, from the tenor of the respondents' complaint, that the respondents' real concern is the appropriateness of the Safe Spaces.

111. We submit that it is evident that the City's engagements with the respondents complies fully with the requirements for meaningful engagement set out in the case law that we have referred to.

(l) The consequences for the respondents, the City and the people of the City of Cape Town if the challenges presented by homeless people are not properly addressed and an eviction order is refused

112. The City has explained in detail that that unless the position is properly managed in relation to street people, the City will become ungovernable. Amenities that are directed for the benefit of all of the people of Cape Town will be overtaken for the exclusive use of street people. It will result in the flight of business and residents from the CBD and exponential loss of revenue for the City.¹²⁶

113. According to the City, unless the position of street people is properly managed¹²⁷:

113.1. It will result in a substantial reduction in the number of visitors to key tourist sites in the City.

113.2. City infrastructure will continue to be damaged and adversely impact on service delivery to communities in that financial resources will have to be redirected

¹²⁶ FA, para 63, rec 72 – 73.

¹²⁷ FA, para 64, rec 73.

towards the repair of damaged infrastructure and away from key issues such as housing delivery.

113.3. City amenities (such as parks and public open spaces) will:

113.3.1. Become overrun by makeshift structures and no longer be available for use by the public.

113.3.2. Be used as places for consumption of drugs and alcohol; there will be used needles and syringes left lying around.

113.3.3. Be taken over by street people, some of whom engage in verbal abuse, ongoing littering and criminal activities. As explained, there is a serious risk to the health of safety of street people by living in these conditions.

114. Save for an allegation of no knowledge and a bald denial, the respondents do not engage with these allegations at all.¹²⁸

A just and equitable date for eviction

115. In the event that this Court is inclined to grant the order for eviction, we submit that the date for the eviction will be determined by a multitude of unknown factors. By way of example, a material question becomes how many of the respondents seek alternative accommodation at the Safe Spaces (if any at all).

¹²⁸ AA, para 326, rec. 810.

116. Given these unknowns, we submit that it would be appropriate for this Court to direct the respondents to inform the City by a specified date as to how many of them seek to take up place at the Safe Spaces. Attendant thereon, the parties ought to be given an opportunity to make written submissions as to the appropriate date for eviction. At that point, the City will be able to consider exact numbers required as against the various vacancies that it has available at its different Safe Spaces.

C. THE INTERDICTIONARY RELIEF

117. We turn now to the interdictory relief sought.

118. It is trite that an applicant seeking a final interdict must establish, (a) a clear right to the relief sought; (b) an injury actually committed or reasonably apprehended; and (c) the absence of any other satisfactory remedy available to the applicant.¹²⁹

119. An interdict is not a remedy for past invasion of rights but is concerned with present or future infringements.¹³⁰ It is appropriate where future injury is feared.¹³¹

120. Where a wrongful act giving rise to the injury has already occurred, it must be of a continuing nature or there must be a reasonable apprehension that it will be repeated.¹³² Whether or not the apprehension is a reasonable one, is again, a fact dependant inquiry. The test is an objective one and the “*the question is whether a reasonable man, confronted by the facts, would apprehend a probability of harm*”.¹³³

¹²⁹ *Setlogelo v Setlogelo* 1914 AD 221. See also *Pilane v Pilane and Another* (4) BCLR 431 (CC) par 39.

¹³⁰ *NCSPCA v Openshaw* 2008 (5) SA 339 (SCA) par 20.

¹³¹ *Ibid.* See also *Phillip Morris Inc v Marlboro Trust Co* SA 1991 (2) SA 720 (A) at 735B.

¹³² *Ibid.*

¹³³ *Minister of Law and Order v Nordien* 1987 (2) SA 894 (A) at 896G – I.

121. In **Nordien and Another** the Appellate Division, as it then was, stated:

“a reasonable apprehension of injury has been held to be one which a reasonable man might entertain on being faced with certain facts. The applicant for an interdict is not required to establish that, on a balance of probabilities following from the undisputed facts, injury will follow he has only to show that it is reasonable to apprehend that injury will result. However, the test for apprehension is an objective. This means that, on the basis of the facts presented to him, the Judge must decide whether there is any basis for the entertainment of a reasonable apprehension by the applicant.”¹³⁴ [Emphasis added]

A clear right

122. First, the City has evidently established that it is possessed of a clear right, inasmuch as it is the owner of the properties, and this is not disputed by the respondents.

123. Second, the City has a clear right as the owner, entity in charge, and local authority to prohibit persons from unlawfully occupying and/or erecting structures on the properties. It has an entitlement to secure this objective through the Courts.

124. The respondents do not deny that the City is the owner or person in charge of the properties in respect of which the interdict is sought. Put differently the respondents cannot and do not deny that the City has a clear right to protect its properties.

125. Third, if the occupation is allowed to continue unabated, the City risks not only that the CBD will become ungovernable, but that there will be significant risk to safety, security, health, infrastructure and the economy.

¹³⁴ *Minister of Law and Order v Nordien* 1987 (2) SA 894 (A) at 896G – I. See also *Openshaw* at par 21.

A reasonable apprehension of harm

126. As explained in the founding affidavit¹³⁵ and the replying affidavit,¹³⁶ it is no exaggeration to say that even if evicted by this Court, the respondents are likely to return to the properties from which they have been evicted and to continue engaging in conduct that is prohibited by law.
127. Moreover, there is a reasonable apprehension that the respondents will simply relocate their structures, which are easily transportable (most commonly tents), back to the properties. Essentially, granting the eviction relief without the additional interdictory relief, will render the eviction an exercise in futility as it will not remove the affected street people from an unhealthy and dangerous situation and will not ensure the vacation of public land in the public interest.
128. It bears emphasis that the respondents do not expressly undertake that if the eviction order is granted, they will not seek to re-occupy the properties in question.
129. It cannot be contended that if a person is evicted and they re-occupy the same site, in the face of the eviction order that a fresh eviction application must be sought, as this would render an eviction order entirely nugatory and without any purpose. Such an outcome would manifestly not be in the interests of justice.

¹³⁵ FA, paras 168 – 169, 171, rec. 131 – 132.

¹³⁶ RA, para 61.7.2, rec.1169.

No alternative remedy

130. The respondents contend that the appropriate alternative remedy is to evict the respondents a second time.
131. This is an unarguable and profound miscarriage of justice.
132. The respondents are not entitled to re-occupy properties from which they have been evicted and then to insist on fresh eviction proceedings each time, thus effectively establishing a permanent right to reside on properties from which they have been evicted.
133. This is profoundly inimical to the rule of law, and in effect, the respondents seek to contend that they are entitled to re-intrude upon properties from which they have been evicted.
134. Were this to be allowed, it would effectively denude any rights which a property owner may have to protect their properties.

There is no merit to the respondents' grounds of opposition

135. As to the grounds of opposition to the interdict, we make the following submissions.
136. First, the City does not seek to evict any of the respondents without a court order.¹³⁷ Quite clearly it has approached this Court specifically for an order seeking the respondents' eviction.

¹³⁷ AA, para 304.1, rec. 805.

137. Second, the interdict seeks to prevent re-occupation of the properties, after the respondents are evicted by a court. The respondents cannot sensibly contend that they will suffer any harm if the City is granted an order preventing them from unlawfully re-occupying any properties from which they have been lawfully evicted. Further it would be contrary to the rule of law if the respondents were simply entitled to ignore a court order evicting them. This would simply engender further land intrusions, which the Constitutional Court has specifically set its face against.¹³⁸
138. Third, the question of balance of convenience does not feature in applications for final interdictory relief.¹³⁹
139. Fourth, it is cynical for the second respondents to contend that because they have refused to identify themselves to the City or to the Court, that the City is not entitled to preclude them from re-occupying the properties.¹⁴⁰
140. Fifth, it is clear that the City seeks an eviction order and an interdict in respect of all persons occupying the identified properties. It cannot sensibly be contended that the City has failed to establish a link between the second respondent and the unlawful conduct.
141. Sixth, as to the questions of unconstitutionality, the interdict is not unconstitutional in that:

¹³⁸ *Gundwana v Steko Development and Others* 2011 (3) SA 608 (CC) at para [45], see also the comments of Froneman J in *Bezuidenhout v Patensie Sitrus Beherend Bpk* 2001 (2) SA 224 (E) at 228F-230A and see *Clipsal Australia (Pty) Ltd and Others v GAP Distributors (Pty) Ltd and Others* 2009 (3) SA 305 (W) at para-21.

¹³⁹ AA, para 304.3, rec. 805.

¹⁴⁰ *Mtshali & Others v Masawi & Others* 2017 (4) SA 632 (GJ) at paras [189] to [194].

- 141.1. The interdict is not a blanket interdict on all City property, but only in respect of those sites which have been identified in this application;
- 141.2. It has been explained above, why there is a reasonable apprehension of harm if an interdict is not granted, inasmuch as it would render the eviction application an exercise in futility;
- 141.3. The interdict sought cannot and does not permit evictions without a court order as the respondents contend. The interdict is an adjunct to the eviction order sought and its underlying purpose is to interdict re-occupation.

D. CONCLUSION

142. The present matter brings into stark focus profound questions of the manner in which the City is required to deal with questions underpinning homelessness, and how it must balance the rights of both homeless persons and together with the interests of the City and the public at large.
143. The respondents offer no real solution to the question, and simply insist on being provided with alternative accommodation as contemplated in Emergency Housing Programme.
144. The City has, within its available resources, sought to provide accommodation in well located areas in the form of constitutionally appropriate safe spaces which will assist the respondents not only by removing them from the conditions of the streets, but also, will assist them in reintegrating into society by providing a holistic solution to the underlying causes of homelessness.

145. The City has explained why the strictures of the Emergency Housing Programme are inapposite to circumstances of the respondents. To relocate the respondents to one of the TRAs would do nothing to address the underlying causes of homelessness and with respect would be nothing more than putting the issue out of sight, this, however, is the solution which the respondents propose.
146. As has been emphasised, there is nothing which precludes the respondents from pursuing other forms of alternative accommodation, the current intervention seeks to remove them from the deplorable conditions in which they presently reside. It is indeed appropriate to provide the respondents with temporary accommodation while they pursue and/or await permanent accommodation particularly so where they are currently residing on the streets, without access to services and the interventions they desperately require.
147. The City seeks to assist its homeless population by providing it with a tailor-made intervention that is more suited to addressing the problem than the Emergency Housing Programme, particularly so, in circumstances where the Constitutional Court in **Dladla** has held that the shelter model constitutes adequate temporary accommodation.
148. In the circumstances, the City prays for the relief as set out in its notice of motion.

KARRISHA PILLAY SC
MUSHAHIDA ADHIKARI
MUHAMMAD EBRAHIM
Chambers, Cape Town
8 September 2023

LIST OF AUTHORITES

1. *Baron v Claytile* 2017 (5) SA 539 (CC).
2. *Bezuidenhout v Patensie Sitrus Beherend Bpk* 2001 (2) SA 224 (E)
3. *Cape Killarney Property Investments (Pty) Ltd v Mahamba* 2001 (4) SA 1222 (SCA).
4. *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* 2012 (2) SA 104 (CC)
5. *City of Johannesburg v Changing Tides 74 (Pty) Ltd and 97 others (The Socio-Economic Rights Institute of South Africa intervening as amicus curiae)* 2012 (6) SA 294.
6. *Clipsal Australia (Pty) Ltd and Others v GAP Distributors (Pty) Ltd and Others* 2009 (3) SA 305 (W).
7. *Daniels v Scribante* 2017 (4) SA 341 (CC).
8. *Dladla and Another v City of Johannesburg and Others* 2018 (2) SA 327 (CC).
9. *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC).
10. *Grobler v Phillips and Others* 2023 (1) SA 321 (CC)
11. *Gundwana v Steko Development and Others* 2011 (3) SA 608 (CC)
12. *Minister of Law and Order v Nordien* 1987 (2) SA 894 (A).
13. *Moela v Shoniwe* 2005 (4) SA 357 (SCA).
14. *Mtshali & Others v Masawi & Others* 2017 (4) SA 632 (GJ).
15. *NCSPCA v Openshaw* 2008 (5) SA 339 (SCA).
16. *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* 2008 (3) SA 208 (CC).
17. *Phillip Morris Inc v Marlboro Trust Co SA* 1991 (2) SA 720 (A).
18. *Pilane v Pilane and Another* (4) BCLR 431 (CC).
19. *Port Elizabeth Municipality v Peoples Dialogue on Land and Shelter and Others* 2001 (4) SA 759 (E) ([2001] 1 All SA 381).
20. *Residents of Joe Slovo Community Western Cape v Thubelisha Homes and Others* 2010 (3) SA 454 (CC).
21. *Setlogelo v Setlogelo* 1914 AD 221.
22. *Unlawful Occupiers, School Site v City of Johannesburg* 2005 (4) SA 199 (SCA).