IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 8681/2017

In the matter between:

ERIC LOLO	**First Applicant**
BERENICE FRANSMAN	**Second Applicant**
and	
DRAKENSTEIN MUNICIPALITY	**First Respondent**
THE MEMBER OF THE EXECUTIVE COUNCIL FOR HUMAN SETTLEMENTS, WESTERN CAPE	**Second Respondent**
THE MINISTER OF HUMAN SETTLEMENTS	**Third Respondent**
GREENWILLOWS PROPERTIES 2 (PTY) LTD (Registration number: 2002/023902/07	**Fourth Respondent**
WOMEN ON FARMS	**Amicus Curiae**

JUDGMENT DELIVERED ELECTRONICALLY: THURSDAY, 28 JULY 2022

MARTIN AJ

[1]

Our Constitution confers on everyone a right of access to adequate housing.[1] Our courts have interpreted this right as imposing a correlative obligation on government

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1 Section 26(2).

to provide it. The most clearly articulated aspect of the governmental duty is that it must provide emergency housing to persons facing eviction or who have suffered a disaster.

[2]

The Constitution in general rights and the Bill of Rights in particular, afford rights with a unifying purpose the Constitutional Court expresses as follows in *Port Elizabeth Municipality v Various Occupiers*:

> "Thus, PIE expressly requires the court to infuse elements of grace and compassion into the formal structures of the law. It is called upon to balance competing interests in a principled way and promote the constitutional vision of a caring society based on good neighbourliness and shared concern. The Constitution and PIE confirm that we are not islands unto ourselves. The spirit of ubuntu, part of the deep cultural heritage of the majority of the population, suffuses the whole constitutional order. It combines individual rights with a communitarian philosophy. It is a unifying motif of the Bill of Rights, which is nothing if not a structured, institutionalised and operational declaration in our evolving new society of the need for human interdependence, respect and concern."[2]

PIE, the Prevention of Illegal Evictions Act [3] is the correlative statute to the Extension of Security of Tenure Act (ESTA)[4] which is relevant to this application.

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2 [2004] ZACC 7 para 37.
3 Act 19 of 1998.
4 Act 62 of 1997

[3]

It is trite that the courts must determine matters within their appropriate context. The Constitutional Court provides important insight into the context within which the court must decide this application in *Modderklip*, saying:

> "The problem of homelessness is particularly acute in our society. It is a direct consequence of apartheid urban planning which sought to exclude African people from urban areas, and enforced this vision through policies regulating access to land and housing which meant that far too little land and too few houses were supplied to African people. The painful consequences of these policies are still with us eleven years into our new democracy, despite government's attempts to remedy them. The frustration and helplessness suffered by many who still struggle against heavy odds to meet the challenge merely to survive and to have shelter can never be underestimated. The fact that poverty and homelessness still plague many South Africans is a painful reminder of the chasm that still needs to be bridged before the constitutional ideal to establish a society based on social justice and improved quality of life for all citizens is fully achieved."[5]

[4]

Justice Madlanga, writing for the majority of the Constitutional Court in *Daniels v Scribante* starts the judgment with the following quote:

> "The land, our purpose is the land; that is what we must achieve. The land is our whole lives: we plough it for food; we build our houses from the soil; we live on it; and we are buried in it. When the whites took our land away from us, we lost the

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[5] *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 (5) SA 3 (CC) para 35.

dignity of our lives: we could no longer feed our children; we were forced to become servants; we were treated like animals. Our people have many problems; we are beaten and killed by the farmers; the wages we earn are too little to buy even a bag of mielie-meal. We must unite together to help each other and face the Boers. But in everything we do, we must remember that there is only one aim and one solution and that is the land, the soil, our world."[6]

The Learned Justice continues:

"[1] This impassioned, painful cry highlights the effects of the dispossession of African people of their land by whites. It is this dispossession and other stratagems that forced people off their land. The result was that some found themselves living and working on land that was now in the hands of whites. As Mr Petros Nkosi says, their way of life had been torn asunder. They had been stripped of their dignity.

[2] This takes us to the nub of this matter: the right to security of tenure. An indispensable pivot to that right is the right to human dignity. There can be no true security of tenure under conditions devoid of human dignity. Though said in relation to the right to life, the words of O'Regan J are apt: "without dignity, human life is substantially diminished". Addressing herself directly to human dignity, she said:

> 'The importance of dignity as a founding value of the new Constitution cannot be overemphasised. Recognising a right to dignity is an acknowledgement of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern. This right therefore is the foundation of many of the other rights that are specifically entrenched in [the Bill of Rights].' "[7]

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[6] Rugege "Land Reform in South Africa: An Overview" (2004) 32 *International Journal Legal Information* 283, 286 reports that an elderly man, Mr Petros Nkosi, said this at a community meeting in the then Eastern Transvaal.

[7] *S v Makwanyane* [1995] ZACC 3; 1995 (3) SA 391 (CC) para 327.

BACKGROUND

[5]

The Applicants, are Eric Lolo and his daughter, Berenice Fransman, have their home on the farm Langkloof Roses in Wellington ("the farm") which the Fourth Respondent ("Greenwillows") owns. Lolo, now over 60 years old, is a farmworker, who lived and worked on the farm from 1976 to 1983 and from 1996 until February 2014 when he was retrenched.[8] Fransman, unemployed at the time they launched this application, has a minor child.

[6]

During 2015 Greenwillows launched an eviction against the Applicants in the Wellington Magistrates' Court in terms of the ESTA. Greenwillows alleges its application that the Applicants' right to occupy the property ended together with Lolo's employment contract. If evicted, the Applicants will have nowhere to go as they have no alternative accommodation.[9]

[7]

Women on Farms Project (WFP) was admitted as *amicus curia* by agreement. WFP is a registered South African non-governmental organisation focused on the advancement of the rights of women who live and work on farms. It grew out of a 1992 Lawyers for Human Rights initiative aimed at meeting the specialised needs of women who live and work on farms.[10] WFP is a charitable and an educational institution whose objective is to provide education, training and capacity-building to women who work and or live on farms and also to organisations that represent

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8 Founding Affidavit (FA) 12 para 11.
9 FA 13 para 12.
10 FA of Collette Solomon in WFP's application for admission as *amicus* para 10.

them, particularly in the Western Cape. WFP provides mostly women farm workers, with the skills and capacity to know and understand their legal rights, to advocate for the extension and improvement of those legal rights, and to campaign for the enforcement of those rights, particularly, women's rights to equality in the home, the workplace and the wider community. It has worked with women who live and work on commercial farms in the Western Cape. WFP has conducted research on the humanitarian conditions of farms where women live and work. Particular focus has been on the impact of laws such as ESTA. During the course of its work it has interacted with communities living in similar conditions to the Applicants in and around the Drakenstein Municipality.

[8]

The essence of the relief Applicants, seek is that the First Respondent (the Municipality) account to court for the manner in which it has implemented its obligations to provide emergency housing to those in desperate need. The substance of the relief is reflected in their quest for orders:

a) Declaring that the Municipality has breached its constitutional and statutory obligations by failing to take reasonable measures to provide emergency housing for people living within its area of jurisdiction.
b) Declaring that the Municipality's policy, alternatively, practice of relying exclusively, alternatively, primarily, on grants received from the Provincial government, in order to provide emergency housing is unlawful.
c) Declaring that the first respondent is legally obliged to make reasonable provision from its own financial resources, excluding funds received from the Provincial Government, or other external sources, for emergency housing.

d) Directing the first respondent to make reasonable provision from its own financial resources, excluding housing grants received from the Provincial Government, for emergency housing.

e) Declaring that the first respondent's housing program is not able to meet the short-, medium- and long-term housing needs of the community that it serves.

f) Declaring that section 5.2.2 of the first respondent's housing selection policy, dated 28 October 2014, is unconstitutional and invalid, to the extent that it precludes farm residents who have been registered on the housing database for a substantial period of time from benefitting from the 20 per cent quota set aside for farm workers and farm residents in municipal housing projects.

[9]

The Applicants act in their own interest, but also, in terms of section 38 of the Constitution:

(a) in the interests of those people within the Drakenstein Municipality who are in need of emergency housing or live in rural areas and who qualify for state-subsidised formal housing; and

(b) in the public interest.

The Municipality does not seriously dispute the Applicants' standing to act in a representative capacity in terms of section 38 of the Constitution[11] but more definitely contests their own standing.

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[11] See Answering Affidavit (AA) para 12.4; Record 189.

[10]

The principal basis on which the Applicants seek relief is the constitutional principles developed, to a large extent, in two Constitutional Court judgments: *Government of the RSA and Others v Grootboom and Others*[12] and *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties.*[13]

[11]

The court in *Adonisi* [14] crystallised the following conclusions from detailed analysis of the obligations sections 26(1) and (2) of the Constitution impose which the *Grootboom* Court undertook:

a) There was a negative obligation on the authorities to desist from impairing the right of access to adequate housing;
b) The right to adequate housing went further than the provision of bricks and mortar: access to land and appropriate services as well as financing was required, thus providing a link to the section 25 rights;
c) The State was required to create conditions which enabled access to housing for people at all economic levels of our society. Thus, where citizens were in a financial position to afford adequate housing, the State's primary obligation was to make it possible for such persons to obtain access thereto, hence the introduction of the Social Housing Act;
d) The State's housing obligations were contextually dependent and might differ between provinces, cities and rural areas;

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12 2001 (1) SA 46 (CC).
13 2012 (2) SA 104 (CC); 2011 (4) SA 337 (SCA); [2011] ZASCA 47.
14 *Adonisi & Others v Minister for Transportation and Public Works, W Cape* [2020] ZAWCHC 87.

e) Section 26(2) imposed a positive obligation on the State to devise comprehensive and workable plans to achieve its statutory obligations;

f) The yardstick according to which the State's compliance with its statutory obligations was to be measured was the test of reasonableness. Accordingly, any proposed housing programme had to be co-ordinated, coherent and comprehensive and determined at all three tiers of government, in consultation with each other, with a view towards the progressive realisation of the right in question;

g) All legislative enactments had to be supported by appropriate and well-directed policies and programmes which had to be reasonable, both in conception and implementation; and

h) The reasonableness of a housing programme would be determined contextually taking into account, inter alia, it's social, economic and historical context, the short, medium and long term needs of the community, while being balanced and flexible. Importantly, the court cautioned that a programme that excluded a significant segment of society might not be considered to be reasonable in the circumstances."[15]

[12]

Blue Moonlight involved a challenge to the City of Johannesburg's policy of differentiating between persons evicted by the City from "buildings", and persons that were evicted from land owned by private person. The City provided temporary emergency accommodation for the first group, but not the second. The Supreme Court of Appeal[16] and the Constitutional Court both found the policy to

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[15] *Adonisi* para 43.
[16] *Blue Moonlight (SCA)* para 67.

be unconstitutional.[17] Some of the Court's critical findings are that:

(i) A municipality would find it difficult to carry out its constitutional and statutory obligations without being entitled or indeed obliged to fund its emergency housing programs itself;

(ii) local authorities (Municipalities) cannot rely solely on funding from Provincial Governments to provide emergency accommodation, since reliance on this source will always be on *ad hoc* basis and fall short of what an emergency policy should entail; and

(iii) Municipalities have a duty to provide to provide temporary emergency accommodation to all persons who will be rendered homeless by eviction orders.

[13]

The Applicants contend that despite this clear articulation of the emergency housing obligations the Municipality's answering affidavit reveals that:

a) The scale of evictions in the area increased so significantly that it constituted a crisis;

b) There is a dire shortage of emergency housing for evictees;

c) The Municipality had not prioritised the provision of emergency housing; and

d) It failed to meaningfully provide for emergency housing.

[14]

The Applicants contend that the Municipality has taken measures to address the disadvantage rural residents face by providing for 20 per cent of each new formal

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[17] *Blue Moonlight (CC)* para 95.

housing project to be reserved for them. Section 5.2.2 of the housing selection policy provides for 20 per cent quota on housing projects for farmworkers and farm residents provided that they have continuously resided on farms for more than 10 years, or the Mayoral Committee decides otherwise, and they are older than 55; they have not until recently been registered on the database; and they have been (or are being) systematically excluded from housing opportunities, despite "registration data measures listed" being used.[177]

[15]

The Applicants argue that the abovementioned steps, though commendable, are not sufficient to address the housing needs of the rural residents within the municipality. It has the undesirable and constitutionally unacceptable consequence of precluding farm residents who have been registered on the housing database for a substantial period of time from benefitting from the 20 per cent quota set aside for farm workers and farm residents in municipal housing projects.

[16]

The following two passages from *Mazibuko* played a key role in the Applicants case:

> "[161] When challenged as to its policies relating to social and economic rights, the government agency must explain why the policy is reasonable. Government must disclose what it has done to formulate policy: its investigation and research, the alternatives considered, and the reasons why the option underlying the policy was selected. The Constitution does not require government to be held to an impossible standard of perfection. Nor does it require courts to take over the tasks that in a democracy should properly be reserved for the democratic arms of

> government. Simply put, through the institution of the courts, government can be called upon to account to citizens for its decisions. This understanding of social and economic rights litigation accords with the founding values of our Constitution and, in particular, the principles that government should be responsive, accountable and open.
>
> [162] Not only must government show that the policy it has selected is reasonable, it must show that the policy is being reconsidered consistent with the obligation to 'progressively realise' social and economic rights in mind. A policy that is set in stone and never revisited is unlikely to be a policy that will result in the progressive realisation of rights consistently with the obligations imposed by the social and economic rights in our Constitution."[18]

[17]

The courts have recognised that they ought to adopt a different approach when adjudicating matters concerning socio-economic rights as a consequence of the Constitution guaranteeing socio-economic rights. Prof Liebenberg succinctly describes the result of constitutionally committing the State to providing socio-economic rights in these terms:

> "Placing an obligation on the State to ensure that everyone has access to socio-economic rights will therefore require a degree of intervention which has significant implications for pre-existing policy and resource distributions. This is an unavoidable consequence of a constitutional commitment to the fulfilment of socio-economic rights." [19]

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[18] *Mazibuko and Others v City of Johannesburg and Others* 2010 (4) SA 1 (CC) para 59.
[19] *Socio-Economic Rights Adjudication under a Transformative Constitution* (2010) 191.

[18]

The Constitutional Court laid the foundations of the approach to socio-economic rights in *Grootboom*,[20] the Court's first engagement with the enforcement of the constitutionally guaranteed socio-economic rights. The Constitutional Court had to give content to the right of access to housing protected under section 26 of the Constitution. The Court held that the State bears an obligation to take reasonable legislative and other measures to achieve the progressive realisation of housing rights, emphasising that this entailed both the obligation to formulate reasonable programmes designed to achieve the objective and to implement those programmes reasonably:

> "*In determining whether a set of measures is reasonable, it will be necessary to consider housing problems in their social, economic and historical context and to consider the capacity of institutions responsible for implementing the program. The program must be balanced and flexible and make appropriate provision for attention to housing crises and to short, medium and long term needs. A program that excludes a significant segment of society cannot be said to be reasonable. Conditions do not remain static and therefore the program will require continuous review.*"[21]

[19]

The right of access to water was in issue in *Mazibuko and Others v City of Johannesburg and Others,* where the Court held that the realization of the socio-economic rights the Constitution guarantees must be approached with the following context in mind:

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[20] Para 42.
[21] *Grootboom* para 43.

> "At the time the Constitution was adopted millions of South Africans did not have access to the basic necessities of life, including water. The purpose of the constitutional entrenchment of social and economic rights was thus to ensure that the State continue to take reasonable legislative and other measures progressively to achieve the realisation of the rights to the basic necessities of life. It was not expected, nor could it have been, that the State would be able to furnish citizens immediately with all the basic necessities of life. Social and economic rights empower citizens to demand of the State that it act reasonably and progressively to ensure that all enjoy the basic necessities of life. In so doing, the social and economic rights enable citizens to hold government to account for the manner in which it seeks to pursue the achievement of social and economic rights."[22]

[20]

WFP submits that the Municipality has adopted an "obstructionist" approach to this application, illustrated in part by a recurring theme of its answering affidavit being a refusal to acknowledge its full responsibility of constitutional for discharging the duty to effect a progressive realisation of the right to access to housing with which the Constitution invests the applicants and similarly situated persons.

[21]

WFP responds to the Municipality's claim this case is not *ripe* for adjudication by arguing that the doctrine of ripeness prevents courts from deciding cases prematurely brought to court. WFP argues that despite the Magistrates Court not having jurisdiction to entertain the relief the applicants seek the Municipality's stance

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[22] 2010 (4) SA 1 (CC) para 59.

suggests that it does not want this Court to immediately adjudicate this case.[23]

[22]

WFP decries the Municipality's entire approach as unfortunate; not least because our courts have made it clear that state litigants have a duty not to litigate as though they are at war with their citizens taking obstructionist technical points. [24] The Court admonished state parties for doing so in *Permanent Secretary Department of Welfare, Eastern Cape Provincial Government v Ngxuza*.[25] The Court held that the volume of evidence placed before it, showed a disregard for the substantive rights of poor citizens: social grant beneficiaries.[25] The SCA found it unfortunate that in the face the evidence the Provincial Government sought to rely on "legal technicalities" in order to avoid being held accountable in court. The SCA found it unconscionable that instead of proactively seeking to assist its vulnerable citizens, the Provincial Government sought to defer the substantive resolution of the case by raising meritless technical points, saying:

> "All this speaks of a contempt for people and process that does not befit an organ of government under our constitutional dispensation. It is not the function of the courts to criticise government's decisions in the area of social policy. But when an organ of government invokes legal processes to impede the rightful claims of its citizens, it not only defies the Constitution, which commands all organs of state to be loyal to the Constitution, and requires that public administration be conducted on the basis that 'people's needs must be responded to', it also misuses the mechanisms of the law, which it is the responsibility of the courts to safeguard. The

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[23] HOA para 33.2.
[24] HOA para 34.
[25] 2001 (4) SA 1184 (SCA).

> province's approach to these proceedings was contradictory, cynical, expedient and obstructionist. It conducted the case as though it was at war with its own citizens, the more shamefully because those it was combatting were in terms of secular hierarchies and affluence and power the least in its sphere. We were told, in extenuation, that unentitled claimants were costing the province R65 million per month. That misses the point, which is the cost the province's remedy exacted in human suffering on those who were entitled to benefits."[26]

[23]

The technical points raised in this case WFP contends, are similar to those the state parties took in *Ngxuza*: (a) the state parties claimed the relief sought by the social grant beneficiaries was premature and the case "not ripe" for hearing,[27] as has the Municipality in this case; (b) the state parties in *Ngxuza* also sought to rely on the "vagueness" of the relief sought,[28] as in this application.

[24]

Countering WFP argument based on *Ngxuza*, the Municipality alleges that in that case there was complete absence of any factual or legal basis for the defences raised and that the evidence of the rights violations was uncontested.[29] It contends that in this matter it has placed clear facts before the court setting out its policies and how they are implemented.

The Municipality's also responds to WFP's argument by saying that there is no blanket prohibition on state litigants raising "points of law" when faced with constitutional

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[26] *Ngxuza* para 15.
[27] *Ngxuza* para 11.
[28] *Ngxuza* paras 21 – 24.
[29] HOA para 17.

challenges.

The court returns to the matter at hand, the first order of business being to ascertain the factual basis for the contentions advanced.

FACTS

[25]

The Housing Reports Municipal officials compiled, play a major role in providing the factual basis for this application. The Municipal Manager compiled the first in 2013 (the 2013 Housing Report) and the Senior Manager; Human Settlements compiled the second in 2016 (the 2016 Housing Report).

[26]

The Municipal Manager's the 2013 Housing Report was submitted to the Magistrates' Court in an eviction application that was eventually reported as *Goosen and Others v The Mont Chevaux Trust* (*Mont Chevaux*).[30] The Municipality requested the Magistrate:

(i) not to grant the eviction order until it was able to provide emergency accommodation; and

(ii) to allow it to consider contributions from all stakeholders, including the landowner due to "*the humanitarian crisis the municipality is faced with and in light of its limited resources*".[31]

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[30] [2017] ZASCA 89

[31] The 2013 Housing Report was marked Annexure FF to those proceedings: see paras 38 – 39; Record 572.

[27]

The 2013 Housing Report acknowledged that the Municipality did not have approved land available for emergency housing,[32] and that it did not have emergency accommodation available for the potential evictees.[33] It advised the court that between June and December 2014 it expected emergency accommodation to become available in the Drommedaris project.[34] The Municipality also gave the court an undertaking that "as and when the need eventually arise for the allocation of emergency housing for particular individuals" it would provide it and undertook to "conduct an assessment to ascertain":

(i) the availability of emergency housing at that point;

(ii) the timeframe within which it would become available;

(iii) the steps which it could take to speed up delivery and the particular need at the time.[35]

[28]

The 2013 Housing Report states:

> "The main challenge is the scarcity of suitable land for emergency Accommodation. Land has been identified by the Council, as erf 584 Drommedaris for the provision of emergency housing. The departments are currently working on the suitability of the land in terms of Environmental Impact Assessment and compliance with all the relevant regulations and laws. Another challenge is the

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[32] Report para 26; Record 569.
[33] Report paras 36 – 40; Record 572 – 573.
[34] Report para 34; Record 571.
[35] Para 35; Record 571.

> public participation campaigns as communities do not want informal settlements in their neighbourhood."[36]

[29]

The SCA in *Mont Chevaux* records that

> "The Magistrate's Court ordered the Municipality to report to it in respect of, inter alia, the steps it intended to take 'to resolve the problem of homelessness' of the appellants. The order of the magistrate's court specifically directed the attention of the municipality to the decision in *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd & another* [2011] ZACC 33; 2012 (2) SA 104 (CC)."[37]

[30]

The Municipality provided the Magistrates' Court with its 2106 Housing Report during November 2016 for purposes of the application to evict the Applicants. It states that the Municipality was not able to commit "with any degree of certainty" as to when it would be able to provide the Applicants with emergency accommodation.[38]

[31]

The Municipality, in its answering affidavit, states that it usually takes about 3 years for a project to move from the planning to the implementation stage, but this figure can vary depending on the circumstances;[39] and concedes that it has "extremely limited emergency accommodation available".[40]

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[36] 2013 Report para 6; Record 556.
[37] *Mont Chevaux* para 32.
[38] Annexure EL1 to FA; Record 41.
[39] AA para 11.15; Record 157.
[40] AA para 12.12.1; Record 192.

[32]

The importance of the 2016 Housing Report justifies the court quoting it extensively. It starts with the following general remarks:

> "The provision of housing opportunities remains one of the key challenges that the Municipality faces. Currently, the active demand for housing (people looking for a housing opportunity) is in the region of 19 500. 30 Informal Settlements are located within the municipal area, housing in the region of 11000 people. In addition, it is estimated that 16000 people live in backyards. On average, the Municipality creates between 400-800 formal housing opportunities per annum with the funding it receives from the Provincial Government. These figures illustrate the mammoth task at hand.
>
> The responsibility placed on Drakenstein Municipality by the Housing Act is that of the implementer for the provision of housing to the lower socio-economic population. Whilst the Municipality is aware of its responsibilities and is prepared to undertake this task, the Municipality is not the source of funding for housing. The State allocates the housing grants to the Provincial Governments for distribution to the Municipalities under its control. Drakenstein Municipality is such Municipality falling under the control of the Provincial Government of the Western Cape. The assistance that can be offered for emergency housing is therefore closely tied to the funds received from the Province.
>
> The Municipality is obliged to provide land for the location of the proposed emergency housing and to provide maintenance costs for the facility. The Constitutional Court has given judgement that the Municipalities must provide emergency housing, but within their ability to do so."

[33]

The "PRESENT EVICTIONS" section of the 2016 Housing Report states that:

> "At present the Municipality has been included as a Respondent in most of the recorded evictions cases. A large number of potential cases will be lodged in the near future. The total at this point in time is 340 cases involving ±947 families. It is estimated that up to 1 500 eviction families will be ultimately involved. This means that a large number of cases have been processed through the Courts and where orders has been passed down that Drakenstein Municipality is instructed to provide housing within a specified period. At this time the Municipality is obliged to contest such decisions. The Municipality has compiled a list of the evictees based on the cases made known to the Municipality. It must be emphasized respectfully that Court decisions cannot condone **queue jumping** and need to be handled within the relevant policy framework. When emergency housing is provided then prefabricated accommodation units will be allocated, as and when funding allow, and according to the waiting list on first come first served basis. The Municipality must retain a sense of order in their allocation policy."

[34]

Another important section of the 2016 housing report reads:

> **"5. LAND FOR EMERGENCY ACCOMMODATION:**
>
> The Municipality has identified three potential sites for the establishment of emergency accommodation. The three sites are located in Gouda, Paarl area (Vlakkeland) and in Simondium. The status of the sites can be reported as follows:
>
> (a) The first site, **Gouda** will not present unsolvable problems as it is part of a declared township establishment next to an existing housing contract. The demand for this site is however for only 25 households. This is the closest emergency housing project to be ready for occupation. Public participatioThe local community was not that keen on this project citing their own housing

situation that need to be addressed before outsiders get an opportunity to be housed at Gouda, albeit emergency housing. A further consultation session took place in January 2016 with the local Gouda representatives and was also not positively received. Despite this, the Municipality worked towards developing emergency housing at Gouda in April 2016. This, however, posed to be more challenging than anticipated considering the current position that the local community have taken. For instance, recently a group of the so-called "backyarders" of Gouda area, invaded open land in Gouda and have erected their informal structures, (suspected to be their response) to the "outsiders" that the Municipality plan to accommodate in the emergency housing in Gouda. This is just an example of the challenges the Municipality faces with development of emergency housing. The Municipality have launched an Application for Eviction of the aforementioned land invaders on 31 March 2016. The matter has been postponed a couple of times for legal aid. The matter was heard on 11 October 2016 and the Municipality awaits judgment. The Gouda project should by now have been implemented, but due to the land invaders, the Municipality cannot commence with the project at Gouda. The Municipality plan to commence with the project once the land invaders are removed and evicted and all other requirements are in place.

(b) The Paarl site, **Vlakkeland** was granted environmental approval. The temporary relocation area (TRA) for emergency housing forms part of the bigger Vlakkeland Development which will cater for approximately 2 500 housing opportunities. The intent is to set aside 500 opportunities for emergency housing. Rezoning and subdivision approval was recently obtained and the appeal period has passed without any appeals. The challenge at Vlakkeland, however, at this stage is the cost for bulk services and the relocation of small scale farmers currently occupying the site. Reports

indicate that to implement phase one (inclusive of the TRA for emergency housing), the Municipality will need to secure an amount of R 40 000 000 toward bulk services (this funding does not include the funding for the emergency housing, but definitely influences as to when emergency housing can be erected). To resolve matters relating to funding, the Provincial Department of Human Settlements have allocated funding towards the project for the 2016/2017 financial year with the view of implementing phase one.

Despite securing funding for phase one, the small scale farmers currently on Vlakkeland poses a more serious challenge than initially thought and will first have to be relocated off site to enable the servicing of the site.

Taking the above challenges into consideration, it is estimated that the Vlakkeland project might be operational within the next 12-24 months.

(c) The identified emergency housing site at **Simondium** is currently being reconsidered for formal housing. The original site that was identified for formal housing could not be secured (the owner did not want to sell the targeted properties). Recent engagements within the Simondium area has prompted the Municipality together with local stakeholders (some farmers in the area and representatives of the local community) to consider this path of action. The identified site provides an opportunity to make formal state assisted housing a reality at Simondium. The implication hereof is that a new site will have to be identified for emergency housing.

Discussions have already started between various organs of State (including Drakenstein Municipality) to look into alternatives. As soon as sufficient progress has been made, it will be reported to the Courts."

[35]

The 2016 Housing Report also informs that:

"The municipality respectfully wishes to inform the honourable Court that though it is not an unfunded mandate, the aforementioned responsibility is imposed by national government through legislation falls outside Schedule 48 and 5B and though it is delegated to local government, it is not accompanied by a dedicated funding stream from national government with specific reference to emergency accommodation."[41]

"The municipality takes cognisance of precedent and it Constitutional obligations but respectfully wishes to inform the honourable Court that it is not the Custodian of the ESTA Act and is of the view that the engagement process and the facilitation thereof is the role and function of the Department of Rural Development and Land Reform as they have the necessary budget and resources to ensure that the rights conferred by the ESTA Act are implemented."[42]

[36

The 2016 Housing Report concludes:

"The Drakenstein Municipality accepts that it has an obligation to provide emergency housing to the categories of persons identified in Chapter 12 of the National Housing Code. This notwithstanding, the demand for emergency housing outstrips its available resources in terms of serviced sites. In the circumstances the Municipality is not in a position to immediately provide emergency housing to all persons in need thereof. **The Municipality is not in a position to commit with any degree of certainty as to when it will be in a position to provide emergency accommodation to the resident(s).**

The Municipality fully intends to meet its commitment, but with certain constraints (statutory compliances, services capacity, community objections and dynamics etc) makes it harder than would normally be the case. The Municipality "is currently

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41 2016 Housing Report para 24.4: Record 565.
42 2016 Housing Report para 24.5: Record 566.

negotiating with other spheres of government for financial assistance in terms of the Intergovernmental Relations Act.

The allocation of temporary housing must follow some logical pattern and the Municipality will be adhering to a first come first served which conforms to the National Housing Policy. The Municipality does not currently have land readily available for emergency housing nor does it have any available erven within its informal settlements.

Although it is anticipated that the first formal emergency housing would be available in Gouda it is difficult to link a specific time frame (for reasons described above as well as the limited number of available sites). The Municipality is busy with a Court case against land invaders at Gouda and this Court case need to be resolved before the Municipality can implement the emergency housing at Gouda. Further reports will be circulated as the above issues resolve themselves and will enable the Municipality to fulfil its obligations.

The Municipality accordingly request that the eviction be stayed, pending the availability of emergency housing for these occupiers."[43]

[37]

The Applicants contend that a significant piece of evidence of the Municipality's failure to meet its emergency housing obligations is found in its recent reduction of the budget for such housing. The 2013 Housing Report states that the Municipality faced a "humanitarian crisis" as a result of the increasing scale of evictions within the municipal area. It now states in its answering affidavit that it has reduced the budget allocated for emergency housing:

"More importantly, the conclusion drawn by the applicants that only R 1 million has been allocated by it for emergency housing in the business plan fundamentally

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[43] The court's emphasis.

> misunderstands the actual extent of monies allocated for this purpose, whilst also ignoring, in some instances, the reasons for their recent reduction." [44]

The Applicants contend that this is an inexplicable and irrational response to the crisis the Municipality faces.[45]

[38]

The court now deals with the preliminary points the Municipality raised: the challenge to the court's jurisdiction to hear the application based on s 110 of the Magistrate's Act,[46] and the vagueness of the pleadings. The court has also decided to deal with the standing / mootness challenge as part of the preliminary points. The vagueness challenge is an integral aspect of the merits, therefore, for practical reasons the court discusses standing before considering vagueness.

SECTION 110

[39]

The Municipality argues that the Applicants should have led evidence in the Magistrates Court, before proceeding to approach this Court seeking to have it declare that the Municipality's housing policy was constitutionally deficient, and the Municipality had failed to fulfil its constitutional obligations, asserting that

> "if a party to litigation in the Magistrate's Court identifies a Constitutional issue, that party is [not] entitled to abandon or stay the litigation in the Magistrate's

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[44] AA para 11.12; Record 156 – 157.
[45] Heads of Argument para 20.
[46] Act 32 of 1944.

Court, to pursue the identified Constitutional issue in the High Court."[38]

It also argues that it is sophistry for the applicants to claim that the matter before court is "fundamentally different" from the pending the proceedings in the Magistrates Court.

[40]

The Applicants argue that the Municipality's objection that "[t]his dispute is currently pending" in the Wellington Magistrates' Court and cannot be adjudicated until all evidence has been led in terms of s 110 of the Magistrates Court Act, is based on a false premise: this dispute is not pending before the Wellington Magistrates' Court. They contend that there are fundamental differences between this case and the Magistrates' Court eviction application:

(a) The issue in the Magistrates' Court case is whether Greenwillows is entitled to an order evicting the ESTA. Greenwillows' cause of action is based on sections 8, 9 and 10 of ESTA;

(b) The primary issue here is whether the Municipality has complied with its constitutional and statutory obligations to provide emergency housing;

(c) The Magistrates' Court does not have jurisdiction to grant the declaratory orders or the structural interdict sought by the Applicants in this matter; and

(d) The parties to the two proceedings are different, the Applicants acting not only in their our own interest, but also in representative capacities:

    (i) on behalf of those people within the Drakenstein municipality

in need of emergency housing;

(ii) on behalf of those people within the Drakenstein municipality who qualify for state subsidised formal housing; and

(iii) in the public interest.

[41]

WFP submits that the Municipality's approach is misconceived since there is precedent for a party to stay proceedings in the Magistrates' Court and approach a High Court to seek relief if the that patty contends that the legal instruments which form the basis of the Magistrates' Court proceedings are unconstitutional. WFP contends that this happened recently in *Economic Freedom Fighters v Minister of Justice and Constitutional Development.*[39] Malema, leader of the Economic Freedom Fighters, had been arraigned in the Magistrates' Court, charged with violating various sections the Riotous Assemblies Act.[47] However, prior to the determination of the Magistrates' Court proceedings, Malema launched a constitutional attack on the relevant provisions of the Riotous Assemblies Act, in the High Court. A full bench of the High Court heard and determined the merits of the constitutional challenge, declaring some of the impugned legislative provisions unconstitutional.

[42]

The Municipality accepts that "the Magistrates Court is not competent to make" the orders which the Applicants seek,[48] but argues that section 110 of the Magistrates' Court Act[49] prescribes how to raise a constitutional challenge in the Magistrates' Court.

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[47] Act 17 of 1956.
[48] HOA para 29.
[49] Act 32 of 1944.

It argues that in effect the High Court is being requested to intervene in uncompleted eviction proceedings pending before the Magistrates' Court.[50]

[43]

The Municipality contends that the Applicants are asking the Court to find that it failed to fulfil its constitutional obligations on the basis of selected and outdated historical set of facts,[51] ignoring what it sets out in the answering affidavit concerning its ongoing and evolving efforts. The Municipality argues that authorities the Applicants cite for the proposition that the Court must determine compliance with the constitutional and statutory obligations on the basis of the facts as they stood at the time that this application was launched, particular *Grootboom*,[52] *TAC*[53] and *Mazibuko*[54] determine only that the circumstances at the time of the launch of the application are relevant to a court's determination, and provide "no warrant for the applicants to delve into issues in the history of the municipality's progressive realisation efforts dating back all the way to 2012".

[44]

The Municipality argues that it "provided comprehensive, detailed information about its financial position and the limitations on its resources, and the strides it has made in relation to housing generally, and emergency housing in particular". Some of the details it refers to are: its 2016/2017 business plan and project pipelines;[55] a technical report relating to funding applications for temporary relocation units;[56] explanation of

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[50] HOA paragraph 40.
[51] Applicants' HoA Para 37, p 18.
[52] Paragraph 69.
[53] Paragraphs 90, 92 and 116.
[54] Paragraphs 38 – 41.
[55] AA paras ??; Record pp 361 – 384.
[56] AA rec pp 385.

the problem of land availability which, aside from financial constraints *per se*, "severely" constrains its ability to roll out projects;[57] it cites the instance in which though subsidies were available in Vlakkeland for the creation of 500 emergency housing opportunities, with a subsidy for each unit of R58,000 amounting to R 29 million, the Provincial Department decision that it "would not support construction of a TRA [on] the site" effectively scuppered this plan, and the budget that went with it;[58] annual reports from 2013 to 2016 setting out in detail its budget and expenditures AA,[59] indicating that, for instance in the 2015/2016 financial year a total of 338 of the targeted 400 houses were handed over to beneficiaries, whilst 447 title deeds were also issued to beneficiaries[60] and in the same year, 37 families were relocated from the banks of the Palmiet river, and 24 families evicted in the Wellington area were also relocated.[61]

[45]

The Municipality cited several examples where it "extensively self-funded to assist evictees" in the period under review: Nieuwenhoop – relocation of 22 families at a cost of about R1,44 million; New Beginnings – relocation of 40 families costing about R1,348 million; Dietman Street – relocation of 23 families (over 110 persons), at a cost of about R1,175 million.[62]

[46]

The Municipality cites examples of situations in which it provided for people who were evicted with housing. The court must, however, determine whether the Municipality

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[57] AA para 11.19.2, pp rec. p 159, 164 - 176.
[58] AA, rec p 164.
[59] Record 442 – 455.
[60] AA, Rec pp 454 – 455.
[61] AA, Rec p 455.
[62] AA para 11.24.14; Record 182.

has proactively taken ongoing systematic steps to meet its obligations. The constitutional jurisprudence, particularly *Blue Moonlight*, indicate that what is required is effective planning and execution of steps to address the scourge of evictees becoming homeless.

STANDING

[47]

Standing probably fits best with the preliminary matters, but the Municipality raised it much later in argument. The Municipality raised it within the context of its argument that it offered the Applicants alternative accommodation on a number of occasions. The Municipality contends that the Applicants either refused or did not respond to these offers, with the aim of preserving their standing in this matter and to avoid it becoming moot.[63]

[48]

The Municipality challenges the Applicants' standing to act in the public interest, relying in part on *Lawyers for Human Rights v Minister for Home* Affairs, where the Court found that when it comes to standing in the public interest

> "[t]he issue is always whether a person or organization acts genuinely in the public interest. A distinction must, however, be made between the subjective position of the person or organization claiming to act in the public interest on the one hand, and whether it is, objectively speaking, in the public interest for the particular proceedings to be brought. It is ordinarily not in the public interest for proceedings

[63] HOA paras 163 – 205.

> to be brought in the abstract. But this is not an invariable principle. There may be circumstances in which it will be in the public interest to bring proceedings even if there is no live case…"[64]

[49]

The court cannot properly determine whether the Applicants' refusal of offers of alternative accommodation affects their standing without properly understanding the whether their reasons for doing so are justified. The issue of whether or not the Applicants are justified in their refusal is best examined in the light or WFP's arguments concerning the right to adequate housing.

[50]

WPF's core submission is the Municipality's failure to implement reasonable measures to give effect to its constitutional obligations through inter alia providing emergency accommodation to those in immediate need, constitutes a breach of its obligations under international law.

[51]

WFP argues that the Constitution obliges the court to have regard to international law:

(a) when interpreting the Bill of Rights, the court must consider international law when determining the meaning of the rights in the Bill of Rights;[65] and

(b) when interpreting a statute, the court must prefer any reasonable interpretation of a statute that is consistent with international law.[66]

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[64] 2004 7 BCLR 775 (CC)
[65] Section 39(I)(b) of the Constitution.
[66] Section 233 of the Constitution

WFP relies on *Glenister* in which the Constitutional Court explained that where the country accedes to international agreements, it is duty bound to comply with such agreements.[67]

[52]

Justice O'Regan observed that the Constitutional Court has said when engaged in constitutional adjudication our courts may consider non-binding sources of international law,[68] also extra curially expressing the view that:

> "Reference to 'international law' in s 35 (1) of the Constitution should be interpreted to include not only reference to international law that is binding in South Africa, but also non-binding international law. This principle has been followed in numerous Constitutional Court decisions since, with the court being willing to consider both non-binding rules of international law as well as the jurisprudence of a range of international tribunals dealing with human rights instruments, and even forms of soft international law, in the form of declarations and principles."[69]

[53]

The primary international law instrument on which that WFP relies is the International Covenant on Economic, Social and Cultural Rights (ICESCR). South Africa, by ratifying the ICESCR, has voluntarily assumed the obligation to be bound by its provisions. Article 11(1) of the ICESCR provides that

> "The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate

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[67] *Glenister* v *President of the Republic of South Africa* 2011 (3) SA 347 (CC) para 193.
[68] *Glenister* para 187.
[69] Kate O'Regan "In memoriam: Arthur Chaskalson" (2014) *SALJ* 461, 466.

> food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.[70]

The Commission on Economic, Social and Cultural Rights, which is the body responsible for interpreting the ICESCR, issues a General Comment (GC) from time to time providing guidance as to the interpretation of the ICESCR. The Constitutional Court relied on ICESCR General Comments to interpret the Bill of Rights, even before South Africa ratified the ICESCR: *Grootboom* and *Motswagae v Rustenburg Local Municipality*.[71] Now that South Africa has acceded to the ICESCR courts have an obligation to apply it.

[54]

General Comment 4 defines the content of the right to adequate housing,[72] identifying seven aspects that must be considered in determining the meaning of adequate housing in terms of the ICESCR: (a) legal security of tenure; (b) availability of services, materials, facilities and infrastructure; (c) affordability; (d) habitability; (e) accessibility; (f) location; and (g) cultural adequacy.

[55]

General Comment 4 provides as follows with regard to legal security of tenure:

> "Tenure takes a variety of forms, including rental (public and private) accommodation, cooperative housing, lease, owner-occupation, emergency

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[70] Available at https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-economic-social-and-cultural-rights

[71] *Grootboom* paras 29 – 31; *Motswagae* 2013 (2) SA 613 (CC) para 12 footnote 6.

[72] *Grootboom* paras 29-31; *Motswagae and v Rustenburg Local Municipality*.

> housing and informal settlements, including occupation of land or property. Notwithstanding the type of tenure, all persons should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats. States parties should consequently take immediate measures aimed at conferring legal security of tenure upon those persons and households currently lacking such protection in genuine consultation with affected persons and groups."[73]

WFP submits that the security of tenure obligation places a duty on the state to ensure that it takes reasonable steps to foster conditions which enable citizens to gain access to land on an equitable basis because land ultimately ensures security of tenure on property.

[56]

Our Constitutional Court has observed that the right to adequate housing

> "evinces special constitutional regard for a person's place of abode. It acknowledges that a home is more than just a shelter from the elements. It is a zone of personal intimacy and family security. Often it will be the only relatively secure space of privacy and tranquillity in what (for poor people in particular) is a turbulent and hostile world.[74]

[57]

General Comment 4 describes the habitability aspect of the right to adequate housing as follows:

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[73] See https://resourcingrights.org/en/document/9c55otxgab9jyodmjwgdnug5mi?page=1
[74] *Port Elizabeth Municipality v Various Occupiers* 2005 (I) SA 217 (CC) para 17.

> "Adequate housing must be habitable, in terms of providing the inhabitants with adequate space and protecting them from cold, damp, heat, rain, wind or other threats to health, structural hazards, and disease vectors. The physical safety of occupants must be guaranteed as well. The Committee encourages States parties to comprehensively apply the Health Principles of Housing prepared by WHO which view housing as the environmental factor most frequently associated with conditions for disease in epidemiological analyses; i.e. inadequate and deficient housing and living conditions are invariably associated with higher mortality and morbidity rates."

[58]

General Comment 4 also expresses the view that the right to housing should not be interpreted in a narrow or restrictive sense, equating it with, for example, the shelter provided by merely having a roof over one's head or exclusively as a commodity, but rather, that the right to adequate housing means

> "the right to live somewhere in security, peace and dignity. This is appropriate for at least two reasons. In the first place, the right to housing is integrally linked to other human rights and to the fundamental principles upon which the Covenant is premised. This 'the inherent dignity of the human person' from which the rights in the Covenant are said to derive requires that the term 'housing' be interpreted so as to take account of a variety of other considerations, most importantly that the right to housing should be ensured to all persons irrespective of income or access to economic resources. Secondly, the reference in article 11(1) must be read as referring not just to housing but to adequate housing....Adequate shelter means ... adequate privacy, adequate space, adequate security, adequate

> lighting and ventilation, adequate basic infrastructure and adequate location with regard to work and basic facilities - all at a reasonable cost".[75]

[59]

WFP argues that the Comments are relevant to assessing whether the Municipality has complied with its obligations, referring specifically to General Comment 7 which emphasises the disproportionate impact forced evictions have on women and other vulnerable groups:

> "Women, children, youth, older persons, indigenous people, ethnic and other minorities, and other vulnerable individuals and groups all suffer disproportionately from the practice of forced eviction. Women in all groups are especially vulnerable given the extent of statutory and other forms of discrimination which often apply in relation to property rights (including home ownership) or rights of access to property or accommodation, and their particular vulnerability to acts of violence and sexual abuse when they are rendered homeless."[76]

[60]

The United Nations Special Rapporteur on Adequate Housing at the Human Rights Council noted the vulnerability of women in housing in the report of the 19th Session, recording that the consultation conducted in preparation of the report

> "brought to light the specific difficulties that women, in every region, have to face in accessing housing and land. And, to make matters worse far from

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[75] GC 4 para 7.
[76] GC 7 para 10; available at https://resourcingrights.org/en/entity/12lts2p23ud2sqq274e1z1714i

being a place of safety and security, the home is too often permeated by violence. Women, those consultations highlighted were likely to experience physical and sexual assault within the context of forced evictions. They also face insecurity and abuse within their own communities, including domestic violence. While the home should be a place of security, dignity, peace, and equality, for millions of women around the world the right to adequate housing has gone unfulfilled and unrealized."[77]

[61]

WFP summarises its submissions on the right to adequate housing by asserting that it has the following critical characteristics.

a) "It must provide for legal security of tenure, including the provision of emergency accommodation to those in need, particularly in the case of forced evictions.
b) It provides adequate space where a person can live in security, peace and dignity, consistent with the rights to dignity;
c) It must protect the inhabitants from cold, damp, heat, rain, wind or other threats to health, structural hazards, and disease vectors;
d) The physical safety of occupants must be guaranteed (right to freedom and security of the person;
e) It provides safe drinking water;
f) It allows access to sanitation, washing facilities, refuse disposal, ventilation, lighting and site drainage; and

[77] Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, Human Rights Council, Nineteenth session, Agenda item 3, 26 December 2011, A/HRC/19/53.

g) It includes access to electricity for cooking, heating and lighting, and accessing communication technologies vital for life in the modern world.

h) It also requires states to take realistic measures to make land available to those who need, particularly those who live in rural areas; it recognises that access to land is inextricably linked to access to adequate housing."[78]

[62]

The Applicants contend that the Constitutional Court clarified the principles concerning standing in *Giant Concerts CC v Rinaldo Investments (Pty) Ltd & Others*, holding that:

a) the court must decide whether the complaint has standing on the assumption that the facts he/she sets out in the founding affidavit are correct; [79]

b) in concert with the Constitution the court must adopt a broad the rather than "the narrow approach adopted at common law";[80] and

c) courts must accept that an applicant has own interest standing once she or he proves that the challenged conduct directly affected his or her rights or interests or potential rights or interests, the Court saying

> "An own-interest litigant does not acquire standing from the invalidity of the challenged decision or law, but from the effect it will have on his or her interests or potential interests. He or she has standing to bring the challenge even if the decision or law is in fact valid. But the interests that confer

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[78] HOA para 88.
[79] [2012] ZACC 28; 2013 BCLR 251 (CC) para 32.
[80] *Giant Concerts* para 18.

> standing to bring the challenge, and the impact the decision or law has on them, must be demonstrated."[81]

The Municipality combined its attack on the vagueness of the pleadings with an attack on the relief the Applicants seek, arguing that (a) it is vague and impractical' (b the court does not have the power to grant the orders the Applicants seek, and (c) that it would be inappropriate in the circumstances of this matter. The court deems it more appropriate to separate them for ease of analysis.

VAGUENESS

[63]

The Municipality argues that the pleadings are vague, complaining that it is unclear which of the measures it took are unreasonable because the Municipality made provision in its 2016/2017 business plan for funding for emergency housing and had three sites that cater for emergency housing by the time the Applicants deposed to founding affidavit.

[64]

The Municipality argues that the "relief claimed by the applicants is couched in such broad, non-specific terms as to render the relief meaningless",[82] that the relief sought in paragraphs 2 and 3 of the notice of motion "are merely restatements of the law established by the Constitutional Court in City of Johannesburg Metropolitan

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[81] *Giant Concerts* para 33.
[82] HOA para 42.

Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another"[83] and questions the court's jurisdiction to make such orders since the Municipality "does not dispute the legal position".[84]

[65]

The Municipality argues that in regard to the pleadings the Constitutional Court has endorsed the dictum that in motion proceedings parties "must stand or fall by their founding papers" citing *Pilane and Another v Pilane and Another* [85] in support. It contends because the founding papers determine the cause of action and issues the court must determine it is impermissible for it to have to meet a fundamentally different case to the one the Applicants' founding affidavit frames.

[66]

The Municipality decries the founding affidavit's lack of clarity, alleging that it is unclear whether the Municipality's "housing program" which the Applicants' attack consists of its 27 January 2016 housing policy,[86] read with the Housing Selection Policy.[87] It contends that the founding affidavit (a) does not scrutinise specific aspects of the Municipality's housing policies; (b) makes it is difficult, if not impossible, to discern on what factual and/or legal basis the applicants seek relief in respect of the Municipality's policies in relation to the delivery of permanent housing; and (c) does not even refer to Municipality's emergency housing policy at all.

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[83] 2012 (2) SA 104 (CC).
[84] HOA para 46.
[85] 2013 (4) BCLR 431 (CC) at para [49].
[86] FA para 29, rec. p. 23.
[87] FA para 35, rec. p. 25.

[67]

The Municipality contends that the attack on its emergency housing policies appears to be based solely on the Applicants' interpretation of the Municipality's 2016/2017 budget[88] and the 2016 Housing Report in the eviction proceedings.[89] The Municipality bases this contention on the founding affidavit not referring to its Emergency Housing Policy dated December 2015, despite the Applicants' challenging the constitutionality of the Municipality's emergency housing policy.[90] The Municipality argues in its answering affidavit that

> "the omission of the first respondent's emergency housing policy clearly indicates that the applicants have not undertaken a proper overview of the full suite of policies applicable to their situation. As such the inferences they seek to draw as to the inadequacy of these policies can only be treated with great circumspection."[91]

[68]

The Municipality responds to the Applicants' attack on its "housing program" by saying the attack appears to shift to the implementation of the housing policies especially its emergency housing policy, contending that this is not entirely clear. It contends that the Applicants attack on the purported "failure" of its efforts to deliver emergency housing is aimed at providing evidence of the unreasonableness of its policies and their implementation.

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88 FA para 38, rec. p. 26
89 FA para 14, rec. p. 13.
90 AA para 11.4.3, rec. p. 154.
91 AA 12.16.2; Record 195.

[69]

The Municipality argues that the founding papers do not raise the issue of the adequacy of housing the *Amicus* and the Applicants argued. It contends that in *Grootboom* the Constitutional Court decided that the State must fulfill its obligation in terms of section 26 (2) of the Constitution to provide access to adequate housing within the "available resources". The Court's formulation, [92] it argues, differs from the wording in article 2 (1) of the International Covenant on Economic, Social and Cultural Rights (ICSECR) that requires a State to take steps "to the maximum of its available resources." It refers to academic authority which argues that South Africa is "unlikely to follow the jurisprudence of the CESCR in determining its financial obligations to realise the right to adequate housing."[93]

ONUS

[70]

A critical aspect of the application is the onus. The reason therefor lies in *Mazibuko*:

> "[161] When challenged as to its policies relating to social and economic rights, the government agency must explain why the policy is reasonable. Government must disclose what it has done to formulate the policy…

[92] *Grootboom* paras 27, 45 and 46.
[93] Kirsty McLean Housing in South African Constitutional Law.

> [162] Not only must it show that the policy it has selected is reasonable, it must show that the policy is being reconsidered consistent with the obligation to "progressively realise" social and economic rights in mind."

It is clear that unless the Municipality can show that the claim is frivolous, it bears the full onus of proof, nothing less.

REASONABLENESS

[71]

One of the cornerstones of the Municipality's response to this application is that it has taken reasonable steps, within its budgetary and other constraints, to provide for emergency housing. The Municipality cites in support *Grootboom* where the Court held

> "what constitutes reasonable legislative and other measures must be determined in light of the fact that the Constitution creates different spheres of government: national government, provincial government and local government... The Constitution allocates powers and functions amongst these different spheres emphasising their obligation to co- operate with one another in carrying out their constitutional tasks. In the case of housing, is a function shared by both national and provincial government. Local governments have an important obligation to ensure that services are provided in a sustainable manner to the communities they govern. A reasonable programme therefore must clearly allocate responsibilities and tasks to the difference here is a government and ensure that the appropriate financial and human resources are available.[94]

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[94] *Grootboom* para 39.

[72]

The Municipality accepts that in *Grootboom* the Constitutional Court found that the real question the Constitution poses is whether the measures taken by the State to realise the right afforded by s 26 are reasonable. It also accepts that in *Mazibuko v City of Johannesburg* the Constitutional Court explained that, when challenged as to its socio-economic rights related policies, the State must explain why the policy is reasonable and show that the policy is being reconsidered consistent with the obligation to progressively realise the social and economic rights in mind.[95]

[73]

In both the 2013 and 2016 Housing Reports the Municipality admits that it was unable to meet its obligation to provide evictees with emergency housing. The Municipality refers to three possible sites for emergency housing, none of which to date have resulted in a single person obtaining emergency housing. The Municipality argues that it is not at fault for these failures: it cites the Provincial Government veto of one proposal; engineers finding one site unsuitable because of the danger of flooding; and progress on the third being thwarted by illegal occupations.

[74]

The Applicants submit that South Africa jurisprudence already provides extensive authority concerning housing and socio-economic rights establishing that the Municipality has a constitutional obligation to allocate resources from its own funds towards emergency housing. They contend that the Constitutional Court's

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[95] 2010 (4) SA 1 (CC) paras 161 - 162.

description of housing rights as transformative in many decisions including in *PE Municipality*,[96] *Joe Slovo*[97] and *Grootboom*, recognises the need for a different allocation of resources as Prof Liebenberg argues.

[75]

The Applicants contend that the decisions of the both the Constitutional Court[98] and Supreme Court of Appeal[99] in the *Blue Moonlight* are relevant to self-funding as: (i) they deal with the primary constitutional and statutory obligation on local governments, the Municipality in this case, to provide emergency housing; and (ii) the nature of the resource allocations required for that end.

Both Courts rejected the City's contention that it did not have authority to initiate and pursue its own housing programs and that it only had an obligation to do so to the extent provided for in national and provincial law and policy, with funds these other spheres of government provided it.[100]

The Supreme Court of Appeal held that:

> "The legislative framework that has been described above appears in large measure to be designed to give effect to the obligations referred to in Grootboom in a co-ordinated manner. It is clear from that framework that each sphere of government has obligations imposed on it in respect of the right of access to adequate housing; that they are required to work together — as one would expect in a system predicated on principles of co-operative government — to 'achieve the progressive realisation of this right'; and that each sphere is an

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[96] *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) paras 17 – 18.

[97] *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* 2010 (3) SA 454 (CC) para (143)

[98] *City of Johannesburg MM v Blue Moonlight Properties* 2012 (2) SA 104 (CC).

[99] 2011 (4) SA 337 (SCA); [2011] ZASCA 47

[100] *Blue Moonlight (SCA)* para 22; (CC) para 57.

> independent bearer of the obligation. From this, and the legislative scheme as a whole, we conclude that the City's obligations to the occupiers is not derivative, as was argued on its behalf, but direct and that the City has the authority to fund its own housing programme and administer its own housing policy from its own resources as well as from the national and provincial spheres of government, within the parameters of the national housing policy". [101]

The Constitutional Court analysed the constitutional and statutory obligations imposed on local government and concluded that the City would not be able to fulfil its constitutional and legislative duties "without being entitled or obliged to fund itself in the sphere of emergency housing"."[102]

[76]

The issue of self-funding is really an aspect of the reasonableness of the Municipality's performance: if it does not perform adequately as a result of reliance on Provincial Government funding, can it be regarded as acting reasonably. *Blue Moonlight* has the effect of making it unreasonable for a Municipality not to make reasonable provision from its own resources as part of its duty to provide emergency housing

[77]

The Municipality cites *Blue Moonlight* [103] as authority for its contention that its role in relation to housing must be determined by reference to the Constitution and various enactments. The Municipality sets out and comments on what it argues are the relevant provisions:[104] sections 152 and 153(a) of the Constitution; the preamble, s 1 and s 9 of the Housing Act;[105] chapter

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[101] *Blue Moonlight (SCA)* para 40; footnotes excluded.
[102] *Blue Moonlight (CC)* para 53.
[103] *Blue Moonlight* para 21.
[104] HOA paras 69 – 73.
[105] Act 107 of 1997.

12 of the National Housing Code; sections 1, 4, 8(2), 23(1) and 73(1) of the Local Government: Municipal Systems Act,[106] from which it concludes:

> "In analysing the Municipality's policies and its response in the present application, its broader obligations, as is apparent from the aforegoing, cannot be ignored. While the Municipality has obligations in respect of the delivery of emergency housing, it also bears a range of obligations in respect of the realisation of formal housing and other services."

[78]

The Municipality argues that in evaluating reasonableness the courts are required to accord due deference to the polycentric decisions it has to make, citing in support *Logbro Properties CC v Bedderson NO and Others* in which the court recommended

> "... a judicial willingness to appreciate the legitimate and constitutionally-ordained province of administrative agencies; to admit the expertise of those agencies in policy-laden or polycentric issues; to accord their interpretation of fact and law due respect; and to be sensitive in general to the interests legitimately pursued by administrative bodies and the practical and financial constraints under which they operate. This type of deference is perfectly consistent with a concern for individual rights and a refusal to tolerate corruption and maladministration. It ought to be shaped not by an unwillingness to scrutinise administrative action, but by a careful weighing up of the need for - and the consequences of - judicial intervention. Above all, it ought to be shaped by a conscious determination not to usurp the functions of administrative agencies; not to cross over from review to appeal."

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[106] Act 32 of 2000 ('*Municipal Systems Act*').

[79]

In furtherance of its argument concerning deference, the Municipality invokes the support of *Minister of Environmental Affairs and Tourism and Others v Phambili Fisheries (Pty) Ltd; Minister of Environmental Affairs and Tourism and Others v Bato Star Fishing (Pty) Ltd*,[107] contending that the Court emphasized the need to respect the decisions and expertise of government agencies specifically entrusted with making decisions in their spheres of operation:

> "[53] Judicial deference is particularly appropriate where the subject- matter of an administrative action is very technical or of a kind in which a Court has no particular proficiency. We cannot even pretend to have the skills and access to knowledge that is available to the Chief Director. It is not our task to better his allocations, unless we should conclude that his decision cannot be sustained on rational grounds. That I cannot say."

The Municipality argues that in the *Bato Star* appeal to it, the Constitutional Court, endorsed the SCA approach holding that judicial deference "flows not from judicial courtesy or etiquette but from the fundamental constitutional principle of the separation of powers itself",[108] expressing itself as follows

> "[48] In treating the decisions of administrative agencies with the appropriate respect, a Court is recognising the proper role of the Executive within the Constitution. In doing so a Court should be careful not to attribute to itself superior wisdom in relation to matters entrusted to other branches of government. A Court should thus give due weight to findings of fact and policy decisions made by those with special expertise and experience in the field. The extent to which a Court

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[107] 2003 (6) SA 406 (SCA) paras 47- 53.
[108] 2004 (4) SA 490 (CC) para 46.

> should give weight to these considerations will depend upon the character of the decision itself, as well as on the identity of the decision-maker. A decision that requires an equilibrium to be struck between a range of competing interests or considerations and which is to be taken by a person or institution with specific expertise in that area must be shown respect by the Courts".

[80]

Pursuant to its due deference argument the Municipality contends that academics have advanced weighty counter-arguments to those the Applicants presented. It refers to Justice Sachs' extra curial comment that there is a grave danger in court reviewing policy choices, arguing that the problem with judges making socio-economic policy

> "*is that of institutional* capacity. It is in this connection that the more radical objection to our *[the Constitutional Court's]* suitability to enforce socio-economic rights comes into play…there can be little doubt that it is inappropriate for judges who in general know very little about the practicalities of housing, land and other social realities to pronounce on these issues. That is what Parliament is there for".[109]

[81]

The Municipality also refers to Steinberg's argument that the Constitution cannot be read as "handing over to each judge in each court the right and duty to decide who should have priority access to social goods in short supply", characterising defining the content of socio-economic rights as typically a policy-making procedure, and that encouraging the judiciary to perform that function stifles the constitutional

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[109] Albie Sachs "*The judicial enforcement of socio-economic rights: The Grootboom case*" (transcript of the lecture presented at the Law Faculty, University College, London on 6 March 2003), referred to in Steinberg below footnote 46.

conversation.[110] It also refers to a comment Justice O'Regan made to the effect that the country's democratic institutions deserve respect as the constitutional era "renders a quality of fundamental legitimacy to legislative and executive action which was absent in the past".[111]

[82]

TAC[112] provides a counter to the due deference argument by emphasising that section 1 of the Constitution assigns the courts the role of guaranteeing the protection of democratic processes, as well as ensuring accountability, responsiveness and openness. It held that the courts have to ensure that the legislative and other measures the State takes in relation to socio-economic rights, are reasonable and that the courts' role is to evaluate the reasonableness of such measures.

[83]

The Municipality argues that "The Courts have consistently accepted that a demonstrated resource scarcity is a relevant factor in determining whether particular measures are reasonable,"[113] and that:

> "Furthermore, the fact that a particular measure may result in a limitation of rights does not in and of itself determine that the measure is not reasonable. The authorities cited by the applicants in paragraphs 91 and 92 of the heads of argument merely to the effect that ordinarily, lack of resources or increasing

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[110] "Can reasonableness protect the poor? A review of South Africa's socio-economic rights jurisprudence" (2006) 2 *SALJ* 283, 272 and 283.

[111] Kate O'Regan "Breaking ground: Some thoughts on the seismic shift in our administrative Law" (2004) 121 SALJ 424, 433.

[112] *Minister of Health and Others v Treatment Action Campaign and Others (No 2)* 2002 (5) SA 721 (CC) paras 36 & 38. The case concerned the provision by the State of anti-retroviral drugs to pregnant women for the prevention of mother-to-child transmission of HIV.

[113] HOA para 86.

costs on its own cannot justify a limitation of a constitutional right. However, it must be recalled that Mlungwana noted, directly after the passage cited by the applicants,[114] that the State had

> 'not provided evidence demonstrating exactly to what extent costs will increase if section 12(1)(a) is declared unconstitutional. This Court is left none the wiser as to what would happen if the incentive for giving notice were removed entirely, or if other ways of incentivising notice were adopted by the Legislature.' "[115]

RELIEF

[84]

In opposing the relief the Applicants seek, the Municipality argues that the court does not have the power to order the relief and that it would be improper for the court to do so because of the dire consequences granting the relief will have.

[85]

The Municipality argues that the Applicants' quest for an order that it utilise its own financial resources for emergency housing it is "hopelessly vague"[116] and that "The applicants are asking this court to direct the Municipality to re-allocate its resources in an unspecified fashion".

[86]

The Municipality argues that *Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others*, on which the Applicants' rely, does not support their contention

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[114] *Mlungwana and others v S and Another* 2019 (1) SA BCLR 88 (CC) para 77.
[115] Quote this in conclusions.
[116] HOA paragraph 48.

that the court may make an order directing a party to make reasonable provision from its resources for a specific obligation.[117] It distinguishes *Rail Commuter* by arguing that Metrorail asserted that it had no obligation whatsoever, whereas the Municipality "does not and never has disputed that it is obliged to make provision for emergency housing". The Municipality contends that its acknowledgement of an obligation makes it inappropriate for the court to grant "a generalised order that the Municipality must make reasonable provision for emergency housing, when it already accepts this to be the case."

[87]

The Applicants contend that two constitutional provisions relevant to the appropriateness of the remedies they seek are:

(1) Section 38 entitles a party to approach a competent court for relief if a right is violated or threatened, and grants that court the power to "grant appropriate relief, including a declaration of rights."

(2) Section 172(1) which provides:

> "When deciding a constitutional matter within its power, a court -
>
> *a)* must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
>
> *b)* may make any order that is just and equitable."

[88]

The Applicants seek to refute the Municipality's argument by referring to *Kwazulu-Natal Joint Liaison Committee v MEC for* Education,[118] where the Court found

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[117] 2005 (2) SA 359 (CC), *Rail Commuter*.
[118] 2013 (4) SA 262 (CC) para 74.

that: there is no reason why a court order must be totally precise; courts "frequently give orders that are very general indeed"; and the Constitutional Court granted an order that the respondents had to take "reasonable measures" to provide for the safety of rail commuters *Rail Commuters*. The Applicants argue that declaratory orders and mandamus they seek are considerably more specific and detailed than the order made by the Constitutional Court in *Rail Commuters*.

[89]

The Applicants argue that further proof that the vagueness of the relief argument cannot succeed, referring to the relief sought in the notice of motion being similar to the order granted by this Court in *City of Cape Town v Rudolph and Others*.[119] There the court granted an order was made declaring that "the housing programme of the City of Cape Town fails to comply with the constitutional and statutory obligations of the City of Cape Town in that:

2.1 "it does not make short-term provision for people in Valhalla Park who are in a crisis or in a desperate situation;

2.2 it does not provide any form of relief for people in Valhalla Park who are in a crisis or in a desperate situation;

2.3 it fails or has failed to promote the resolution of conflicts arising in the housing development process in Valhalla Park;

2.4 it fails to give adequate priority and resources to the needs of the people in Valhalla Park who have no access to a place where they may lawfully live;

2.5 in the allocation of housing, it fails to have any or adequate regard to relevant factors other than the length of time an applicant for housing has been on the

[119] 2004 (5) SA 39 (C).

waiting list, and in particular does not have regard to the degree and extent of the need of the applicants;

2.6 it has not been implemented in such a manner that the right to access to housing of residents of Valhalla Park is progressively realised."

[90]

The Applicants refer to the Constitutional Court holding in *Fose* that "an appropriate remedy must mean an effective remedy" finding that

> "[W]ithout effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced. Particularly in a country where so few have the means to enforce their rights through the courts, it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated."[120]

[91]

The Constitutional Court was confronted with an argument that it lacked the power to grant a supervisory interdict in *Minister of Health and Others v Treatment Action Campaign and Others (No 2) (TAC)*. Ultimately the court declined to grant the interdict, but held that courts have the power to grant such remedies in appropriate circumstances. The Court holding that:

> "'[99] The primary duty of Courts is to the Constitution and the law, "which they must apply impartially and without fear, favour or prejudice". The Constitution requires the State to "respect, protect, promote, and fulfil the rights in the Bill of Rights". Where State policy is challenged as inconsistent with the Constitution,

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[120] *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) para 113.

> Courts have to consider whether in formulating and implementing such policy the State has given effect to its constitutional obligations. If it should hold in any given case that the State has failed to do so, it is obliged by the Constitution to say so. Insofar as that constitutes an intrusion into the domain of the Executive, that is an intrusion mandated by the Constitution itself . . .
>
> "[106] We thus reject the argument that the only power that this Court has in the present case is to issue a declaratory order. Where a breach of any right has taken place, including a socio-economic right, a Court is under a duty to ensure that effective relief is granted. The nature of the right infringed and the nature of the infringement will provide guidance as to the appropriate relief in a particular case. Where necessary this may include both the issuing of a *mandamus* and the exercise of supervisory jurisdiction . . .
>
> [113] South African courts have a wide range of powers at their disposal to ensure that the Constitution is upheld. These include mandatory and structural interdicts. How they should exercise those powers depends on the circumstances of each particular case. Here due regard must be paid to the roles of the Legislature and the Executive in a democracy. What must be made clear, however, is that when it is appropriate to do so, Courts may – and, if need be, must - use their wide powers to make orders that affect policy as well as legislation".

[92]

Subsequent to *TAC* the Constitutional Court granted numerous structural interdicts. The courts have granted such interdicts under a wide variety of circumstances, demonstrating that this flexible relief is appropriate in a variety of circumstances. The court now considers a sample of them.

[93]

The Constitutional Court found that the state had taken "far too long" to substitute death sentences with alternative punishments after it declared the death penalty unconstitutional in *Sibiya.*[121] The Court acknowledged that the process had commenced, but found that it "has taken so long that it will be inadvisable for this Court to assume that the death sentences will be substituted as envisaged." The Court decided to supervise the substitution of the remaining sentences because of the existing delay, and the urgency of ensuring substitution occurred speedily. The Court required the state to: (a) file a report with the details of all those sentenced to death; and (b) an affidavit setting out the reasons why a sentence had not yet been substituted, and (c) the steps it would take to do so. The state filed five reports before it satisfied the Court.

[94]

Nyathi v Member of the Executive Council for the Department of Health Gauteng and Another declared section 3 of the State Liability Act,[122] unconstitutional as it prevented the execution of the more than 200 outstanding civil claims against the State.[123]. The Court found "the many instances of state officials' inefficiency," necessitated its oversight of the settlement process ordering the Minister: (a) to produce a list of all the outstanding judgments;[124] and (b) set out a plan for the

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[121] *Sibiya and Others v Director of Public Prosecutions: Johannesburg High Court and Others* 2005 (5) SA 315 (CC).

[122] Act 20 of 1957.
[123] 2008 (5) SA 94 (CC).
[124] *Nyathi* para 6.

settlement of all those debts.[125]

The Court recorded that the Minister filed three reports detailing compliance.

[95]

In *DPP Transvaal*[126] the evidence showed that, despite a clear legislative requirement that intermediaries be available when children testified in sensitive cases, many Regional courts had no intermediaries. This led to delays, or children testifying without intermediaries, which led to a constitutional challenge to various sections of the Criminal Procedure Act.[127] The Court, despite rejecting the challenges, held that it was necessary to grant a supervisory order to monitor the provision of intermediaries in Regional Courts. The Court held that "the rights of child complainants in sexual offence cases are threatened by the non-availability of intermediaries and related child protection facilities"[128] requiring "urgent attention."[129] The Court ordered the Director-General to provide a report detailing which Regional courts still required intermediaries and related facilities, and setting out what steps he would take to meet those needs.[130]

[96]

Pheko is particularly relevant to these proceedings.[131] The Court held that the applicants had been unlawfully evicted and ordered the local Municipality to find

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[125] *Nyathi* paras 7.
[126] *Director of Public Prosecutions, Transvaal v Minister for Justice and Constitutional Development and Others* 2009 (4) SA 222 (CC).
[127] Act 51 of 1977.
[128] *DPP Transvaal* para 202.
[129] *DPP Transvaal* para 204.
[130] *DPP Transvaal* para 205
[131] *Pheko and Others v Ekurhuleni Metropolitan Municipality* 2012 (2) SA 598 (CC).

suitable alternative land for them. There was some uncertainty when and where that land would be located, so the Court decided to supervise the implementation of its order. The Court ordered the Municipality to file a report on its progress in finding alternative land, explaining that:

> "The applicants are entitled to effective relief. It is, however, uncertain how long it will take for the Municipality to identify land for purposes of affording the applicants access to adequate housing. Supervisory relief is thus necessary in this case to enable the Municipality to report to this Court about, amongst other things, whether land has been identified and designated to develop housing for the applicants".[132]

[97]

The Applicants argue that the principles established in the cases discussed above were supplemented in the recent judgment of *Mwelase and Others v Director-General for the Department of Rural Development and Land Reform and Another*.[133] The Constitutional Court, faced with the Department's "sustained, large-scale systemic dysfunctionality" and "obstinate misapprehension of its statutory duties" in administering labour tenant claims, held:

a) The vulnerability of those who suffer most from the failings of the department underscores how important it is for courts to craft effective, just and equitable remedies, as the Constitution requires them to do;[134]

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[132] Paragraph 50.
[133] [2019] ZACC 30; 2019 (6) SA 597 (CC)
[134] *Mwelase* para 49.

b) Courts step in only when persuaded by argument and evidence that they have to correct erroneous interpretations of the law, or intervene to protect rights infringed by insufficient and unreasonable conduct in social and economic programs. They seek to carry out their constitutionally mandated function with appropriate restraint;[135]

c) The power, derived from section 172(1) of the Constitution to "make any order that is just and equitable" is an injunction to do practical justice. The outer limits of these wide remedial powers are bounded only by considerations of justice and equity and should not be understated. Many and varied remedies may be called for, and "[t]he odd instance" may require a singularly creative remedy so as do justice and afford those before it an equitable remedy.[136]

The Court ordered the Department to appoint "special master" to assist it to administer labour tenant claims, develop a comprehensive strategy for the processing and referring claims; deal with lost applications and to prevent the Land Claims Court from being over-burdened with the supervision of claims.The Court itself noted that "no court order has done anything quite like this before".[137]

[98]

The Applicants contend that the three components of the order granted in *Mwelase* are: a declaratory order; the appointment of the Special Master; and a supervisory order. They argue that the first and third components of the order were

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[135] *Mwelase* para 51.
[136] *Mwelase* para 65.
[137] *Mwelase* para 38.

uncontentious because only the appointment of a Special Master was in issue before the Constitutional Court. The Applicants also contend that the relief the Applicants seek in the present matter mirrors the first and third components of the *Mwelase* order.

[99]

The Courts have stressed the ineffectiveness of ordinary enforcement remedies, such as contempt of court, in situations where it has granted supervisory orders. The SCA struck down an order of contempt of court against a municipal official who had not complied with a complex order concerning a dispute between a rich suburb and a poor, informal settlement in *Meadow Glen Home Owners Association and Others v City of Tshwane Metropolitan Municipality and Another*, explaining its preference for a supervisory order rather than one of contempt of court, as follows:

> "Both this Court and the Constitutional Court have stressed the need for courts to be creative in framing remedies to address and resolve complex social problems, especially those that arise in the area of socio- economic rights. It is necessary to add that when doing so in this type of situation courts must also consider how they are to deal with failures to implement orders; the inevitable struggle to find adequate resources; inadequate or incompetent staffing and other administrative issues; problems of implementation not foreseen by the parties' lawyers in formulating the order and the myriad other issues that may arise with orders the operation and implementation of which will occur over a substantial period of time in a fluid situation. Contempt of court is a blunt instrument to deal with these issues and courts should look to orders that secure on-going oversight of the implementation of the order ... Our courts may

need to consider such institutions as the special master used in those cases to supervise the implementation of court orders. [138]

[100]

The Applicants contend that common features of the cases in which courts have issued supervisory orders are:

(1) They all concern the protection of vulnerable groups of people such as prisoners, refugees, children, homeless people, and social grant beneficiaries. The courts regard themselves as having a heightened obligation to ensure that their orders are implemented when those who will suffer are vulnerable and marginalised.

(2) The courts are often confronted with situations in which there is repeated or blatant non-compliance with legal obligations, a refusal to act on recommendations, or some other reason to believe that, without supervision, the respondents may not fully and promptly comply with the court's order;

(3) They all concern situations where there is no easy or immediate solution to cure the unconstitutional state of affairs, and full compliance would take time. They deal with the need to revisit and change existing practices, and then implement new, constitutionally-compliant measures. The courts retain supervision to ensure that the illegality is rectified as promptly as possible.

[101]

This matter falls within the framework of the principles above, the Applicants

[138] 2015 (2) SA 413 (SCA) para 35.

argue, because:

(1) Infringement of the rights of vulnerable people who are in need of emergency housing is in issue, a situation which *Mwelase* holds creates a heightened obligation on the Court to craft an effective, just and equitable remedy;

(2) The Municipality has displayed an obstinate and long-standing disregard for its constitutional and statutory obligations to provide emergency housing. It must have been aware of these obligations since *Grootboom* in 2000 and in 2011 the *Blue Moonlight* judgment made it clear that the Municipality was obliged to fund emergency housing out of its own resources. The Applicants demonstrate that by at least January 2013 the Municipality was aware that the increasing scale of evictions meant it faced a "humanitarian crisis", yet it conceded in its answering affidavit that it had recently reduced the funds allocated for emergency housing.

(3) The Municipality's answering affidavit fails to account openly to this Court and it attempts to avoid having to deal with its constitutional and statutory obligations by raising ill-advised procedural objections; and

(4) It is common cause that providing of emergency housing takes three years or more and it is clear that the process is often beset with unanticipated difficulties.

[102]

The Applicants argue that other similarities are that:

(i) the unconstitutional state of affairs does not admit of easy solution;

(ii) full compliance will take several years; and

(iii) it might be necessary for the Municipality to change its existing

emergency housing practices.

They contend that such circumstances create a danger that unless this Court exercises its supervisory jurisdiction the Applicants and the other vulnerable people that they represent, will not obtain an effective remedy.

[103]

The Municipality argues that the Applicants' approach

> "proceeds from an incorrect premise that the Municipality has an obligation to provide emergency housing immediately to the applicants and all other persons finding themselves in need of emergency housing".

[104]

The Municipality laid great store by the Constitutional Court finding in *Soobramoney v Minister of Health (KwaZulu Natal)* that:

> "the appellant's case must be seen in the context of the needs which the health services have to meet, for if treatment has to be provided to the appellant it would also have to be provided to all other persons similarly placed…if all the persons in South Africa who suffer from chronic renal failure were to be provided with dialysis treatment – and many of them, as the appellant does, would require treatment three times a week – the cost of doing so would make substantial inroads into the health budget. And if this principle were to be applied to all patients claiming access to expensive medical treatment or expensive drugs the health budget would have to be dramatically increased to the prejudice of other needs which the State has to meet."[139]

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[139] 1998 (1) SA 765 (CC) para 41.

[105]

The Municipality refers to *Blue Moonlight* in relation to the reasonableness criterion when evaluating implementation by the state of socio-economic rights to the effect that

> "proportionality is a constitutional watchword. In dealing with the interrelated issues of the limits of judicial intrusion and the reality of available resources, balanced against the assertion of socio-economic rights, a court's role can rightly be described as "the art of the possible". And, as stated in *Grootboom*, it is not the court's task to decide "whether public money could be better spent".

[106]

The Municipality argues that the Applicants, by referencing various academic articles rather than authority, posit an alternative, viz. that it is necessary to place 'an obligation on the State to ensure that everyone has access to socio-economic rights', which will 'require a degree of intervention which has significant implications for pre-existing policy and resource distributions. This is an unavoidable consequence of the constitutional commitment to the fulfilment of socio-economic rights'.[140]

[107]

The Municipality contends that in order to meet the levels which the applicants require given the resource constraints it experiences would require input from provincial and national levels of government to justify the budgetary allocations to the Municipality, and the constraints those necessarily impose." It contends that is significant that, despite its invitation, the Applicants declined to join the relevant national department, the

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[140] Applicants' HoA para 99; page 40.

Minister of Rural Development and Land Reform.[141] It argues that the allegations made as to the manner in which resource allocation should take place between different levels of government, render this non-joinder a fatal flaw in the application. It relies on *Khosa and others v Minister of Social Development and others; Mahlaule v Minister of Social Development and Others* which held that, even where a branch of government elects not to oppose relief claimed, it is duty-bound to provide relevant evidence in relation to the issues, policies and legislation in question. The importance of a constitutional case may be justification to postpone a case rather than decide it without sufficient input from the relevant department of state.[142]

[108]

The Municipality argues that supervisory orders are not appropriate where

> "much of what is required may fall within the field of either the province or the municipality [and] while the former was not cited and the latter, though cited, was informed that no relief was being sought against it".[143]

It argues that since the Applicants do not seek relief against the National or the Provincial Departments, and "cite the incorrect national department", the same principle applies.[144] The Municipality's answering affidavit avers that

> "the applicants have omitted to cite the relevant Minister of Rural Development and Land Reform. As a result of the undoubted interest of the National Minister in these

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[141] Record 187 and 609. The applicants say "it is doubtful whether it is necessary to join the Minister of Rural Development and Land Reform as a mere interest in a matter does not translate into a valid ground for joinder. However, my attorney has corresponded with his legal representatives and we reserve the right, if required, to apply for his joinder as a respondent in this application" (RA para 59; Record 609).

[142] 2004 (6) SA 505 (CC)

[143] *Grootboom* paras 39 and 40.

[144] FA para 5, Record 10; FA paras 9.1 to 9.7, Record 11 – 12.

> proceedings, and the guiding role [she] plays in the formulation and implementation of policy, this constitutes a significant non-joinder. The National Minister of Human Settlements (cited as the third respondent) is not the national department charged with the issue of ESTA evictees. Furthermore, to the best of my knowledge the Minister of Rural Development and Land Reform is funding the applicants' litigation".[145]

[109]

The Municipality contends that the 20% quota for rural dwellers is significant, supporting its contention by arguing that the importance of citing the relevant state department may be seen, for instance in the fact that the policies sought to be impugned were developed arising from engagements between different tiers of government, and in particular the relevant Provincial Framework Policy. Critically, also, a significant deficit appeared in the Municipality's provision for emergency accommodation by reason of the provincial department's decision that it "would not support construction of a TRA the site".[146]

[110]

The Municipality argues[147] that it realised that many people from farming areas simply do not feature on the housing waiting list, ran a pilot project as part of the "*Drommedaris*" formal housing project,[148] eventually adopting the 60/20/20% quota following the August 2012 Provincial Policy Framework on Selection of Housing Beneficiaries.[149] The Provincial Policy Framework recognised quotas as a suitable

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[145] AA para 12.5; Record 187.
[146] AA, rec p 164.
[147] HOA para 146; AA para 11.25.6, Record 185.
[148] AA, para 11.25.2.2, rec p 183.
[149] AA para 11.25.2.3; AA annexure "Y", Record 456.

means of differentiating and prioritising different applicants for housing opportunities,[150] and laid down that municipalities

> "should consider whether the application of the selection criteria as laid out in its policy will lead to all eligible groups being included within housing projects, and should adjust the policy pre-emptively to ensure that selection is inclusive. For instance, municipality should ensure that application of the policy includes households located outside of towns in which housing projects tend to be concentrated" and "ensure that households living in proximity to a project are not prioritised to the degree that those living further away from projects are systematically excluded from receiving housing opportunities."[151]

[111]

The Municipality argues that

> "If the relief claimed in these proceedings were to be granted, it would entail this Court entering into the territory of policymaking, rather than policy review on grounds of constitutional reasonableness. If relief were granted on the terms of the notice of motion, this would … compel the Municipality to remake its policies in an unspecified and perplexing way. Given that little or no content is given to the policy alterations required by the applicants, the abject generality of the relief claimed will compel blind and sometimes even dangerous (particularly in the case of paragraph 7 of the notice of motion) attempts by the Municipality's to alter its policies, which have been the

[150] AA para 11.25.2.4, Record 184.
[151] AA para 11.25.2.6, Record 185; AA para 11.25.2.9, Record 186.

product of extensive deliberations between different tiers of government, and conform to the relevant provincial policy framework".

[112]

Mazibuko determined that even though the Constitution does not require the State to furnish citizens with all the basic necessities of life immediately, the socio-economic rights the Constitution guarantees invest citizens with the power to demand that the State acts reasonably in order to ensure that everyone enjoys access to the basic necessities of life on a progressive basis. This enables citizens to hold government accountable for the manner in which it ought to promote realisation of these rights through litigation.[152]

[113]

The Court in *Mazibuko* also held that when someone challenges the State in the assertion of socio-economic rights the State has to explain and give reasons for its decisions and actions. Government is obliged to provide access to the information it has considered, as well as the processes followed, in determining the content and implementation of its policies. The duty to disclose such information indicates how important socio-economic rights litigation is: it enables the court to grant appropriate relief if the process government followed is flawed or the Government acted on inadequate or incomplete information.[153]

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[152] *Mazibuko* para 59.
[153] *Mazibuko* para 71.

[114]

Mazibuko found that socio-economic rights litigation plays important role as it constitutes an important mechanism by which citizens can hold the democratic arms of the government to the promises of the Constitution. Viewed from this perspective, litigation fosters a form of participative democracy, holding government accountable and requiring it to answer for specific aspects of its policy between elections.

[115]

The Applicants align themselves with the court in *Adonisi* accepting that the challenge one of the Applicants, Reclaim City (RTC), mounted was not directed at government's statutory or policy framework which had largely been established by national government through legislation,[154] but rather the manner in which the Province and the City implemented the constitutional and statutory obligations, as well as the policies formulated in terms of the applicable legislation. The RTC application required the Province and the City to

(a) explain why their policies directed at redressing spatial injustice were reasonable;

(b) explain the processes they had undergone in formulating their policies;

(c) explain the alternatives considered; and

(d) provide the reasons why they opted for the policies selected.

[154] Housing Act 107 of 1997, the Social Housing Act (SHA) 16 of 2008, and the Spatial Planning and Land Use Management Act (SPLUMA) 16 of 2013.

[116]

The relief sought by RTC in prayer 1 of its draft order in *Adonisi* was for a declaratory order that the MEC, the Premier, the City and the MEC: Human Settlements are held to be in breach of their respective obligations under ss25 and 26 of the Constitution, while the second prayer seeks a mandatory interdict that these respondents be directed to comply with such obligations. The third, fourth and fifth prayers contemplate supervisory interdicts against such respondents to ensure judicial oversight in relation to their compliance with the *mandamus* sought in prayer 2.

[117]

The court in *Adonisi* cites a list of cases in which the Constitutional and High Courts have considered applications for appropriate relief in constitutional matters finding such applications are no longer considered controversial.[155] The courts have, among others, granted supervisory interdicts to ensure adequate compliance with orders finding invalidity for a breach of constitutional obligations. The courts have emphasised that section 172(1) of the Constitution invests them with the power to grant effective remedies.

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[155] *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC); *TAC* ; *Sibiya and others v Director of Public Prosecutions, Johannesburg, and others* 2005 (5) SA 315 (CC); *Nyathi v MEC for the Department of Health, Gauteng and another* 2008 (5) SA 94 (CC); *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development, and others* 2009 (4) SA 222 (CC); *Allpay Consolidated Investment Holdings (Pty) Ltd and others v Chief Executive Officer, South African Social Security Agency and others* 2014 (4) SA 179 (CC); *Mwelase and others v Director-General, Department of Rural Development and Land Reform and another* 2019 (6) SA 597 (CC); *S v Z and 23 similar cases* 2004 (4) SA BCLR 410 (E); *Strydom v Minister of Correctional Services and Others* 1999 (3) BCLR 342 (W) and *Kiliko and Others v Minister of Home Affairs and Others* 2007 (4) BCLR 416 (C).

[118]

Despite sections 172(1)(a) and 172(1)(b) both dealing with the courts' powers, courts must bear in mind the important differences between them. The primary distinction is that the former obliges the court ("must") to grant a declaration of inconsistency with the Constitution in the event that the conduct of an organ of state is in breach of its constitutional obligations whereas section 172(1)(b) invests the court with wide discretionary terms ("may") enabling the courts, in the words of *Mwelase* and *Mhlope*, to grant relief that will "*ensure practical justice*" and "afford an equitable remedy".

[119]

Rail Commuters[156] explained the distinction between the powers given to a court under sections 172(1)(a) and (b) as follows

> "[106] I have concluded that Metrorail and the Computer Corporation bear an obligation in terms of the SATS Act interpreted in the light of the Constitution to ensure that reasonable measures are taken to provide for the safety and security of rail commuters on the rail commuter service they operate. In this Court, they both denied that they bore such an obligation. The first form of relief that is sought by the applicants is declaratory. Section 172(1)(a) of the Constitution states that this Court must declare 'any law or conduct that is inconsistent with the Constitution' to be invalid to the extent of its inconsistency. It is a special constitutional provision, different to the common-law rules governing the grant of declaratory orders. It does not mean, however, that this Court may not make a declaratory order in circumstances where it has not found conduct to be in conflict with the Constitution. Indeed s 38 of the Constitution makes it clear that the Court may grant a declaration of rights where it would constitute appropriate relief:

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[156] *Rail Commuters Action Group and Ors v Transnet Ltd t/a Metrorail and Ors* 2005 (2) SA 359 (CC).

'Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights.'

Unlike under section 172(1)(a), the courts are not obliged to grant a declaration of rights but may do so where they consider it to constitute appropriate relief. The principles developed at common law, and under the provisions of the Supreme Court Act,[157] will provide helpful guidance to consider whether such a declaratory order should be made, though of course the constitutional setting may at times require consideration of different or additional matters.

[107] It is quite clear that before it makes a declaratory order a court must consider all the relevant circumstances. A declaratory order is a flexible remedy which can assist in clarifying legal and constitutional obligations in a manner which promotes the protection and enforcement of our Constitution and its values. Declaratory orders, of course, may be accompanied by other forms of relief, such as mandatory or prohibitory orders, but they may also stand on their own. In considering whether it is desirable to order mandatory or prohibitory relief in addition to the declarator, a court will consider all the relevant circumstances.

[108] It should also be borne in mind that declaratory relief is of particular value in a constitutional democracy which enables courts to declare the law, on the one hand, but leave to the other arms of government, the Executive and the Legislature, the decision as to how best the law, once stated, should be observed.

[109] In this case, Metrorail and the Commuter Corporation denied, in error, that they bore obligations to protect the security of rail commuters. Given the importance of that obligation in the context of public rail commuter services, it is important that this court issue a declaratory order to that effect. The applicants

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[157] Since repealed and replaced by the Superior Courts Act, 10 of 2013.

> also sought an order in which this Court would put Metrorail and the Commuter Corporation on terms to take steps to implement that order. While such an order is no doubt competent, I am not persuaded that it is an appropriate order in the circumstances of this case. There is nothing to suggest on the papers that Metrorail and the Commuter Corporation will not take steps to comply with the terms of the order."

[120]

The Court's judgment in *Islamic Unity*[158] explains the important difference between the common law and constitutional approach to a declaration of rights:

> "[9] In terms of s19(1)(a)(iii) the High Court has the power, in its discretion, to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that the person seeking the order cannot claim any relief consequential upon the determination. In this case the applicant sought an order declaring that clause 2(a) is inconsistent with s 16(1) of the Constitution and without force or effect. The High Court was not being asked to "enquire into and determine" applicant's rights, but to exercise its powers in terms of s 172(1)(a) of the Constitution and to declare clause 2(a) invalid.
>
> [10] A Court's power under s172 of the Constitution is a unique remedy created by the Constitution. The section is the constitutional source of the power to declare law or conduct that is inconsistent with the Constitution invalid. It provides that when a Court decides a constitutional matter, it *must* declare invalid any law or conduct inconsistent with the Constitution. It does not, however, expressly regulate the circumstances in which a Court should decide a constitutional matter. As Didcott J stated in *JT Publishing (Pty) Ltd and Another v Minister of Safety and Security and Others* [1997 (3) SA 514 (CC) para 15]:

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[158] *Islamic Unity Convention v Independent Broadcasting Authority and others* 2002 (4) SA 294 (CC).

> 'Section 98(5) [of the Interim Constitution] admittedly enjoins us to declare that a law is invalid once we have found it to be inconsistent with the Constitution. But the requirement does not mean that we are compelled to determine the anterior issue of inconsistency when, owing to its wholly abstract, academic or hypothetical nature should it have such in a given case, our going into it can produce no concrete or tangible result, indeed none whatsoever beyond the bare declaration.'
>
> [11] In determining when a Court should decide a constitutional matter, the jurisprudence developed under s19(1)(a)(iii) will have relevance, as Didcott J pointed out in the *JT Publishing* case. It is, however, also clear from that judgment that the constitutional setting may well introduce considerations different from those that are relevant to the exercise of a Judge's discretion in terms of s19(1)(a)(iii)."

[121]

An important consideration to which the court in *Adonisi* had regard in deciding to grant a supervisory order was the ease with which policies were side stepped.[159] The court referred to a document the Western Cape Provincial government issued in March 2014 signalling an intention to release Provincial state land in and around the CBD for development purposes. The Province document provided that property development opportunities would be available subject to the condition that the Province retained ownership of the land. The Province did not abide by that criterion when it sold the Tafelberg site and did not explain its policy change. The court noted the ease with which the condition had been side stepped and in determining an appropriate remedy, stated that the Court wanted to be assured that, in future, the Province not only had clear policies

[159] *Adonisi* para 491.

in respect of the use of state land for affordable housing, but that it would adhere to those policies. This was one of the considerations the court had regard to in deciding on a structural interdict as an appropriate remedy.[160] The Applicants submit that the need to ensure that the Municipality will adhere to the principles established by the Constitutional Court applies to the present matter.

[122]

The Municipality disputes that the relief sought in the *Adonisi* case was similar to the present matter and pointed to several of the prayers pertaining to the reviews and additional relief sought by the *Adonisi* applicants.

The Applicants in turn argue that the submission misses the point because a lthough the relief sought in the *Adonisi* case was wide-ranging, paragraphs 1 to 5 of the *Adonisi* notice of motion sought orders declaring that the Province and the City had failed to comply with their constitutional and statutory obligations in terms of sections 25 (5) and 26 of the Constitution and the legislation enacted to give effect to these rights. The Applicants argue that there are obvious similarities between the relief the Applicants seek, despite the obligations in this matter relating to the Municipality's constitutional and statutory emergency housing obligations, whereas *Adonisi* the concerned obligations to redress spatial apartheid.

[123]

In *Hoërskool Ermelo*[161] the Court found that the ample and flexible remedial jurisdiction section 172(1)(b) of the Constitution confers

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[160] *Adonisi* paras 492 to 493.
[161] *HOD, Mpumalanga Department of Education v Hoërskool Ermelo* 2010 (2) SA 415 (CC) para 97.

> "permits a court to forge an order that would place substance above mere form by identifying the actual underlying dispute between the parties and by requiring the parties to take steps directed at resolving the dispute in a manner consistent with constitutional requirements."

Similarly, in *Modderklip*[162] the Supreme Court of Appeal held

> "In the court below the state objected to the new direction, wishing to hold Modderklip to the relief originally sought. This objection was overruled by De Villiers J (at para 52), correctly so. If a constitutional breach is established, this court is (as was the court below) mandated to grant appropriate relief. A claimant in such circumstances should not necessarily be bound to the formulation of the relief originally sought or the manner in which it was presented or argued."

[124]

The Municipality argues that is not in the interest of justice to grant the Applicants the relief they seek

> "in light of the evidence put up by the Municipality as to the manner in which it is delivering on its obligations in respect of housing, which demonstrates clearly that there is no rights violation."

[125]

The Municipality argues that the effect of the Court granting the relief the Applicants seek would be to

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[162] *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 (5) SA 3 (CC) para 52, where the Court cites with approval *Modderfontein Squatters, Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, amici curiae); President of the Republic of South Africa and Others v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, amici curiae)* 2004 (6) SA 40; [2004] ZASCA 47 para 18.

> "prevent any Court seized with an eviction in which the Municipality might be required to deliver emergency housing, from determining such application pending the discharge of the supervisory order sought by the applicants".

[126]

The Constitutional Court in *Economic Freedom Fighters and Others v Speaker of the National Assembly and Another* made a similar finding to that *Hoërskool Ermelo* holding that the

> "power [in s 172(1)(b)] to grant a just and equitable order is so wide and flexible that it allows courts to formulate an order that does not follow prayers in the notice of motion or some other pleading. This power enables courts to address the real dispute between the parties by requiring them to take steps aimed at making their conduct to be consistent with the Constitution".[163]

[127]

The Municipality argues the Applicants have not made out a case for an order they seek declaring the unlawfulness of

> "the first respondent's policy, alternatively practice of relying exclusively .... on grants from the provincial government in order to provide for emergency housing."

It contends that it is required to show to avoid that conclusion is that it must self-fund its emergency housing obligations from its own means; and has the right to apply to the Province for funds for its emergency housing scheme if it is not able to fully address its emergency housing obligations from its own means.[115]

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[163] 2018 (2) SA 571 (CC) paras 210-211.

[128]

The Municipality advances the following reasons for its argument that the Applicants have not made out a case as required:

a) "[T]he Municipality has no such policy or practice";

b) It is settled that a Court will not readily grant a declaratory order where there is no real dispute on the question of law at issue in the case, or where the legal position is clear;[164]

c) The Constitutional Court recognised the critical role National and Provincial Government play as the primary duty-bearer in relation to funding emergency housing in *Blue Moonlight.*

d) The Constitution does not mandate such a finding.

[129]

The Municipality during the course of its argument by indicating that accepts that it is not entitled to rely solely on funding received from the Province to meet its emergency housing obligations as the Constitutional Court set them out in *Blue Moonlight*. It argues that this issue is not disputed on the papers and contends that it is not disputed that the Municipality does not rely exclusively on provincial funding to meet its emergency housing obligations, either in principle or in practice.[165]

[130]

The Municipality argues that *Blue Moonlight* does not constitute authority for the proposition that it may not primarily rely on funding from other spheres of government to fund its emergency housing obligations in appropriate circumstances.

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[164] *Myburgh Park Langebaan (Pty) Ltd v Langebaan Municipality and Others* 2001 (4) SA 1144 (C) at 1153C.

[165] FA para 38-39, Record 26-27; AA para 11.6-11.10, Record 155-156.

Consequently, it argues, the combination of Provincial and its own funding must be reasonable.

[131]

The Municipality argues that the Applicants are not entitled to the alternative relief they seek in paragraphs 2 or 3 of the Notice of Motion because what it seeks is to get this Court to rearrange the Municipality's emergency housing budget "in some unspecified way" and to direct that it "must primarily fund its emergency housing obligations from its own resources to the exclusion of its other constitutional obligations." The Municipality contends that this is contrary to *Blue Moonlight*, and that the

> "effect of such a finding would be far reaching and indeed devastating on the ability of the Municipality to deliver on its non-emergency housing obligations, and its other primary constitutional obligations, such as delivery of basic services".

[132]

The Municipality also argues that granting the alternative relief would establish the principle that Municipalities are compelled to primarily fund their emergency housing obligations from their own resources, irrespective of their other housing and socio-economic rights obligations, or their ability to obtain funding from other governmental sources. It denies that the Constitution mandates such a far-reaching finding, "which would self-evidently be deleterious to good governance everywhere" and offend the separation of powers, citing the Constitutional Court finding in *TAC* that:

> *"[c]ourts are ill-suited to adjudicate upon issues where court orders could have multiple social and economic consequences for the community. The Constitution contemplates rather a restrained and focused role for the courts, namely, to require*

> *the state to take measures to meet its constitutional obligations and to subject the reasonableness of these measures to evaluation. Such determinations of reasonableness may in fact have budgetary implications, but are not in themselves directed at rearranging budgets. In this way the judicial, legislative and executive functions achieve appropriate constitutional balance".* [166]

[133]

The Municipality also raised the separation of powers argument in relation to which the Court in *Soobramoney* said:

> "the precise contours and content of the measures to be adopted are primarily a matter for the legislature and the executive. They must, however, ensure that the measures they adopt are reasonable. A court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent. The question would be whether the measures that have been adopted are reasonable. It is necessary to recognise that a wide range of possible measures could be adopted by the state to meet its obligations."

[134]

The Constitutional Court still found itself grappling with the possible impact of an order under section 172 might on the separation of powers principle in *Mwelase*, eventually concluding that:

> "[65] This court has held that the Labour Court, although not expressly so invested, enjoys jurisdiction to strike down a statute on the ground of constitutional invalidity. By parallel reasoning, it follows that the Constitution affords the Land Claims Court extensive powers, when deciding a constitutional matter within its power, to "make

[166] *Minister of Health and Others v Treatment Action Campaign and Others (No 2)* [2002] ZACC 15; 2002 (5) SA 721 para [38].

any order that is just and equitable". Any order that is just and equitable! That is no invitation to judicial hubris. It is an injunction to do practical justice, as best and humbly, as the circumstances demand. And it is wrong to understate the breadth of these remedial powers, as Madlanga J eloquently reminds us in *Mhlope*:[167]

> 'The outer limits of a remedy are bounded only by considerations of justice and equity. That indeed is very wide. It may come in different shapes and forms dictated by the many and varied manifestations in respect of which the remedy may be called for. The odd instance may require a singularly creative remedy. In that case, the court should be wary not to self-censor. Instead, it should do justice and afford an equitable remedy to those before it as it is empowered to do.' "

[135]

The Municipality argues that such a finding runs counter to the principle that the State must manage the demands on its resources holistically, taking into consideration the larger needs of society, rather than focusing on the specific needs of particular individuals or groups.[168]

CONCLUSIONS

[136]

The Municipality's argument that s 110 of the Magistrate's Courts Act precludes the Applicants from launching this application fails for the following reasons:

(a) Section 110 is permissive and not peremptory - the critical words of sub-section (2)(b) are that the party "may adduce evidence regarding the

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[167] Para 83.
[168] *Soobramoney* para [31]

invalidity" and the Municipality did not mount an argument that context requires the word "may" to be read as "must";

(b) It is not a matter of "sophistry", as the Municipality argues, that these proceedings are fundamentally different to the proceedings pending before the Magistrate's Court. Despite the Municipality being a party to the pending proceedings, the relief sought in those proceedings is the eviction of the Applicants in terms of ESTA. The Municipality had to be cited in those proceedings because before a court can order an eviction it must fully investigated the relevant circumstances: a critical aspect of that investigation is the determination whether the granting of an eviction order will result in the evictees being rendered homeless. The obligation imposed on government, local, seeks to avoid the social evil resulting from the scourge of homelessness. The pending proceedings are not aimed at the same objective, but rather the exercise by the property owner of his or her right to possess the property.

[137]

The attack on the Applicants' standing fails. The Municipality brushed away WFP's argument that it has not met its international legal obligations by arguing that there is a significant difference between the Constitutional Court formulation of the duty to provide housing does not stand up to scrutiny: there is only a difference in form between the demand that the Municipality act within the confines of its available resources and "to the maximum of its available resources". It is inconceivable that the courts can find that anything other than the Municipality's best efforts satisfy the test of reasonableness: they must make their best efforts within their available resources. This

resulted in the Municipality failing to establish that the Applicants were not justified in refusing of its offers of alternative accommodation. The Municipality which bears the onus failed to provide a basis on which this court could find on anything but the principles set out in *Giant Concerts*.

[138]

The factual material the Municipality provided does not displace its admissions in both Housing Reports in revealing a dismal failure on its part to achieve a progressive realisation of the constitutional right of access to adequate housing. The Municipality's malperformance, particularly concerning emergency housing, is characterised by a failure to implement proactive planning measures, as well as those plans which it did formulate, being scuppered by its failure self-fund.

[139]

Due deference does not mean that courts should shrink from analysing the basis on which the functionary arrived at its decision, the Constitutional Court in *Bato Star* holding:

> "This [treating a decision was due deference] does not mean however that where the decision is one which will not reasonably result in the achievement of the goal, or which is not reasonably supported on the facts or not reasonable in the light of the reasons given for it, a court may not review that decision. A court should not rubberstamp an unreasonable decision simply because of the complexity of the decision or the identity of the decision-maker".[169]

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[169] *Bato Star* para 48.

[140]

The court finds little support for the argument that the Applicants' pleadings were so vague that the Municipality was unable to plead properly. The Municipality's own admission, implicit in its references to *Blue Moonlight*, combined with the reality of the pleadings and argument it presented dispel any notion of vagueness. Just one of the Constitutional Court findings in in *Blue Moonlight* was that

> "the City has both the power and duty to finance its own emergency housing scheme, out of its own means.... The City has a duty to plan and budget proactively for situations like that of the Occupiers." [170]

The Court's deliberate use of the word "proactively" implies an obligation to act in anticipation of the need arising: the Municipality failed to do so.

[141]

The Municipality's attempt to distinguish the circumstances in this case from those confronting the court in *Ngxuza* fails: in that matter the court specifically mentions that it was confronted by a volume of evidence which led it to draw its conclusions.

[142]

The Municipality's argument that the Applicants make an unwarranted reference to evidence of its performance as far back as 2012 fails. The Applicants are entitled to place all available evidence before the court provided they do so within the bounds of the law of evidence.

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[170] *Blue Moonlight (CC)* para 57.

[143]

The facts establish that the Municipality did not act reasonably when it failed to self-fund its emergency housing programme even to the extent of its abilities. The Constitution requires well planned and executed measures to progressively realise the constitutional right of access to adequate housing: the ad hoc measures the Municipality took are no substitute. The court examines each of the explanations for the failures of its emergency housing projects.

The failure of its efforts develop the Vlakkeland site as a result of a Provincial Government veto is possibly ample evidence of the unreasonableness the Municipality relying primarily on funding from the Provincial or National government, while making a minimal contribution from its own coffers. The Constitutional Courts finding in *Blue Moonlight* that the local government has a duty to finance its own emergency housing scheme effectively means that a lack of funds cannot constitute a valid excuse for local government failing to provide emergency housing. The Municipality's performance must be assessed bearing in mind that the 2013 Housing Report evidences its full awareness of the unfolding catastrophe arising from the anticipated increase in the numbers of evictions from rural properties.

The Municipality's selection of a site that falls within the 100 year flood plain exclusion zone cannot be regarded as reasonable. The Municipality does not explain how it came to make such a bad selection. Considerations such as flood exclusion zones must be part of the considerations when selecting a possible site for housing. The examples of formal housing developments which the Municipality provides indicate that it has considerable experience with housing development. The court cannot simply excuse an experienced Municipality for choosing so inappropriately. The court would be failing

in its constitutional duty if it were to excuse the Municipality for its failure with the result that some of the most vulnerable members of our society are deprived of their constitutional protection.

[144]

The Constitution invests a court with the power to provide litigants with effective relief once it determines an instance of constitutional delinquency. The courts have decisively dismissed the arguments the Municipality mounts with regard to the granting of effective relief offending the separation of powers: *TAC* and *Mwelase* make this clear. The Municipality also failed to take into account the differences between the common law and the principles derived from interpreting the Constitution on the question of declaratory orders. The Applicants have succeeded in establishing the appropriateness and need for declaratory relief in this matter. The court finds the criterion "They have been up until recently not registered on the database" in paragraph 5.2.2 of the Municipality Housing Selection Policy unfairly discriminatory: the Municipality has not explained the rationale therefor.

[145]

There is voluminous authority establishing that grants of supervisory orders are no longer controversial or unusual. The wide variety of circumstances under which the courts have granted such orders more than sufficiently establish that the circumstances in the present matter than justify the court making of such an order. The Applicants successfully demonstrated remarkable similarities between the circumstances in which the courts have granted such orders and those of the present application.

[146]

The wide variety of circumstances in which the courts have granted supervisory orders that were successfully executed belies the Municipality's predictions that granting the orders the Applicants seek will have catastrophic consequences. The Municipality provided no evidence that grants of supervisory interdicts have had any negative impact.

[147]

The court finds that the Municipality has failed to meet its constitutional obligation to provide emergency housing. This finding, more than a decade-and-a-half after *Grootboom*, sufficiently demonstrates the need for the court to supervise the implementation of its order. The Municipality had more than ample opportunity to place equally effective alternatives to such an order before court, but failed to do so.

[148]

The court, in deciding on the appropriateness of a supervisory interdict, bore in mind WFP's argument that proof of the Municipality's failure to meet its obligations starts with its claim that it bears no primary responsibility in so far as the provision of housing is concerned, asserting that:

> "It should be remembered that the first respondent, according to the Constitutional dispensation which differentiates the roles of government between national, provincial and local spheres, effectively acts as the second respondent's agent in delivering upon the Constitutional housing mandate. Housing is a national and provincial mandate and is not .... a specific mandate of local government....in so far as emergency accommodation is concerned, the broad idea has developed

> that national/ provincial government should bankroll expenditure on emergency housing, whilst local government should provide ongoing maintenance costs."[171]

This argument indicates that the Municipality did no more than to pay lip service to the acknowledgement that it bore the obligations set out in *Blue Moonlight*.

[149]

The Municipality did not provide factual basis for its plea that it does not have the resources to meet its obligations. The court finds that it has no one but itself to blame for not calling an expert on municipal budgeting to explain the circumstances that led to it allocating a budget of R1 million for emergency housing within a total budget of over R2 billion. There is no basis upon which the court can accept the Municipality's unsupported assertion that this is the case. The court would be failing in its constitutionally assigned duty to determine the reasonableness of the Municipality's actions if it did so. The reliance on *Soobramoney* and *Grootboom* does not assist the Municipality because of its failure to place their significance in perspective by explaining its budget as indicated.

[150]

The picture the court is left with, is one of the Municipality's dismal, perhaps wilful, failure to meet its constitutional obligations to an extremely vulnerable group. Not only did it seek refuge from accountability by taking numerous technical defences, but sought to shield behind the notion of deference and hoped to benefit from the cloak of legitimacy with which the Constitution clothes state institutions. The court

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[171] AA para 11.9.

finds itself driven to the conclusion that the Municipality operated as if war with its own citizens, a deplorable state of affairs indeed.

COSTS

[151]

The court finds nothing in the arguments presented to persuade it to exercise its discretion in according with the trite principle that costs follow the order. The court's findings on the manner in which the Municipality acted, fall just short of it making a punitive costs order.

ORDER

[152]

The court makes the following order on the basis of the reasoning and pursuant to its findings above:

1. The First Respondent is declared to be in breach of its constitutional and statutory obligations by failing to take reasonable measures to provide people living within its area of jurisdiction with emergency housing;
2. The First Respondent's policy, alternatively, practice of relying primarily, on grants and other funding received from the Provincial Government in order to provide emergency housing is declared unlawful;

3. The First Respondent is declared legally obliged to make reasonable provision from its own financial resources, excluding funds received from the Provincial Government, or other external sources, for emergency housing;
4. The First Respondent is directed to make reasonable provision from its own financial resources, excluding housing grants received from the Provincial Government, for emergency housing;
5. Section 5.2.2 of the first respondent's housing selection policy, dated 28 October 2014, is declared unconstitutional and invalid, to the extent that it precludes farm residents who have been registered on the Municipality housing database for a substantial period of time from benefitting from the 20 per cent quota set aside for farm workers and farm residents in future municipal housing projects;
6. The declaration of invalidity in part 5 of this order is suspended until 27 February 2023 pending the First Respondent complying with part 7 of this order by that date;
7. The First Respondent is directed to remove and reformulate section 5.2.2 of its Housing Selection Policy so as to render it constitutionally compliant by 27 February 2023;
8. The First Respondent is directed to provide the court with a written report setting out the measures and or steps it has taken in compliance with this order on 27 February and 31 August each year;
9. The First Respondent is directed to make a copy of each report referred to in Part 6 of this order available to the Applicants and to publish the

report on its website at least 21 days in advance of each of the dates prescribed in Part 6 of this order;

10. The First Respondent shall pay the Applicants' costs, including the costs of two counsel.

Martin AJ

Acting Judge of the High Court