IN THE SOUTH GAUTENG HIGH COURT, JOHANNESBURG

REPUBLIC OF SOUTH AFRICA

CASE NO: 2006/11442

In the matter between:

BLUE MOUNTAIN PROPERTIES 39 (PTY) LIMITED Applicant

and

THE OCCUPIERS OF SARATOGA AVENUE First Respondent

THE CITY OF JOHANNESBURG METROPOLITAN MUNICIPALITY Second Respondent

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REASONS FOR JUDGMENT

SPILG J

NATURE OF APPLICATION

1. The Applicant, which is a private landowner, seeks the eviction of those occupying its property. It launched proceedings in May 2006 after furnishing two earlier notices to vacate. The occupants claim protection from eviction under the Prevention of Illegal Eviction from Unlawful Occupation of Land Act 19 of 1998 ("*PIE*") until such time as the City of Johannesburg Metropolitan Municipality ("*the City*") has provided them with adequate temporary accommodation.

2. The occupiers joined the City to the proceedings in October 2007. Moreover, the occupiers brought a counter-application to stay the eviction proceedings until the outcome of certain declaratory relief regarding the City's constitutional and statutory obligations to make provision for temporary emergency shelter and to have access to adequate housing on a progressive basis. It further sought an order requiring the City to deliver a report on the steps it has taken and intends to take to

comply with its constitutional and statutory obligations with regard to providing the occupants with alternate accommodation on a temporary basis and thereafter to give them access to adequate housing on a progressive basis.

3. The City's response was to dispute that it had any constitutional or statutory obligation to provide any form of accommodation to those evicted from privately owned land. This prompted the occupiers to amend the relief sought against the City by adding an order declaring that the City's policy to exclude them from consideration on the grounds of occupying privately owned land was unfairly discriminatory and arbitrary and hence unconstitutional.

4. The City filed a report regarding its policy and programmes in regard to present and future accommodation which, by court order, was regarded as inadequate and prompted a second report that was

eventually presented under pain of contempt proceedings. In effect, the City claims it does not provide accommodation to indigent persons who face eviction from privately owned land, that it effectively has confined even its emergency and temporary accommodation planning to those threatened with eviction from Government land, that it does not have the financial resources to make provision for persons in the position of the First Respondent occupiers and that in any event Provincial Government is unable to provide additional funds to it.

5. The landowner then introduced a new notice of motion seeking alternative forms of relief directly against the City, including an order that it pays an amount equivalent to the fair and reasonable monthly rental for the premises should an eviction order not be granted.

6. In my respectful view, the facts of this case require the Court to confront the issue of whether private landowners

are obliged to indefinitely provide housing for occupants who fall within the definition of an "*unlawful occupier*" in terms of Section 4 as read with the Section 1 definitions of PIE, and who are unable to afford basic accommodation, or whether this obligation falls on the shoulders of the City.

7. The issues involve a consideration principally of Sections 25 and 26 of the Constitution and of the latter's implementation under PIE as well as the reach of the equality provisions of Section 9. The outcome, as appears later, raises further issues regarding both the extent to which a Court can fashion an order and whether it would interfere with the "*doctrine*" of separation of powers.

8. There have also been a number of interlocutory applications and procedural matters that required resolution. They raise a number of material issues, including whether a local sphere of government should, as a matter of course, be entitled to join any other sphere of government when faced with the prospect of either an

order to provide accommodation or pay constitutional damages.

SUMMARY OF ESSENTIAL FACTS

9. The papers filed exceed 1200 pages. However, the essential details of the case may be readily stilled. I do so in the following paragraphs.

10. The Applicant is Blue Moonlight Properties 39 (Pty) Limited *("Blue Moonlight")*. It is the registered owner of commercial property in Saratoga Avenue, which is located in the Johannesburg Central Business District.

11. The buildings on the property consist of a factory, garages and offices. However, for a considerable period of time the property has been occupied as a dwelling.

12. Until 1999, the property had been used for commercial purposes. Many of the occupiers had been employed there and were allowed to live on the property provided

they paid rent. However, in 1999, the company owning the property ceased trading and from then until 2005, various persons came to collect rent from the occupiers on a basis that they represented the owners. In the interim, the living conditions had deteriorated to such an extent that the occupiers lodged two separate sets of complaints with the Rental Housing Tribunal. They also effected some repairs to the property at their own expense. The rental they had paid varied between R150,00 to R700.00 per month.

13. At the time the application was brought, there were 62 adults and 9 children living on the property, most of whom had lived there for more than two years. However, all the occupiers had been living there for more than six months. The case made out is that the occupiers of the property are poor with an average household income of R790,00 per month. The household income ranges from R180,00 per month to R2 500,00 per month, whilst many occupiers

have no income at all. Very few of the occupiers have full time employment. Most are engaged in the informal sector, either hawking or obtaining casual unskilled piecework. Such limited work opportunities as they have depend on their being within the inner city precinct.

14. The occupiers claim that the cheapest private rental accommodation available in the inner city costs approximately R850,00 per month for a single room with cooking facilities and a bath. It excludes water and electricity. This was determined pursuant to a study conducted by the Centre on Housing Rights and Evictions ("*COHRE*"). COHRE is an international non-governmental research and advocacy organisation dedicated to expanding access to adequate housing and protection from arbitrary evictions for individuals and communities around the world. The rental excluded water and electricity which, for a family of four, would increase the total minimum cost to R1 000,00 per month. It was

contended, through COHRE's acting executive director, Jean Du Plessis, that only a household with an income of about R3 200,00 per month could afford to stay in such a room and then probably in overcrowded conditions.

15. COHRE also established that transitional housing in the form of a single room with communal ablutions and cooking facilities on a non-renewable 18 month lease under a subsidised housing scheme cost between R200,00 to R450,00 per month. Communal rental housing would cost between R300,00 to R800,00 per month, whilst social housing comprising a single room with shared cooking and ablutions would cost between R452,00 to R600,00 per month. COHRE's analysis also revealed that the unmet demand for affordable accommodation in the inner city for families earning under R3 200,00 per month remained at around 18 000 households. There was effectively no private rental housing available within the CBD for the

households earning an income of R3 200,00 per month or less.

16. The occupiers claimed that if evicted, they would be rendered homeless and without any shelter in the short term. They were also unaware of any alternative accommodation that would be both lawful and affordable to them. They accepted that the property was in poor condition with no basic amenities. It nonetheless affords them "... *protection from the elements and the dangers of the streets and allows us a measure of privacy and dignity*".

17. Each of the individual occupiers or household heads set out their personal circumstances, effectively confirming their indigent status and the disastrous consequences to either themselves or their ability to support their families if evicted.

18. Subsequently in April 2008 the Wits Law Clinic, which represents the First Respondent, undertook a survey of occupiers which revealed that there were 86 persons occupying the property comprising of 53 men, 28 women and 5 children. Of that number, 2 were pensioners and the average monthly income was R940,00. Moreover, there was a degree of fluidity of occupants although just under half had in fact been in occupation prior to 2005 when notice to vacate was first given and no rentals were being collected. The highest individual income was R2 200,00 whilst 18 individuals over the age of 22 earned no income and another 20 over that age earned R1 000,00 or less per month. There are also a number of households headed by women. The City has not seriously challenged the indigent status of the occupants but claims that the survey is unsupported by direct affidavit evidence.

19. It is common cause that the occupation of the property by each of them is unlawful. Indeed, the rights they claim

are dependent on their enjoying such status (see section 4 of PIE). The occupiers have over time erected internal structures and effected other alterations.

20. The Applicant acquired the property for redevelopment which was to involve, as a first step, the demolition of the existing structures. To do so, the Applicant needed to lawfully evict the occupiers.

21. The Applicant brought eviction proceedings against the occupiers and complied with the notice requirements of PIE. The Applicant launched its application in 2006. Aside from relying on its rights as registered owner of the property, it also relied on a warning notice issued by the City of Johannesburg concerning the dangerous state of the building, which amounted to an offence under the *Emergency Services Bylaws*, 2003 (promulgated under section 16 of the *Fire Brigade Services Act*, Act 99 of 1987) and the inability to remedy the situation.

22. The occupiers admitted that their occupation was unlawful but contended that they could not be ejected from the property until the City had provided them with alternative accommodation. They relied on their occupation of the property for a period in excess of six months and the fact that they were desperately poor.

23. In order to secure the rights they claimed, the occupiers brought an application to join the City in the proceedings. In addition, they sought an order compelling the City to provide them with temporary shelter from the date of their eviction until such time as the City was able to provide them with adequate and more permanent housing. They also sought an order that the City report to the Court on its ability to provide temporary adequate shelter and also adequate housing on a progressive basis.

24. The occupiers relied on three general grounds to support the relief they sought:

24.1. A constitutional right to adequate housing under section 26(1) and (2) of the Constitution of the Republic of South Africa, Act 108 of 1996 supported by other Chapter 2 rights including those to dignity, equality, security of person and the rights of children to basic shelter and protection against degradation.

24.2. Housing legislation. The First Respondent relied on the provisions of the National Housing Act 107 of 1997 relating to access to adequate housing on a progressive basis and the implementation of necessary programs to secure that end. Reliance was also placed on Chapter 12 of the National Housing Code, which deals with Emergency Housing Policy to provide temporary shelter for those who qualify for assistance as an initial step towards a permanent housing solution.

24.3. PIE. The First Respondent relied on PIE in order to compel the City to file a report on the relief that it can provide to unlawful occupiers facing eviction in a manner that complies with the City's constitutional and statutory obligations.

25. The City was joined as a party to the proceeding in October 2007. In February 2008 the City sought a postponement of the application on a number of grounds, including the desirability of awaiting the outcome of the Consfitutional Court decision pursuant to the decision in *City of Johannesburg v Rand Properties (Pty) Ltd and Others 2007 (6) SA 417 (SCA)*. On 19 February 2008 the Constitutional Court gave its decision. See *Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg v City of Johannesburg and others 2008 (3) SA 208 (CC)*.

26. Subsequent to the Constitutional Court decision and in March 2008, the City filed its first report concerning the City's current and future ability to provide housing.

27. The First Respondent took issue with the contents of the Report. This was met with a challenge to the appropriateness of the October 2007 order joining the City as a party. Masipa J dismissed the joinder challenge and upheld the First Respondent's argument regarding the inadequacy of the City's Housing Report. See *Blue Moonlight Properties 39 (Pty) Ltd v Occupiers Saratoga Avenue and Another 2009 (1) SA 470 (W)*. The learned Judge expressed herself as follows in paragraph [69]:

> *"In the present case the report has not attempted to even remotely deal with the present eviction application and its implication as well as how or when it would be in a position to assist. A statement such as, 'The City cannot for the time being make any of its emergency shelters available for any persons evicted from property by way of PIE', is vague in the extreme and not helpful at all. It is clear that the City is trying to distance itself from the problems of the unlawful occupiers in this matter. This indeed is at odds with the Constitution*

and is tantamount to failure by the City to comply with its constitutional obligations."

28. I will refer to this passage later in relation to the conduct of the City and its subsequent failure to either appreciate or comply with its socio-economic obligations under the Constitution in respect of people living within its area, when by its own showing it claims to have budgeted for a large surplus in the relevant fiscal year and is able to locate and access emergency or temporary accommodation at short notice when exigencies arise.

29. Masipa J ordered the City to report to the Court on the "... *steps it has taken and in future can take to provide emergency shelter or other housing for the First Respondents in the event of their eviction as prayed*". The learned Judge allowed the other parties to file affidavits in response to the Report.

30. In January 2009 Blue Mountain brought contempt proceedings against the City and its officials by reason of

their failure to provide the Report ordered by Masipa J. The application was supported by the First Respondent and opposed by the City.

31. However, on 12 February 2009, the City filed a report effectively without prejudice to its rights to appeal the decision of Masipa J.

32. In summary, the City's Report:

32.1. Indicated that, despite the number of housing units constructed from 2007 to 2009 and the current number of available temporary accommodation as well as that planned in the CBD, there are not less than 160 000 inhabitants on the Provincial Department's official waiting list for housing.

32.2. Stated that the Gauteng Province had refused the City's request to provide an allocation of funds under section 12 of the National Housing Program

(Emergency Housing). The reason given was a lack of funds.

32.3. Submitted that the City merely implements provincial and national housing policy but has no obligation to finance it. While accepting that it is a local government which forms part of the State, it contends that its "... *constitutionally mandated role is passive in respect of housing delivery, in the sense that it does not itself dictate policy or provide funding*".

I have cited this extract from the Report since it forms an integral part of the City's argument both substantively and in respect of its belated application to join the Provincial Government as a party to the proceedings.

32.4. Categorically stated that "... *the City's budget does not provide for the financing of the acquisition of*

housing for occupiers of private land elsewhere within its jurisdiction".

It did not claim to have insufficient funds to provide accommodation for occupiers of state owned land.

32.5. Proceeded to explain that the City "*...focuses without being obliged to do so from its own resources and within its financial constraints, on the provision of shelter to occupiers of dangerous buildings, who qualify as being desperately poor and who find themselves in a true crisis situation*" (my emphasis). A "*dangerous building*" is identified as one that is in such a state of disrepair as to pose a fire hazard or disease threat to its occupants or is for some other reason totally unfit for residential occupation.

33. Both Blue Moonlight and the First Respondent delivered their commentaries in response to the Report.

34. Aside from repeating its common law rights to undisturbed use and occupation of its property, Blue Mountain contended that the occupiers were in premises that constituted a "*dangerous building*" under the City's own by-laws and therefore rendered those in occupation in breach of such laws. The owner contended that if this is what is necessary to secure evictions then the City should allocate the necessary emergency facilities.

35. The occupiers relied on the City's deliberate decision to exclude from its relief programs unlawful occupiers of privately owned land facing eviction under PIE, even though their plight may be similar to or worse than those occupying state-owned land (in the broad sense).

36. The occupiers then brought a substantive application :

36.1. To declare the City's housing policy, to exclude from consideration occupiers of privately owned land as opposed to state-owned land, as unconstitutional on grounds of unfair discrimination and arbitrariness;

36.2. To order the City to rectify its housing policy and report back to Court;

36.3. To interdict Blue Mountain from evicting the occupiers until suitable alternative accommodation is procured by the City or becomes available to it.

37. The City then filed a response to the First Respondent's application. It also contended that the occupiers were obliged to join the Provincial Government if they wished to pursue their constitutional challenge by reason of the provisions of Rules 10A and 16A of the Rules of Court. The occupiers disputed that their challenge was to the

constitutional validity of a law, but rather to the City's housing policy and contended that the City had only engaged the Provincial Government in April 2009, some 3 years after being made aware of the occupiers' predicament. They nonetheless sought a postponement of the main eviction application in order to join the Provincial MEC. The City was agreeable to this course. Blue Mountain was not.

38. In the meantime, and on 3 June 2009, Blue Mountain delivered what it termed a "*fresh*" notice of motion. The notice comprised a document setting out the various orders that were sought. There was no supporting affidavit or documentation. The notice sought a series of progressively muted forms of relief. First prize was an order seeking the immediate and unconditional eviction of the occupiers. Alternatively it sought an eviction order coupled with an order requiring the City to house the occupiers on an emergency basis. A more watered-

down order was proposed in the alternative, namely, *"interim relief that would have the effect of displacing ... some of the burden that it, as a private entity, has no obligation to bear"*. This alternative order included an order for monetary compensation against the City. It was the first time that Blue Mountain sought relief directly against the City.

39. In response, the City brought an application under Rule 30 and Rule 30A to strike out Blue Mountain's *"fresh application"* on the grounds that it was an irregular step. One of the grounds was that there was no *lis* between itself and the Applicant. The City also complained that it had not been afforded an opportunity to deal with the new forms of relief sought.

40. Accordingly, by the time the matter was to be heard on 17 June 2009, there were a number of interlocutory applications. I have already mentioned the occupiers' application to join the Provincial MEC or other relevant

executive officers of the Provincial Government which was in response to the City's motion for a mis-joinder under Rule 10A against them (in respect of their application for declaratory and interdictory relief against the City). The City also contended that there had been a failure to give notice to the Registrar under Rule 16A that a constitutional issue was being raised. There was also the strike-out application mentioned in the previous paragraph.

41. However, both the City and the occupiers were of the view that the matter was not ripe for hearing. Blue Mountain contended otherwise and insisted that the matter be argued.

42. The matter proceeded before me on 17 June 2009 with an application by the First Respondent for a postponement to join the provincial government. This was supported by the City. During the course of argument, the First Respondent withdrew its application and the City persisted with its contentions. I also dealt with the issue

regarding the applicant's new notice of motion of 3 June 2009.

43. On 18 June 2009 I refused a postponement for the joinder of the Gauteng Provincial Government. I granted an application to amend the Applicant's notice of motion dated 3 June 2009. By agreement I directed that the applications and counter-applications be consolidated, that there is a *lis* as between each of the parties and that the second respondent could file answering affidavits to Blue Mountain's application with the right of reply by both the Applicant and the First Respondent. Costs were reserved.

44. The issue regarding whether or not a *lis* existed between the parties was resolved by agreement that without the necessity of a formal joinder and having regard to the Court's power to *mero motu* direct joinder there would be a *lis* between each of the parties.

45. The application was then postponed until 22 July 2009 to hear argument on the merits of the main applications before me.

46. I now deal with the reasons for refusing the postponement in order to join the Gauteng Provincial Government and why I considered that the issue of a *lis* between the applicant and the City was readily resoluble without the need for formal affidavits.

REFUSAL OF POSTPONEMENT IN ORDER TO JOIN PROVINCIAL GOVERNMENT

47. It is considered axiomatic that anyone with a direct and substantial interest in the outcome of proceedings or who may be prejudicially affected by a court order must be joined. See *Amalgamated Engineering Union v Minister of Labour 1949 (3) SA 637 (A) at 659; Transvaal Agricultural Union v Minister of Agriculture and Constitutional Affairs 2005 (4) SA 212 (SCA) at para [64]* and generally

Rosebank Mall (Pty) Ltd v Cradock Heights (Pty) Ltd 2004 (2) SA 353 (W).

48. By contrast, the failure to join a party raises issues of *prejudice to that party should the Court make an order* affecting its interests. In the present case, the Gauteng Provincial Government showed no interest in becoming a party to the proceedings despite being aware of the issues. Indeed, the contempt proceedings referred to earlier were also directed at the MEC Housing for Gauteng, and the National Minister of Provincial and Local Government to ensure that the provisions of Masipa J's order, directing that a proper report be filed, was implemented on behalf of the City. Both delivered notice of intention to oppose the application. *Prima facie* they would have taken an informed decision either that the issue was to be dealt with by the City without the involvement of their spheres of Government or else that they supported the City's position (i.e. that the City ought

not to have been joined in the proceedings or that Masipa J's decision to require a further report was incorrect).

49. Accordingly, a joinder of the Gauteng Provincial Government had to be considered against the prospect of it challenging each of the steps taken up until then despite the lapse of 3 years since the original motion proceedings were launched.

50. Moreover, the City had belatedly sought to engage the Provincial Government in obtaining funds to find alternate accommodation for the First Respondent occupiers. The City confirmed that on 12 December 2008, the Head of the Provincial Housing Department, Ms B Monama, had received a full set of the papers filed of record. Despite advising her on 23 January 2009 that the City could not provide emergency accommodation and had to rely on the provisions of Chapter 12 of the National Housing Code, there had been no response from the Provincial

Government. At no stage did the Provincial Government seek to be joined in the proceedings.

51. The City, however, sought to justify the joinder of the Gauteng Provincial Administration on the following grounds :

(a) The Provincial Government should have been joined because the First Respondent had challenged the constitutional validity of a law (Rule 10A);

(b) The Provincial Government plays a crucial role in respect of securing emergency housing under Chapter 12 of the National Housing Code whilst the City had discharged its obligations under that Chapter, (i.e. by seeking assistance from Provincial Government which had declined on the grounds that it was unable to provide any funds for housing assistance either in respect of the First Respondent

occupiers or occupiers of a number of other properties within the Inner City).

52. The City furnished its application to the Gauteng Department of Housing with a caveat that any statements contained in the document should not be construed as an admission of any of the facts in issue as it had been compiled without reference to the City's legal representatives or necessarily an awareness of the issues before the Court.

53. The document reveals that the City regarded the position of the occupiers as constituting an emergency situation that could not be addressed by any of the other programmes contained in the Housing Code. It specifically identified eight buildings, including the building in issue, whose occupants were under threat of eviction and who would be homeless if evicted because they were poor. The emergency identified by the City was that residents needed to be relocated to alternative

accommodation by reason of imminent evictions from unsafe buildings and conditions.

54. The City indicated in its application for funding that it was currently investigating the acquisition of warehouses in and around the Inner City for conversion into temporary accommodation. These buildings were privately owned and would have to be purchased. Some R5 million was requested for the acquisition of these buildings. A further R30 million was requested in order to convert these buildings into temporary accommodation with water and sanitation facilities and some degree of internal partitioning in terms of health and safety standards. In addition, relocation charges, professional fees and operating costs of some R15,4 million were also requested, resulting in a total budget for the project of some R50,4 million.

55. The Provincial Government replied that it had thoroughly considered and applied its mind to the City's application

for a subsidy and reminded the City of the need to "... *identify efficiency gains and curbing of unnecessary expenditure*". It advised that the Department had committed all its budgetary and financial resources from a contractual point of view, did not have any funding available for emergency accommodation and could not accede to the City's request, but should it receive a cash injection during the course of the financial year, then the situation could be reconsidered. The last communication from the Provincial Government was on 5 June 2009.

56. Accordingly, over a period of some two months there was effectively only a discussion with a formal application for funding and two letters in reply stating the same thing.

57. It will also be recalled that the City disavowed any positive obligation to provide funding and perceived its position as a passive player.

58. It is perhaps appropriate therefore that the City be reminded of the decisions of both the Constitutional Court and the SCA which unequivocally rendered Local Government *directly responsible for implementing* the constitutional and statutory obligations regarding the provision of adequate housing on a progressive basis and to take active steps to provide accommodation for the most desperate by reference not only to the socio-economic rights identified in the Constitution and in housing legislation, but also by reference to the entrenched rights to dignity under Section 10 of the Constitution. I do so in the following paragraphs.

59. In both *Government of the Republic of South Africa and Others v Grootboom and Others 2001 (1) SA 46 (CC) at paras [44] and [82-83]* and *Port Elizabeth Municipality v Various Occupiers 2005 (1) SA 217 (CC) at paras [29] and [39]* the Court confirmed that the State, including municipalities are obliged to ensure the provision of

services to communities in a sustainable manner, and when providing services to residents the State is fulfilling its statutory and constitutional obligations to take reasonable measures to provide adequate housing.

60. The terms of section 152(1)(b) read with (d) of the Constitution require a Local Government to ensure the provision of services to communities in a sustainable manner and to promote a safe and healthy environment. Moreover Local Government, which consists of municipalities, have a primary responsibility to give priority to the basic needs of the community. Section 153, under the heading *"Developmental Duties of Municipalities"* reads as follows:

> *"A municipality must –*
>
> *(a) structure and manage its administration and budgeting and planning processes to give priority to the basic needs of the community, and to promote the social and economic development of the community' and*

(b) *participate in national and provincial development programmes."* [my emphasis]

61. In *Modderfontein Squatters, Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd and related matter 2004 (6) SA 40 (SCA)*, Harms JA at para [35] pertinently referred to a municipality having a positive duty to act in eviction matters where the provisions of PIE applied and placed reliance on *Grootboom* at para [87]. Although the Constitutional Court on appeal in Modderklip determined the issue by reference to the State's failure to satisfy the requirements of the rule of law and fulfil the section 34 rights to which the landowner was entitled (by reason of its inability to eject occupiers despite obtaining an eviction order from a competent court), Langa ACJ (at the time) responded to the Municipality's argument that it was not obliged to involve itself or to cooperate with the land owner in searching for solutions to the latter's inability to effect an eviction order. *(President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd*

(Agri SA and Others), amici curiae) 2005 (5) SA 3 (CC). At para 32, the then Acting Chief Justice reminded the Local Authority that:

> *"Section 4 (of PIE) requires that the Municipality be informed of any action for eviction being undertaking by a property owner. Section 6(1) of the Act provides for the institution of eviction proceedings by a municipality against an unlawful occupier from privately owned land which falls within the jurisdiction of such municipality."*

62. The City had also been reminded by Masipa J in her judgment earlier in this case that both under section 26 of the Constitution and under the Housing Act (section 9(1)), Local Government had positive obligations to ensure that those within its jurisdiction had access to adequate housing on a progressive basis. *See Blue Moonlight supra* at paras 23 and 30-31. See also *Lingwood and Another v The Unlawful Occupiers of Erf 9 Highlands 2008 (3) SA BCLR 325 (W) at para 24* and *Sailing Queen Investments v The Occupants of La Colleen Court 2008 (6) BCLR 666 (W) at paras 6 and 10.*

63. In two of the most recent cases, both the Constitutional Court and the SCA stressed the Municipality's constitutional obligations that it is obliged to discharge in favour of those facing eviction under PIE and it "... *should therefore not be open to it to choose not to be involved*". (See *The Occupiers of Erf 101, 102, 104 and 112 Shorts Retreat, Pietermaritzburg v Daisy Dear Investments (Pty) Ltd and others (SCA), case no. 245/08 at paras 13-14*).

64. In *Residents of Joe Slovo Community, Western Cape v Tubelisha Homes*, Ngcobo J (as he then was) at paras 209 and 210 reaffirmed the import of *Port Elizabeth Municipality* and *Grootboom* that the Local Authority has constitutional obligations to take reasonable measures to provide adequate housing. See also Yacoob J at para 75, in dealing with the object of Local Government under section 152(1) of the Constitution and section 73(1)(c) of the Local Government : Municipal Systems Act, No. 32 of 2000.

65. Sachs J in *Residents of Joe Slovo Community* at para [348] stated the following:

> *"The Constitution deals expressly with the duties of Councils towards disadvantaged sections of our society. It states that the objects of Local Government include ensuring "the provision of services to communities in a sustainable manner" and "promot[ing] social and economic development", and that a municipality must "structure and manage its administration and budgeting and planning processes to give priority to the basic needs of the community, and to promote the social and economic development of the community."*

Later at para [350] Sachs J referred to section 2(1) of the Housing Act which "... requires all spheres of Government to "*give priority to the needs of the poor in respect of housing development*". Municipalities are then given the following specific functions: (which the learned Justice then enumerates) being those contained in section 9(1). In summary, section 9(1), in peremptory language, states that every the Municipality must take all reasonable and necessary steps within the framework of national and provincial housing legislation and policy to ensure that the

inhabitants of its area of jurisdiction have access to adequate housing on a progressive basis and to properly plan in an informed way and implement programs directed at housing development which are financially and socially viable as well as promote the resolution of conflicts arising in the housing development process.

66. In City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others (SCA) case no 335/08, Nugent JA went into detail with regard to which sphere of local, provincial and national government is concerned with the regulation of the use of land within a municipal area. Of relevance for the purpose of this case is the manner in which Nugent JA dealt with the inter-relationship between the various spheres of government. At para [28] the learned Judge dealt with the general proposition with regard to the functions of government, identified in section 156(1), with regard to a municipality's executive authority in respect of and right to administer

local government matters listed in Part B of Schedule 4 and Part B of Schedule 5 and any other matters assigned to it by national and provincial legislation, the Court said :

> *"It will be apparent, then, that while national and provincial government may legislate in respect of the functional areas in schedule 4, including those in part B of that schedule, the executive authority over, and administration of, those functional areas is constitutionally reserved to municipalities".*

67. Later at paragraph [38] the Court concluded that it "... *cannot accept that the Constitution was framed so as to confine the powers of a municipality to conceiving and preparing plans in the abstract, with no power to implement them. ... I fail to see what purpose would be served by reserving power to Local Government merely to assist or participate in the exercise of powers by another tear of Government*".

68. I therefore conclude that the principal point taken by the City in relation to the necessity to join the Provincial Government as a necessary party, because the City has

no greater obligation than to seek financial assistance from the Provincial Government and is confined to the role of a passive bystander, is wrong. By now, the City should have fully appreciated that it is most directly involved and has the most direct and immediate control over housing and housing policy within its boundaries and in particular in relation to the attainment of the core rights *under section 26 of the Constitution as read with the* National Housing Act and the provisions of PIE.

69. Secondly, the constitutional challenge, as Mr Kennedy points out, is not directed at the validity of any law but to the discriminatory and arbitrary policy adopted by the City to exclude destitute occupiers who are subject to eviction from privately owned land.

70. There is a further matter that was not directly raised by Mr Both on behalf of the City. It, however, weighed with me in considering the issue of joinder and was raised in the course of argument, namely the impact of section 41 of

the Constitution in respect of the desirability of joining another organ of State in order to either clarify or resolve issues between them.

71. The effect of a joinder in the present case, although not expressly articulated, would involve a court of law determining whether and to what extent the Provincial Government was able to allocate funds and the relative obligations and duties as between these two spheres of Government in relation to their respective constitutional obligations under section 26 of the Constitution.

72. Prejudice is a consideration where a party whose rights may be potentially prejudiced has not been joined. However, the question of prejudice to a claimant if a party sued seeks to join another does not appear to be a consideration that has weighed with the courts.

73. This is readily understandable since it is in the interests of both the court and the parties before it that there not be

a multiplicity of actions and consequent court hearings in respect of the same subject matter. Moreover, a joinder assumes that a competent cause of action exists against the party sought to be joined.

74. The usual situations where a joinder will not be ordered are where the court is satisfied that a person has waived his or her right to be joined and in the case of joint wrongdoers where a claimant is not obliged to join all other wrongdoers although that is desirable (*Sasfin (Pty) Ltd v Jessop 1997 (1) SA 675 (W) at 682*). Similarly a claimant need not join all those who are jointly and severally liable to each other in the same action, but is entitled to select any one of them to the extent that a principal debtor need not be joined even though the surety who is sued may contest the principal debt. See *Parekh v Shah Jehan Cinema 1982 (3) SA 618 (D)* (compare [1998] 4 All SA 334 (W) at 345).

75. The history of the matter reveals that the Applicant brought its application in October 2006. The application for joinder was brought some three years later, effectively on the basis that there has been no headway with Provincial Government after a few discussions and one or two letters.

76. It is necessary to distinguish the usual situation of a person sought to be joined in conventional litigation where there is an existing claim that is currently enforceable from the case of organs of State that are in dispute with one another. In the latter case, neither State organ can simply pursue a claim. This is by reason of the provisions contained in Chapter 3 of the Constitution, headed "*Co-operative Government*".

77. Firstly, section 40 reads as follows:

> "***40. Government of the Republic***
>
> *(1) In the Republic, government is constituted as national, provincial and local spheres of*

government which are distinctive, inter-dependent and inter-related.

(2) *All spheres of government must observe and adhere to the principles in this chapter and must conduct their activities within the parameters that the chapter provides* – "[my emphasis]

78. Secondly, the key provision of Chapter 3 is section 41. It effectively requires spheres of government that are in dispute with one another to exhaust a consultative and other dispute resolution processes before the matter can be taken to court. This appears from the following extracts of section 41:

> "41. ***Principles of co-operative government and inter-governmental relations***
>
> *(1) All spheres of government and all organs of state within each sphere must –*
>
> *(a) ...;*
>
> *(b) secure the well-being of the people of the Republic;*
>
> *(c) provide effective, transparent, accountable and coherent government for the Republic as a whole;*
>
> *(d) be loyal to the Constitution, the Republic and its people;*

(e) respect the constitutional status, institutions, powers and functions of government in the other spheres;

(f) not assume any power or function except those conferred on them in terms of the Constitution;

(g) exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere; and

(h) co-operate with one another in mutual trust and good faith by –

(i) ...

(ii) assisting and supporting one another;

(iii) ...

(iv) co-ordinating their actions and legislation with one another;

(v) adhering to agreed procedure; and

(vi) **avoiding legal proceedings against one another**.

(2) An Act of Parliament must –

(a) establish or provide for structures and institutions to promote and facilitate inter-governmental relations; and

(b) provide for appropriate mechanisms and procedures to facilitate settlement of inter-governmental disputes.

> *(3) An organ of State involved in an inter-governmental dispute must make every reasonable effort to settle the dispute by means of mechanisms and procedures provided for that purpose, and must exhaust all other remedies before it approaches a court to resolve the dispute.*
>
> *(4) If a court is not satisfied that the requirements of sub-section (3) have been met, it may refer a dispute back to the organs of State involved."* [my emphasis]

79. It is evident that unless the mediation and other dispute resolution processes envisaged in section 41 of the Constitution have been exhausted, a Court might not properly be seized of the matter and must consider *whether or not to refer the dispute between spheres of* government back to them for resolution. In this case, the is one of a fair or proper application of budgeting priorities or a weighing of policy considerations, none of which may necessarily be justifiable before a court of law, having regard to the separation of powers principle.

80. *The legislation envisaged in section 41 (2) has been* implemented. It is to be found in the *Intergovernmental Relations Framework Act, 13 of 2005*. Extensive guidelines have been issued by the Department of Provincial and Local Government entitled "*Guidelines for the Settlement of Intergovernmental Disputes*".

81. In my view an additional factor militating against joining a Provincial or the National Government is that the Courts have already determined that a primary responsibility falls on a local authority to make provision for housing on a progressive basis having regard to its available resources. (See *Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg v City of Johannesburg and Others* per Yacoob at para 18).

82. I accordingly do not consider it self evident that even if the Provincial Government has an interest in the outcome of the matter it is necessarily desirable that it be joined. Other considerations such as further delay, the ability of a

Court on the facts before it to determine that the City itself has an obligation (as in the case of a joint wrongdoer whether other joint wrongdoers need not be joined) and the nature of the order that a court may be expected to make and the possibility of protracted delays in the finalisation of the issues where non-adversarial routes remain open, militate against a joinder. In the present case, I believe that on weighing the relevant factors, it was undesirable in allowing a postponement to join the Provincial Government.

THE *LIS*

83. The effect of the First Respondent joining the second respondent to the proceedings was to enable a court to make effective substantive orders as between them. However, it did not necessarily create a *lis* as between the Applicant and the second respondent. There is no triable issue between them. See *Control Instruments Finance (Pty) Ltd (in liquidation) v Mercantile Bank Ltd; In re:*

Mercantile Bank Ltd v MM Laubscher Rustasie (Pty) Ltd and others 2001 (3) SA 645 (C) at 649 but compare *MCC Contracts (Pty) Ltd v Coertzen and Others 1998 (4) SA 1046 (SCA) at 1050A* where Corbett J (at that time) was of the view that a *lis* could conceivably arise between the plaintiff and a third party who had been joined by a *defendant by reason of the wording of Rule 3(7) and (8).*

84. In a case involving indigent occupiers of land who are subject to eviction and a consequent infringement of their section 26 rights as well as their more profound right to dignity under section 10 of the Constitution, where a court can fashion an appropriate remedy in circumstances where the Local Authority is a necessary party (see above), it may be more difficult to adopt a too rigid approach as to whether a *lis* exists between the Local Authority and each of the other parties. In my view, as long as there is no prejudice to the parties, the court is entitled to direct joinder in the most effective way, and in

particular without the necessity to regurgitate the issues for the sake of formalism.

85. I consider that permitting the City such reasonable time as they requested to deal with the application of Blue Moonlight as it now concerned them, with a right of reply accorded to both Blue Moonlight and the Occupiers, would secure a full and fair ventilation of all the issues and an opportunity to deal with such relief or defences to the relief sought between the respective parties.

APPLICATION TO AMEND

86. I proceed to deal with the Applicant's application to amend its the notice of motion in terms of the fresh notice

of 3 July 2010 and the second respondent's challenge to strike it out.

87. As regards the City's further complaint that the notice of motion of 3 June 2009 was required to be supported by an affidavit, I took the view that properly construed Blue Moonlight was seeking no more than to amend the relief claimed and that if there was agreement as to a *lis* between it and the City and a consolidation of all applications and counter-applications, there was an unnecessary formalism in requiring further affidavits.

88. I heard argument and was satisfied that once a *lis* had been established between Blue Moonlight and the City and a consolidation of the matter, the Applicant was doing no more than fashioning relief based on the facts contained in the affidavits filed of record in respect of issues that had already crystallised and that whether relief in the form sought could be granted was a matter of law.

SUMMARY OF LEGAL ISSUES

89. Since the Applicant sought an eviction order, it may be appropriate to first identify its rights and the limitation of those rights to obtain an ejectment order.

90. It is then appropriate to identify the rights of occupiers of privately owned land who would be in desperate need should they be evicted.

91. It is also necessary to address the obligations of the City to take steps to implement a policy and programme for the provision of emergency or temporary housing. These obligations will be considered in relation to :

91.1. Its obligations, if any, to unlawful occupiers of privately owned land based on a challenge that its policy is both unfairly discriminatory and arbitrary;

91.2. Its obligations, if any, to landowners whose property is occupied illegally and the tensions created by PIE

in respect of the duration of such unlawful occupation after proper notice to evict and the City's obligation to prevent homelessness of the indigent under Section 26 of the Constitution;

92. Finally, it is necessary to consider the nature of the relief that might be obtained by unlawful occupiers of private land and by the owners of the property in question if the City has breached its constitutional or statutory obligations. This also involves consideration of whether the City is able to provide at least emergency housing and possibly temporary housing.

RIGHTS OF PRIVATE LANDOWNERS TO EVICT

93. The right to property is an essential foundational stone of a democratic state. There are at least two reasons for this. Firstly, the arbitrary seizure of land without adequate compensation strikes at the core of democratic values. The ability to strip people of the right to own private and

commercial property without adequate compensation was an essential tool of apartheid governments' ability to implement a system that undermined the fabric of African society, stunted its economic growth and undermined dignity.

94. The right not to be deprived of property, except in terms of a law of general application and subject to further limitations, which are always subject to just and equitable compensation is a constitutionally protected right under Section 25. One of the express limitations concerns the need to acquire privately owned land, subject to compensation, in order to address both the forced removal of communities and the inability to fairly access our natural resources. These issues are addressed under Section 25(4) to (8) and the enactment of the Restitution of Land Rights Act in accordance with subsection 25(9).

95. Secondly, the State is obliged to initiate and maintain the socio-economic objectives identified in Sections 26, 27

and 29 of our Constitution as well as maintaining the necessary framework to protect the security of all South Africans. It must have the ability to structure sound economic growth and stability through Government enterprises or to provide necessary goods and services through State-owned corporations. Its ability to do so is dependent on the State's ability to raise revenues by way of direct and indirect taxation, by the levying of rates and charging for basic services, such as water and electricity.

96. It is evident that section 26 of the Constitution affords everyone the right to have access to adequate housing and does not impose an obligation on the private sector to give up its property for this purpose. If this consequence had been intended, then the limitation of the right to use and occupy one's own property would have been founded in section 25. The private sector's obligation remains to provide the necessary revenues via

taxation and the other means already referred to, to *enable the State to achieve its duties under section 26.*

97. Moreover, section 26 does not, whether directly or indirectly, permit the State to either abdicate or thrust its responsibilities to provide adequate housing onto the private sector, nor does it suggest that the private sector is obliged to itself indefinitely provide housing without compensation. If this was the intention, then by reason of the limitation of rights to property being subject to compensation as part of a constitutionally protected right (under section 25), a purposive interpretation of the Constitution read as a whole would have similarly required the provision for "*just and equitable*" compensation where there is an indefinite inability to utilise one's own property.

98. Accordingly, the "*reasonable legislative*" measures envisaged in section 26(2) to achieve the progressive realisation of the right to have access to adequate

housing does not envisage laws that indefinitely require the private sector to be effectively expropriated of its common law rights of use and occupation of its own land.

99. On the contrary, it is my view that section 26(3) specifically addresses the relative limitation of rights on the private sector to take steps to evict those who under common law would not be entitled to occupy privately owned property. It specifically requires that an eviction may only be effected pursuant to an order of a competent court "... *made after considering all the relevant circumstances*".

100. The relevant provisions of section 4 of PIE and the preamble with regard to the eviction of an "*unlawful occupier*" as that term is defined in section 1 of that Act as follows :

> "***Preamble***
>
> *WHEREAS no one may be deprived of property except in terms of law of general application, and*

no law may permit arbitrary deprivation of property;

AND WHEREAS no one may be evicted from their home, or have their home demolished without an order of court made after considering all relevant circumstances;

AND WHEREAS it is desirable that the law should regulate the eviction of unlawful occupiers from land in a fair manner, while recognising the right of land owners to apply to a court for an eviction order in appropriate circumstances;

AND WHEREAS special consideration should be given to the rights of the elderly, children, disabled persons and particularly households headed by women, and that it should be recognised that the needs of those groups should be considered ...

4. ***Eviction of unlawful occupiers*** –

(1) notwithstanding anything to the contrary contained in any law or the common law, the provisions of this section apply to proceedings by an owner or person in charge of land for the eviction of an unlawful occupier.

(2) at least 14 days before the hearing of the proceedings contemplated in subsection (1), the court must serve written and effective notice of the proceedings, on the unlawful occupier and the municipality having jurisdiction.

(6) if an unlawful occupier has occupied the land in question for less than six months at the time when the proceedings are initiated,

a court may grant an order for eviction if it is of the opinion that it is just and equitable to do so after considering all the relevant circumstances, including the rights and needs of the elderly, children, disabled persons and households headed by women.

(7) if an unlawful occupier has occupied the land in question for more than six months at the time when the proceedings were initiated, a court may grant an order for eviction if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances, including, except where the land is sold in a sale of execution pursuant to a mortgage, where the land has been made available or can reasonably be made available by a municipality or other organ of state or another landowner for the relocation of the unlawful occupier, and including the rights and needs of the elderly, children, disabled persons and households headed by women.

(8) if the court is satisfied that all the requirements of this section have been complied with and that no valid defence has been raised by the unlawful occupier, it must grant an order for the eviction of the unlawful occupier, and determine –

(a) a just and equitable date on which the unlawful occupier must vacate the land under the circumstances; and

(b) the date on which the eviction order may be carried out if the unlawful occupier has not vacated the land

on the date contemplated in paragraph (a).

(9) in determining a just and equitable date contemplated in subsection (8), the court must have regard to all relevant factors, including the period the unlawful occupier and his or her family have resided on the land in question.

7. ***Mediation*** *–*

(1) if the municipality in whose area of jurisdiction the land in question is situated is not the owner of the land the municipality may, on the conditions that it may determine, appoint one or more persons with expertise in dispute resolution to facilitate meetings of interested parties and to attempt to mediate and settle any dispute in terms of this Act; provided that the parties may at any time, by agreement, appoint another person to facilitate meetings or mediate a dispute, on the conditions that the municipality may determine.

(3) any party may request a municipality to appoint one or more persons in terms of subsections (1) and (2) for the purposes of those subsections.

(5) all discussions, disclosures and submissions which take place or are made during the mediation process shall be privileged unless the parties agree to the contrary."[my emphasis]

101. I accept that a landowner's entitlement both to exercise unfettered rights to exploit his property or to obtain an eviction order immediately upon default of rental payments are limited. Historically, Rent Control legislation limited a landlord's ability to evict his tenant from certain classified residential properties. However, as pointed out by Selikowitz J in *City of Cape Town v Rudolph and Others 2004 (5) SA 39 (C) at 73D-E* such interference with property rights does not amount to an expropriation.

102. Moreover, under the common law, courts from time to time, but not immutably, would allow an occupier a period of grace within which to find alternative rented accommodation although the basis for doing so does not appear to have been articulated (*Bhyat's Departmental Store Ltd v Dorklerk Investments Ltd 1975 (4) SA 881 (AD) at 886*), it seems to have its foundation in the application of the Court's entitlement to ensure real and substantial

justice. See *Le Roux v Yscor Landgoed (Edms) Bpk en Andere 1984 (4) SA 252 (T) per Ackermann J at 259H-261B.*

103. In my respectful view, the fact that the Court's discretion under section 4 of PIE to delay the eviction of any unlawful occupier, whatever their personal circumstances, is temporary and what the exact period is depends on the circumstances of the case save that a landowner cannot be effectively deprived of his property without adequate compensation and ought to retain the right to decide how he wishes to develop what he has paid for.

104. I consider that the hierarchy principle of precedent binds me. The tension between the right to property under section 25(1) and an indigent unlawful occupier's right to access to housing under section 26 was determined in *Modderfontein Squatters, Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd* 2004 (6) SA 40 (SCA) where the SCA also considered that the landowner's right to equality under section 9(1) and (2) of the Constitution was

infringed by the State burdening the owner with providing accommodation without compensation.

105. Although the Constitutional Court on appeal (*President of the Republic of South Africa & Another v Modderklip Boerdery (Pty) Ltd supra*) considered it unnecessary to reach any conclusion on whether Modderklip's section 25(1) right to property had been breached, and if so to what extent, until the SCA decision has been overruled by the Constitutional Court, I am bound by it.

106. Accordingly, save for the further observations I have already made regarding the need to take into account the promotion of economic growth and development as the essential basis for providing revenue to organs of state through taxation and other means, I intend referring to only those key passages in the SCA judgment of *Modderklip* that are pertinent to weighing the nature of the landowner's constitutional rights having regard to the provisions of PIE.

107. The SCA confirmed that *Modderklip's* right to its property is entrenched by section 25(1) of the Constitution and that the unlawful occupation of its land, even if an eviction order had not been granted, amounted to such a breach (at para [21]). The duty under section 7(2) of the Constitution that is imposed upon the State to "*respect, protect, promote and fulfil the rights*" in the Constitution exists if the damaging act is caused by third parties (at para [26]) – I should add that the Constitutional Court also considered that it was unnecessary to deal with this issue – at para [26].

108. I should interpose that Langa ACJ (as he then was) in *Modderklip* on appeal to the Constitutional Court expressed the view at para [45] that :

> *"It is unreasonable for a private entity such as Modderklip to be forced to bear the burden which should be borne by the State, of providing the occupiers with accommodation."* It is however

unclear whether the statement is to be contextualised or whether it is self-standing.

109. Harms JA also referred in *Modderklip* to section 9 of the Constitution and applied De Villiers J's finding in the court *a quo* that *Modderklip* was not treated equally because "*... as an individual, it has to bear the heavy burden, which rests on the State*".

110. The SCA further expressed the view that circumstances can be envisaged where the right of access to adequate housing might be enforceable horizontally but that there is no legislation under which the State has transferred its obligation to provide access to adequate housing on a progressive basis to private landowners. The Court found that even in the extreme circumstances where there had been a massive invasion of privately owned land that there was nonetheless no horizontally enforceable right against a private landowner under section 26 of the Constitution (at paras [30] and [31]).

111. Accordingly, the case before me is an *a fortiori* one where there is no horizontal application to a private landowner of section 26 of the Constitution.

112. In order to succeed with an eviction application after due notice to a person in occupation for longer than six months the Court;

(a) must be of the opinion that it is just and equitable to do so after considering all the relevant circumstances including those enumerated in section 4(7);

(b) must be satisfied that all the requirements of the section have been complied with and that no other valid defence has been raised.

Once the Court has made these findings then it is obliged by the peremptory wording of section 4(8) to grant an eviction order.

113. However, the eviction order itself must provide a date upon which the occupiers must vacate and a date upon which the eviction order may be carried out if they have not vacated the land. In determining a just and equitable date for the land to be vacated the court under section 4(9) must have regard to all relevant factors, including the period the unlawful occupiers and his or her family have resided on the land in question.

RIGHTS OF DESTITUTE "UNLAWFUL OCCUPIERS" ON PRIVATE LAND

114. Fundamental to an understanding of the significance of the specific socio-economic right to access to housing identified in section 26 is an appreciation of at least the following historic factors that ought to be entrenched in our nation's collective psyche. First, that the right of access to housing is inexorably bound to and finds its origins in the right to dignity. Secondly, the existence of informal settlements and the lack of capacity within the central urban area close to employment opportunities are

directly attributable to the apartheid system of land distribution and influx control. That limited access by Africans to urban areas and then confining African people to townships. Ngcobo J (as he then was) in the *Joe Slovo* case at para [194] made the observation that:

> *"It was an anathema to make provision for the accommodation of more African people than the number essential to provide labour in the urban areas."*

115. It was the lack of accommodation in the townships that compelled people to live in informal settlements and then to move out of the squalor of those settlements, if they could, to dilapidated or abandoned buildings within the inner city or for others to exploit the situation by effectively seizing de facto control of inner city buildings and extracting rent whilst excluding the landlord from effectively exercising its rights.

116. I do not believe that it is necessary to expand on the historic reasons for the provision of housing for Africans

within the urban areas. It has been comprehensively dealt with by Ngcobo CJ at paras [191] through to [198] insofar as the existence of the housing crisis relates to those living in what are appropriately called "squatter camps". Reference may also be made to *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd 2007 (6) SA 199 (CC)* at paras 57-63 and 75 in relation to the repressive grid of legislation that unfairly discriminated against African people in relation to ownership and occupation of land where they had resided.

117. However, I do not believe that the significance of the rights to dignity have been property grasped by the City, its advisers and in particular those responsible for formulating its policy within the constitutional framework as required by section 153 of the Constitution. In *S v Makwanyane and Another 1995 (3) SA 391 (CC)* O'Regan J said the following :

"[327] The importance of dignity as a founding value of the new Constitution cannot be over-emphasised.

[329] Respect for the dignity of all human beings is particularly important in South Africa. For apartheid was the denial of a common humanity. ... The new Constitution rejects this past and affirms the equal worth of all South Africans. Thus recognition and protection of human dignity is the touchstone of the new political order and is fundamental to the new Constitution."

118. Accordingly, the Constitutional entitlement to respect for dignity is severely compromised if not unattainable (in the sense of self-worth) without a basic roof over one's head.

119. Section 26 of the Constitution expressly secures the right of access to adequate housing and requires the State to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right. See section 26(1) and (2).

120. Moreover, section 26(3) provides that:

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

121. These provisions have been given content through PIE and various housing legislation as well as the obligations imposed on all three spheres of government to give effect to the socio-economic rights accorded under the Constitution. I have dealt with the latter aspect. I proceed to deal with relevant aspects of our housing legislation.

122. The National Housing Act, to which I have already referred, imposes specific obligations on Local Government. I agree with Mr Kennedy's summary of section 9 of the Act, that Municipalities are obliged to take all reasonable and necessary steps, within the framework of National and Provincial housing legislation and policy to ensure that its inhabitants have access to adequate housing on a progressive basis and, *inter alia*, to prevent or eradicate unhealthy and unsafe habitation and *"initiate, plan, co-ordinate, facilitate, promote and unable appropriate housing development ..."*

123. Moreover, under section 2 of the National Housing Act, in performing its functions, a local authority must under sections 2(1)(a), (b), (c)(ii) and (c)(iv) give priority to the needs of the poor in respect of housing development, undertake meaningful consultation with individuals and communities affected by housing development, ensure that housing development is economically, fiscally, socially and financially affordable and sustainable and also ensure that it is administered in a "*transparent, accountable and equitable manner and uphold the practice of good governance*" [my emphasis].

124. Allied to the National Housing Act and relevant to this case is Chapter 12 of the Emergency Housing Program under the National Housing Code. Clause 12.3.1 defines an emergency as a situation where "... *the affected persons are, owing to situations beyond their control, evicted or threatened with imminent eviction from land or*

unsafe buildings, or situations where pro-active steps ought to be taken to forestall such consequences ...".

125. The Emergency Housing Program obliges a local authority to investigate and assess the emergency housing needs within their areas and to undertake pro-active planning in that regard. The program provides for funding from Provincial Departments of Housing.

126. Ngcobo CJ in the *Joe Slovo* case at paras [231] and [232] made it clear that the Constitution requires that all evictions must be carried out in a manner that respects human dignity, equality and fundamental human rights and freedoms and that section 26(3) "... *underscores the importance of a house, no matter how humble ... it acknowledges that a home is more than just a shelter from the elements. It is a zone of personal intimacy and family security.*" Reference was then made to international human rights law which recognises that whilst State projects for housing development and the like may

require evictions, it should not result in people being rendered homeless and that where those affected by the eviction are unable to provide for themselves, the Government "... *must take appropriate measures, to the maximum of its available resources, to ensure that adequate alternative housing, resettlement or access to productive land, as the case may be, is available.*"

127. Constitutional Court and SCA authority on the subject make it plain that those in desperate situations who face eviction are entitled to have access to adequate housing on a progressive basis and that all tiers of Government must take reasonable legislative and other measures within available resources to achieve this end. However, desperately poor families have no right to look to private landowners for indefinite continued accommodation at no cost.

OBLIGATIONS OF THE CITY TO "UNLAWFUL OCCUPIERS" OF PRIVATELY OWNED LAND

128. It is clear from the Constitutional Court and SCA judgments to which I have referred, that the City has a positive constitutional duty to the desperately poor not to render them homeless should they be evicted.

129. The right of access to adequate housing is given effect where the City takes reasonable measures through a coherent public housing program towards the progressive realisation of this right within the State's available means. (See *Grootboom* at para [41]). Moreover, Ngcobo CJ identified reasonable measures to mean ".. those that take into account "*the degree and extent of the denial of the right they endeavour to realise*" and they should not ignore people "*whose needs are the most urgent and whose ability to enjoy all the rights therefore are most in peril*"." (See *Residents of Joe Slovo* at [226] citing *Grootboom* at para [42].

130. Moreover, the measures and policies, in accordance with Grootboom, at para [44] "*facilitate access to temporary*

relief for people who have no access to land, no roof over their heads, for people who are living in intolerable conditions and for people who are in crisis because of natural disasters such as floods and fires, or because their houses are under threat of demolition." (See *Residents of Joe Slovo* at [227])

OBLIGATIONS OF THE CITY TO PRIVATE OWNERS OF ILLEGALLY OCCUPIED LAND

131. I respectfully apply the SCA reasoning in *Modderklip* and certain of the observations made in *Modderkliip* and by Masipa J in *Blue Moonlight*.

132. I have already referred to the extract by Langa CJ in *Modderklip* at para 45 to the effect that it is unreasonable for a private entity to be forced to bear the burden which should be borne by the State to provide occupiers with accommodation.

133. I believe the extensive references earlier in this judgment to the SCA decision in *Modderklip* adequately

demonstrate that there is binding authority for the proposition. It is necessary to expand further upon it.

134. Moreover, Masipa J in the earlier contempt proceedings in this matter said at paragraph 37 :

> *"It seems that the City is of the view that its obligations to assist unlawful occupiers are confined only to cases where occupiers are evicted from public property. That this cannot be correct is clear from the relevant statutes already referred to above as well as from case law."*

135. Whatever the temporary period might be to assist in the amelioration of hardships caused by an eviction order in respect of those who are unlikely to find alternate shelter, no tier of Government can transfer its constitutional obligations to private citizens on what, realistically, would be an indefinite basis rendering the ownership rights nugatory.

BREACH OF FIRST RESPONDENT OCCUPIERS' RIGHTS BY THE CITY

136. Mr Both, on behalf of the City, contended that since Housing fell under the functional area of concurrent national and provincial legislative competence, the primary constitutional obligation to provide housing or access to housing did not lie with Local Government. He argued that Local Government's role is secondary, has no right to formulate or apply a housing policy independently of the other spheres of Government and that section 9(1) of the National Housing Act effectively compelled the Municipality to perform its functions "... *within the framework of National and Provincial Housing legislation and policy*".

137. The City also argued that the financial burden to provide housing lies with National and Provincial Government and not with municipalities.

138. It was also argued, on behalf of the City, that a court has no jurisdiction to reallocate public funds. See *City of*

Johannesburg v Rand Properties (Pty) Ltd and Others 2007 (6) SA 417 (SCA) at para 45.

139. Finally, it was contended that Chapter 12 of the National Housing Code which deals with emergency housing is a reasonable and responsible measure adopted to meet the content of the Constitutional Court's judgment in *Grootboom*. In particular, the City referred to the following extract from Chapter 12 in support:

> *"The judgment furthermore suggested that a reasonable part of the National Budget be devoted to providing relief for those in desperate need, but the precise allocation was for National Government to devise.*
>
> - *Consequently, this program is instituted in terms of section 3(4)(G) of the Housing Act, 1997, and will be referred to as "the National Housing Programme for Housing Assistance in Emergency Housing Circumstances".*

140. In my view the City has obfuscated the issue and has declined to explain its policy of excluding from any of its accommodation programs, whether emergency, temporary or otherwise, the City's inhabitants threatened

with eviction from private property. The City also refuses to acknowledge the consequence that flows from its decision to exclude a class of indigent occupier but provide assistance to those who were to be removed from property owned by it or other organs of State for whatever pressing reason.

141. The consequence of excluding persons in the position of the first respondent occupiers of private property was to exclude them from both program formulation and budget preparation. It is not surprising therefore that there has not been a budget allocation. It is, however, difficult to appreciate that the persons responsible for this policy decision could genuinely have believed it to be justifiable. The fact that it is not is demonstrated by the failure of any meaningful argument being presented on behalf of the City in that regard.

142. In my view, the City cannot rely on its own default to explain why it has neither the budget nor the

accommodation to cater for indigent occupiers of private land facing eviction.

143. Moreover, the City has persisted over at least three fiscal years, after becoming aware of the challenge to its exclusionary policy, to reconsider its position both in the formulation of its policy or in the planning of its budget.

144. It is self-evident that a failure to exclude indigent occupiers facing eviction solely on the basis that they happen to have found refuge on private, as opposed to State-owned property, offends the first respondent occupiers' right to "... *equal protection and benefit of the law*" under section 9(1) of the Constitution. It also offends their right to "... *full and equal enjoyment of all rights and freedoms*" under section 9(2). In particular, the effect of the City's policy to plan and budget (since at least late 2006) for indigent occupiers of private property faced with eviction, excluded them from the enjoyment of the right to have access to emergency or temporary housing

under section 26 of the Constitution as explained in *Grootboom*. This amounts to unfair discrimination.

145. Moreover, such unfair discrimination renders the City's policy and its implementation, whether in the form of providing accommodation or planning and budgeting for housing relief, constitutionally flawed, irrational and unreasonable.

146. In *Grootboom*, the Constitutional Court, when cautioning against judicial activism in relation to the division of powers said:

> *"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."*

147. In the present case, the answer to that question is "No".

148. The City did not argue that the unfair discriminatory policy contended for by the first respondent is not specifically

referred to in section 9(3). If it had been necessary to deal with the topic then I would have had little difficulty in applying the purposive interpretation to the constitutional provisions contained in section 9 (equality) read as a whole, section 110 (human dignity) and section 26 (housing). Compare *Attorney-General Botswana v Unity Dow 1994 (1) BCLR (C of A Botswana)*.

149. It is also of concern that the City's policy was self-serving. The exclusionary policy not only benefited its own interests but also had the potential of allowing it to overcome the difficulties inherent in a section 6 eviction under PIE where effectively it is obliged to allow occupiers to remain on State-owned land indefinitely until basic accommodation can be provided. This is by reason of the greater burden imposed on the State to demonstrate that an eviction from State land is also in the public interest and see *Joe Slovo Residents*, per Moseneke DCJ at para [172].

150. Indeed, in *Port Elizabeth Municipality v Various Occupiers 2005 (1) SA 217 (CC)*. The Constitutional Court held that although there was no unqualified constitutional duty under section 6(3) of PIE, on Local Government to provide alternative accommodation, "... *a court should be reluctant to grant an eviction against relatively settled occupiers unless it is satisfied that a reasonable alternative is available, even if only as an interim measure pending ultimate access to housing in the formal housing program.*" *(per Sachs J at para [28]).*

BREACH OF BLUE MOONLIGHT'S RIGHTS BY THE CITY

151. A necessary corollary to unfairly discriminating against the unlawful occupiers of Blue Moonlight's property is that Blue Moonlight's own constitutional right to be treated at least equally with the State was breached in regard to accessing the City's program to house, on either an emergency or temporary basis, destitute occupiers of land subject to eviction under PIE.

152. In *Modderklip*, Harms JA at paras [30]-[31] referred to the application of the equality provisions contained in section 9(1) of the Constitution where the State "... *allowed the burden of the occupiers' need for land to fall on an individual.*" The SCA endorsed the finding by De Villiers J in the Court *a quo* that Modderklip had not been treated equally because "... *as an individual, it has to bear the heavy burden, which rests on the State, to provide land to some 40 000 people.*"

153. In the present case, not only is Blue Moonlight expected to utilise its land at no cost and to prevent it from realising its investment through developing the land without compensation, but the City has adopted a policy that benefits its interests more beneficially than private landowners without any discernible justification, particularly if regard is had to the heavier burden placed on the State to allow continued residence on State-owned land if no alternate accommodation is available.

154. Accordingly, the City's policy not to provide accommodation or plan or budget for the procurement of accommodation on an emergency or temporary basis in respect of private land occupied unlawfully under PIE is unfairly discriminatory and offends the equality provisions of section 9 of the Constitution.

CONSEQUENCES OF THE BREACH OF BLUE MOONLIGHT'S RIGHTS

155. It is a fundamental principle that where there is a right there is a remedy. *See Harris v Minister of ??*

156. It is settled law that a court has a duty to fashion an order that will achieve effective relief for those whose constitutional rights have been breached. *See Minister of Health and Others v Treatment Action Campaign and Others (2) 2002 (5) SA 721 (CC) at para [102].*

157. In *Fose v Minister of Safety and Security 1997 (3) SA 786 (CC) at para [42]* Ackermann J determined that appropriate relief will "... *in essence be relief that is*

required to protect and enforce the Constitution." The Court indicated that this may not only take the form of a declaration of rights or other usual orders but may include new remedies to secure the protection and enforcement *of rights enshrined in the Constitution. Ackermann J* continued:

> *"In our context and appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the right entrenched in the Constitution cannot properly be held or enhanced. particularly in a country where so few have the means to enforce their rights through the courts, it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated. The courts have a particular responsibility in this regard and are obliged to "forge new tools" and shape innovative remedies, if needs be, to achieve this goal."*

158. In *Joe Slovo Residents* Sachs J at paras [333] and [334] referred to the courts' function in managing tensions between competing legitimate claims to adopt as balanced, fair and principled resolution as possible.

159. During argument, the possibility of expropriating property that was of little current worth and use it not only to house the families that were there but others was mooted, particularly having regard to the enormous costs that had already been incurred by the City in litigating up to that stage. This did not find favour. It is evident from *Ekurhuleni Metropolitan Municipality v Dada N.O. and Others* (SCA) (case No. 280/2008) that it is inappropriate if not incompetent to direct expropriation. Whilst the City may not have a comprehensive or coherent long-term plan for the area in question, a court would be imposing its resolution of an issue between immediate parties on matters where broader planning considerations may be involved and may effectively retard structured urban growth.

160. This brings me to the second concern that I must guard myself against, namely, improperly usurping the policy-making functions of Government.

161. It is, however, clear from *Modderklip*, both before the SCA and the Constitutional Court, that constitutional damages based on the loss of use of property by a landowner can constitute an acceptable form of relief in appropriate circumstances.

162. In the present case Blue Moonlight has been deprived of its entitlement to use and develop its property. This is sufficiently causally linked to the breach by the City of Blue Moonlight's rights to equality of treatment and in its failure since at least 2006 to implement a reasonable program and include in its budget provision for the accommodation of indigent occupiers of private owned land.

163. There are three further considerations that weigh with me. The first is that the attitude of the City has been to wash its hands of any obligation, whether constitutional or otherwise, to adopt a coherent program and take steps to secure basic accommodation for all those who it ought

to have established (by way of surveys and projections) were indigent and at risk of being evicted from property within its area of jurisdiction and irrespective of who held title to the land in question. The City's failure is aggravated by the fact that both before and during the past three years a body of law has been built up before our highest courts that the City should have heeded.

164. Secondly, the City appeared to have a sufficient budget to deal with providing emergency or temporary accommodation without reference to the Provincial Government. This arises from the First Respondent's reply to the City's report. The first respondent (at para 20.3) stated that according to the City's latest medium-term operating budget (which was attached) it had budgeted for a surplus of R397 million which is expected to increase to R647 million in the 2009/2010 financial year. This appeared from the City's Integrated Development Plan. The City's response (at para 27 of its reply) was curt and

unhelpful. Mr De Klerk who is the Director-Director: Legal and Compliance of the City, said the following:

> *"Although a city the size of Johannesburg is indeed very large and its budget is significant, the second respondent has attempted in its 2008 report to describe to the court the many and varied demands on its funds. It is naive and inappropriate (if not presumptuous in the extreme) for the first respondent to purport to rewrite and reallocate the City's budget."*

165. I find it difficult to appreciate how drawing attention to the fact that there is a budgeted surplus, amounts to telling the City how to apply its funds. Its obligation to apply its funds with regard to its constitutional and statutory obligations, and in particular those involving social-economic upliftment is an issue before the court and it was for the City to explain why it could not apply any portion of its anticipated budgeted surplus to shore up its failure to include indigent occupants of privately owned land in its emergency or temporary accommodation program or to find even the R5 million as

a first stage to acquiring property in terms of its request to the Provincial Government (see above).

166. The belated attempt to argue the issue of what a budget surplus means did not assist matters. On the contrary, the City's report revealed that without National or Provincial Government funding, the City had embarked on its emergency and temporary accommodation program, using its own resources and without requesting funding from the other spheres of Government. This appears from the following passage:

> *'The City focuses, without being obliged to do so, from its own resources and within its financial constraints, on the provision of shelter to occupiers of dangerous buildings, who qualify as being desperately poor and who find themselves in a true crisis situation. There are numerous dangerous buildings in the city of Johannes burg."*

167. The condition of the applicant's property, the fact that it has already received warnings from the City regarding the state of the building and the clear evidence regarding its degradation is unlikely to result in significant damages

based on the loss of use of the property on the basis that I regard as appropriate, namely rental.

168. I have based constitutional damages by reference to rental values and not by reference to lost opportunity revenues had the property been developed in the interim period. In doing so I have considered that the fairest form of compensation is to be based on the benefit to the Municipality of not being obliged to incur the cost of its self procuring accommodation and effectively foisting its duties on the Applicant when it appeared to have adequate resources at the time.

169. Blue Moonlight only sought compensatory relief against the City in its notice of motion of 3 June 2009. In my view it is appropriate that compensatory damages in the form of notionally lost rental for holding over is only claimable from the commencement of the following month, 1 July 2009. The City had ample opportunity to consider its

position in the meantime when preparing its answering affidavits.

170. Finally, relevant case law considers it best to avoid what might be unnecessary further litigation between the parties where other means of fairly resolving potential disputes arise. See *Modderklip* (SCA) at para [44]. Mr Brassey, on behalf of Blue Moonlight had sought an order where, failing agreement on what constitutes a fair and reasonable monthly rental, a sworn valuator appointed by the President of the South African Council for Property Valuers profession would make the determination. I considered this to be an eminently practical dispute resolution process, save that it is necessary to ensure that the valuator's decision is subject to scrutiny by the Court on the limited basis of a judicial review as is the case with the decision of an arbitrator.

171. By reason of the view I take in regard to Blue Moonlight's right to evict the first respondent occupiers and when that

is to take place, constitutional damages are payable up to the date when the eviction order is effected and the occupants vacate.

REMEDIES AS BETWEEN THE FIRST RESPONDENT OCCUPIERS AND THE CITY

172. There can be no doubt that the City breached its constitutional and statutory obligations towards the first respondent occupiers by precluding them for a period of at least four years from access to its emergency and temporary housing programs.

173. Moreover, the fact that some of the occupants may have only been on Blue Moonlight's property since 2008 is irrelevant. The City's obligation remains to provide access to adequate housing on a progressive basis within the limitations of available resources with due regard to the poorest who otherwise would have no shelter and little prospect of a dignified life. Their papers reflect that they ought to have been in a position to do so at least during

176. The remedy for the breach of the occupants' constitutional and statutory rights in respect of accommodation appear extremely limited. A court cannot dictate who should go to the head of the queue. What it can concern itself with is whether the order it makes will result in an impermissible queue-jumping. By reason of the failure to have any regard to the occupants' rights over a significant period of time, this issue does not arise.

177. While it is correct that compensatory damages until accommodation is provided may result in the City changing its policy and budgeting, nonetheless it is obliged to change its position not because the court has selected another route but because it is constitutionally obliged to include indigent occupants of private land threatened with eviction in the housing programs and to budget for it.

178. There might be a concern that raising rates and taxes will be a necessary consequence particularly as there is a real risk of an avalanche of litigation seeking subsidies for accommodation.

179. In part the first concern is answered by reference to the letter addressed by the Provincial Government when the City applied for emergency funding. It recognised that there was a need for departments within the Provincial Government to exercise proper fiscal discipline. Secondly, there are numerous unoccupied buildings within the CBD. None of the reports presented by the City dealt meaningfully with whether these buildings were being moth-balled by the State indefinitely or whether they were to be developed. It is for this reason that I have included an order effectively requiring an audit of vacant State-owned buildings. I should add that Mr Kennedy also forcefully argued that even the subsequent

Report by the City was inadequate. By reason of the view I take it is unnecessary to make a finding on this.

180. Since handing the order down, strong statements have emanated from the National Assembly of a renewed commitment to prioritise the provision of housing. The way in which I have formulated the order enables the City to find either emergency or temporary accommodation for the first respondent occupants. As soon as that occurs monthly compensatory damages ceases.

181. The occupiers sought orders to be placed effectively close to where they presently live. Moreover, the rentals in buildings which might be available vary dramatically. In my view the City should avoid disrupting the lives of the occupants unduly, particularly where children are enrolled in nearby schools or employment is in close proximity.

182. Nonetheless there is no obligation on the City to do so nor is it obliged to spend more than it otherwise would because an unlawful occupier is able to occupy premises in a relatively better suburb than another. The yardstick is not where the occupant was able to find accommodation at no cost, but rather what is a fair amount to acquire rudimentary accommodation within a reasonable radius, having regard to the circumstances and the cost of available transport.

183. I had regard to COHRE's survey and to its conclusion that the cheapest private rental accommodation available in the inner city was approximately R850 per month for a single room with cooking facilities and a bath, but excluding water and electricity. No more recent figures were provided. If water and electricity was included then a family of four would pay a minimum of R1 000 per month. Nonetheless the COHRE survey also identified cheaper available premises.

184. There is very little data available to me. Moreover, the occupants range from those who have no income whatsoever to the few who earn R2 000 or more a month. There is also the concern of adequate oversight. In my view the court does not have enough to individualise the amount that each occupant ought to receive in the form of compensatory damages until either emergency or temporary accommodation is provided. It is therefore necessary to provide a regular review mechanism to monitor and oversee the appropriate subsidy.

185. I accept that the structure of my order is intended to encourage the City to expeditiously reassess its housing program in accordance with its constitutional obligations. It also assumes that the order I make can be implemented. Again this is based on the facts presented, including the fact that the City was able to find on an urgent basis accommodation when pressed to do so by a court order of Claassen J in a matter heard after it had

filed papers. The City claimed that it was compelled to do so by reason of the court order. It is evident that the City had claimed that it had no such recourse to accommodation.

186. Finally, in the contempt proceedings, Masipa J, at para 69, considered that the City was trying to distance itself from the problems of unlawful occupiers which is at odds with the Constitution and is tantamount to a failure by the City to comply with its constitutional obligations. I consider the subsequent conduct in these proceedings by the City and the position it has continued to take to be essentially unchanged. I accordingly remain sceptical at its protestations, either in relation to budgetary constraints or accessing emergency or temporary accommodation.

APPLICATION OF SECTION 4 OF PIE

187. I must consider whether Blue Moonlight is entitled to an eviction order against the first respondent occupiers and,

if so, to determine the relevant dates mentioned in section 4(9).

188. In *Occupiers of 51 Olivia Road, Berea* the Constitutional Court considered the appropriateness of an order that would require the parties to meaningfully engage one another in the fashion contemplated in section 7 of PIE. The requirement of meaningful engagement was again considered in *Joe Slovo Residents* at paras [239]-[247].

189. In my view the possible resolution of the case without a court decision has been explored during the hearing. It is evident that the parties now seek finality regarding their respective positions.

190. In order to come to a decision as to whether or not an eviction order must be granted on the basis that it is just and equitable to do so, I have considered the following relevant circumstances;

(a) The inability of any of the current occupants to be able to afford rented accommodation without subsidisation;

(b) The degree of movement of occupants. Currently more than half of the occupants have only resided on the property since notice to vacate was given. Of the 86 people occupying at the last formal census, at least 16 individuals only commenced occupation after proceedings were instituted. In addition, 19 others only took occupation in 2006, which means that they were on the property for less than six months prior to proceedings being instituted.

(c) It is axiomatic that irrespective of the length of occupation and whether or not occupation only occurred after proceedings were instituted and with full knowledge that an eviction order was being sought, the occupants are unable to afford

any basis accommodation and are at risk of losing such meagre piece work as they are able to obtain, or a basic shelter to be able to prepare for their studies.

(d) Blue Moonlight acquired the property for development. As a private land owner and investor, it is able to exploit the land and will be able to create work during the demolition and development phases and once developed the property will become rateable at a significantly higher figure.

(e) Urban renewal is a desirable objective but must be tempered if immediate hardship will be caused that is not alleviated by other fair means.

(f) Without the ability to evict, there is no realistic prospect that Blue Moonlight can gain possession of its property. Effectively the property will be lost.

191. The principal finding I have made is that a private landowner cannot be indefinitely deprived of the bundle of rights that come with the ownership of immovable property. Accordingly, Blue Moonlight is entitled to an eviction order. The only question is when it is to be implemented having regard to what is just and equitable in the circumstances.

192. Blue Moonlight has been unable to realise any benefit from its investment for some five years.

193. On the other hand, the occupiers live in squalid conditions with no water or other basic facilities.

194. Resolution of what is just and equitable therefore depends on what constitutes a reasonable time within which the first respondent occupiers can find alternate accommodation. Clearly there can be no time stipulated if they do not have sufficient income to pay rental for even the most meagre of accommodation. I

have, however, resolved that the rights of the landowner do not allow for an indefinite deprivation that renders their section 25 rights *de facto* nugatory and that the occupants are entitled to compensatory damages in the form of a subsidisation of their income that is likely to allow them a form of basic accommodation until the City remedies its breach.

195. In my view a period of one month only is inadequate. However, a period of three months, having regard to the tenuous position in which the occupants must have realised they were in and there being no evidence that alternate accommodation cannot be found within a period just short of two months is not justified on the papers, I consider it appropriate that, having regard to the time that has already elapsed and there being no suggestion that a period just short of two months would be inadequate, such a period would be appropriate.

ORDER

196. On 5 February 2010 I accordingly ordered that:

IT IS ORDERED THAT:

1. The first respondent and all persons occupying through them (collectively "*the occupiers*") are evicted from the immovable property situate at Saratoga Avenue, Johannesburg and described as Portion 1 of Erf 1308 Berea Township, Registration Division IR, Gauteng ("*the property*");

2. The occupiers are ordered to vacate by no later than 31 March 2010, failing which the Sheriff of the Court is authorised to carry out the eviction order;

3. The Second Respondent shall pay to the Applicant an amount equivalent to the fair and reasonable monthly rental of the said premises from 1 July 2009 until the occupiers vacate on 31 March 2010, which amount is to be determined by agreement between the Applicant and the Second Respondent and failing agreement by a sworn valuator appointed by the President of the South African Council for Property Valuers Profession with a rights of judicial review to a competent court accorded to the parties;

4. The Second Respondent's application of its housing policy is declared unconstitutional to the extent that it discriminates from consideration for suitable housing relief (including temporary emergency accommodation) persons within the Second Respondent's area of jurisdiction

   (a) Who are subject to eviction from privately owned land, whether by reason of the building constituting a dangerous building under the said housing policy or for any other reason, provided that the eviction is in terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998, and

   (b) Who are in desperate need of housing, or who would otherwise qualify if they had been in occupation of property owned by or devolving upon the Second Respondent and/or another organ of state whether by reason of the building being a dangerous building as aforesaid or any other currently qualifying ground under the Second Respondent's existing housing policy;

5. The Second Respondent is ordered to remedy the defect in its housing policy set out in the preceding paragraph 4 above and;

   (a) to report to this Honourable Court under oath, on the steps it has taken to do so, what steps it will take in the future in this regard and when such steps will be taken;

   (b) the Second Respondent's report is to be delivered by 12 March 2010. The report shall include details of all state owned office buildings that are de facto unoccupied, and in respect of each building a statement by a senior responsible person who has direct knowledge, as to when, if at all in the foreseeable future, it is expected that the buildings will be occupied;

   (c) the First Respondent may within 10 days of delivery of the report deliver commentary thereon, under oath;

   (d) the Second Respondent may within 10 days of delivery of that commentary, deliver its reply under oath;

   (e) thereafter the matter is to be enrolled on a date fixed by the Registrar in consultation with the

presiding Judge for consideration of the aforesaid report, commentary and reply and determination of such further relief to the individual claiming as the First Respondent as may be appropriate having regard to the implementation of the order set out in the following paragraph;

(f) By no later than 31 March 2010;

- the Second Respondent shall provide each of the occupiers who are entitled to claim as the First Respondent with at least temporary accommodation as decant in a location as near as feasibly possible to the area where the property is situated and if rental is expected then, unless there is agreement with the individual occupier or household head (as the case may be), such rental may only be imposed pursuant to a court order, which application may be dealt with at the same hearing to consider the report referred to in paragraph 5 above;

ALTERNATIVELY and until such time as such accommodation is provided

- the Second Respondent shall pay per month in advance, on the 25th of each month preceding the due date of rental and commencing on the 25 March, to each occupier or household head (as the case may be) entitled to claim as the First Respondent the amount of R850 per month until the final determination of the relief referred to in paragraph 5 (e) above that might be sought; PROVIDED THAT: The amount payable in the first month to each occupier or household head shall include an additional sum of R850 should a deposit be required from a landlord, which shall be refunded in full to the Second Respondent upon expiry of the lease or upon accommodation being provided as aforesaid by the Second Respondent.

(g) Where a monthly amount is paid to one of the First Respondents in lieu of accommodation as provided for in paragraph 6(b) then such amount will be reviewed by the parties every six months without prejudice to any parties right to approach a court to increase or decrease the amount;

(h) For the purposes of paragraphs 5 and 6 the persons entitled to claim as the First Respondent are those whose names appear in the Survey of Occupiers of 7 Saratoga Avenue, Johannesburg under filing notice of 30 April 2008 at pages 784 to 790 of the record provided they are still resident at the property and have not voluntarily vacated;

(i) The second Respondent shall pay the Applicant's and the First Respondent's costs, including the costs that were previously reserved and including the costs of two counsel.

SPILG J