CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 22/08
[2009] ZACC 16

RESIDENTS OF JOE SLOVO COMMUNITY, WESTERN CAPE	Applicants
versus	
THUBELISHA HOMES	First Respondent
MINISTER FOR HOUSING	Second Respondent
MINISTER OF LOCAL GOVERNMENT AND HOUSING, WESTERN CAPE	Third Respondent
with	
CENTRE ON HOUSING RIGHTS AND EVICTIONS	First Amicus Curiae
COMMUNITY LAW CENTRE, UNIVERSITY OF THE WESTERN CAPE	Second Amicus Curiae

Heard on : 21 August 2008

Decided on : 10 June 2009

JUDGMENT

THE COURT:

[1] In this case, five judgments have been prepared by different members of the Court: Moseneke DCJ, Ngcobo J, O'Regan J, Sachs J and Yacoob J. All the

judgments support the order set out at the end of this judgment. This judgment has been prepared to outline briefly the basis upon which all judges agree that the order should be made.

[2] The history of the matter and the relevant facts are set out fully in the judgment of Yacoob J. Crisply, the question the Court has to answer is whether the application for leave to appeal against the order of eviction made by the Western Cape High Court, Cape Town[1] should succeed and, if so, on what basis.

[3] All the judgments agree that two key legal questions must be answered. The first is whether the first to third respondents have made out a case for eviction of the applicants in terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 ("the PIE Act" or "PIE"). Key to the PIE question is whether, at the time the eviction proceedings were launched, the applicants were "unlawful occupiers" within the meaning of PIE and whether it is just and equitable to issue an eviction order. The second question is whether the respondents have acted reasonably within the meaning of section 26 of the Constitution[2] in seeking the eviction of the applicants.

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[1] *Thubelisha Homes and Others v Various Occupants and Others* Case No 13189/07, Western Cape High Court, Cape Town, 10 March 2008, unreported. The full terms of the order made by the High Court are to be found below at [13] of the judgment of Yacoob J.

[2] Section 26 provides:

> "(1) Everyone has the right to have access to adequate housing.
>
> (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.
>
> (3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions."

[4] All the judgments accept that by the time the eviction proceedings were launched, the applicants were "unlawful occupiers" within the meaning of PIE, although the reasoning which supports this conclusion differs. The difference between the judgments concerns whether the applicants had the consent of the municipality to occupy the land in question within the meaning of PIE. In this regard, Yacoob J holds that they did not have consent at all, while Moseneke DCJ, Ngcobo J, O'Regan J and Sachs J conclude that they did but that the consent was conditional and subsequently revoked.

[5] All the judgments agree, as well, that an eviction order as crafted in the order annexed to this judgment is just and equitable. It should be noted, however, that the terms of the eviction order made by this Court are different from the terms of the eviction order made by the High Court. The main differences between the High Court order and the order made by this Court are the following. First, this Court's order imposes an obligation upon the respondents to ensure that 70% of the new homes to be built on the site of the Joe Slovo informal settlement are allocated to those people who are currently resident there or who were resident there but moved away after the N2 Gateway Housing Project had been launched. Secondly, this Court's order specifies the quality of the temporary accommodation in which the occupiers will be housed after the eviction; and thirdly, this Court's order requires an ongoing process of engagement between the residents and the respondents concerning the relocation

process. Accordingly, the High Court order is set aside and replaced with the order attached.

[6] All the judgments, too, agree that the respondents, and particularly the second and third respondents who bear obligations to act reasonably in seeking to promote the right of access to adequate housing contained in section 26 of the Constitution, have acted reasonably in seeking the eviction of the applicants in this case. There are differences in emphasis in the reasoning supporting this conclusion.

[7] Accordingly, the following order (which is in the terms proposed by Yacoob J) is made unanimously by the Court:

1. The application for leave to appeal is granted.
2. The appeal succeeds in part and is dismissed in part.
3. The order of the Western Cape High Court, Cape Town dated 10 March 2008 under case number CPD 13189/07 is set aside.
4. The applicants are ordered to vacate the Joe Slovo Informal Settlement (Joe Slovo) in accordance with the timetable set out in annexure "A" hereto, subject to any revisions to that timetable agreed to in terms of paragraphs 5 – 7 of this order. The order to vacate is conditional upon and subject to the applicants being relocated to temporary residential units situated at Delft or another appropriate location on the conditions set out in paragraphs 8 – 10 below.

5. The applicants and the respondents are ordered, through their respective representatives, to engage meaningfully with each other with a view to reaching agreement on the following issues:

    5.1 a date upon which the relocation will commence different to that contemplated in annexure "A";

    5.2 a timetable for the relocation process different to that contemplated in annexure "A"; and

    5.3 any other relevant matter upon which they agree to engage.

6. The process of engagement described in the previous paragraph of this order must be completed by 30 June 2009.

7. If the process of engagement results in agreement between the parties, the agreement must be placed before this Court, by 7 July 2009 for this Court to consider whether it is appropriate to issue an order giving effect to the agreement.

8. The respondents are ordered to provide alternative accommodation in the form of temporary residential units to those applicants who vacate Joe Slovo.

9. A temporary residential unit must be made available to each household moved, and each temporary residential accommodation unit:

    9.1 that already exists, must in all respects comply with the specifications in paragraph 10 of this order; and

9.2 that is newly constructed, must be of an equivalent or superior quality.

10. The temporary residential accommodation unit must:

    10.1 be at least $24m^2$ in extent;

    10.2 be serviced with tarred roads;

    10.3 be individually numbered for purposes of identification;

    10.4 have walls constructed with a substance called Nutec;

    10.5 have a galvanised iron roof;

    10.6 be supplied with electricity through a pre-paid electricity meter;

    10.7 be situated within reasonable proximity of a communal ablution facility;

    10.8 make reasonable provision (which may be communal) for toilet facilities with water-borne sewerage; and

    10.9 make reasonable provision (which may be communal) for fresh water.

11. The respondents are further directed to engage with the affected residents in respect of each relocation that is to take place, the engagement to take place at least one week prior to the date specified for the relocation in annexure "A" or as otherwise specified in an order of this Court. The engagement must include (but not be limited to) the following issues:

11.1 Ascertainment of the names, details and relevant personal circumstances of those who are to be affected by each relocation;

11.2 The exact time, manner and conditions under which the relocation of each affected household will be conducted;

11.3 The precise temporary residential accommodation units to be allocated to those persons to be relocated;

11.4 The need for transport to be provided to those to be relocated;

11.5 The need for transport of the possessions of those to be relocated;

11.6 The provision of transport facilities to the affected residents from the temporary residential accommodation units to amenities, including schools, health facilities and places of work;

11.7 The prospect in due course of the allocation of permanent housing to those relocated to temporary residential accommodation units, including information regarding their current position on the housing waiting list, and the provision of assistance to those relocated with the completion of application forms for housing subsidies.

12. The first respondent is directed, in accordance with its tender to do so, to render assistance to the parties affected to move their possessions insofar as it is reasonably practicable.

13. The applicants are interdicted, once they have been relocated from Joe Slovo, from returning to Joe Slovo for the purpose of erecting or taking up residence in informal dwellings.

14. The applicants are entitled to remove their informal structures when they leave Joe Slovo.

15. After the informal dwellings at Joe Slovo have been vacated in accordance with this order, the respondents are authorised to demolish the housing that remains in the areas vacated.

16. The parties are directed:

    16.1 to lodge affidavits with the Registrar of this Court not later than 1 December 2009 setting out a report on:

        16.1.1 the implementation of this order;

        16.1.2 the allocation of permanent housing opportunities to those affected by this order.

    16.2 to serve copies of the affidavits on the legal representatives of all the parties.

17. The respondents are directed to allocate 70% of the *Breaking New Ground* houses (that is low-cost government housing available at low rentals) to be built at the site of Joe Slovo to:

    17.1 the current residents of Joe Slovo; and

17.2 those former residents of Joe Slovo who left Joe Slovo after the N2 Gateway Housing Project was launched after being requested to do so by the respondents or the City;

and who apply for and qualify for this housing.

18. It is recorded that the respondents have indicated that the total number of *Breaking New Ground* houses to be built at the site of Joe Slovo will not number fewer than 1 500. The respondents are ordered to inform the other parties and the Court within 14 days of this order if this number has changed or is likely to change whereupon the Court may issue further directions in this regard.

19. The second respondent and third respondent are directed to ensure – in accordance with their undertakings to do so – that any successor to the first respondent agrees to the terms of this order, and agrees to be bound by the obligations of the first respondent under this order.

20. If a successor to the first respondent is appointed and becomes bound by the terms of this order, the first respondent will be relieved of its obligations to the extent that they are taken over by its successor, with effect from the date upon which the successor becomes bound.

21. Should this order not be complied with by any party, or should the order give rise to unforeseen difficulties, any party may approach the Court on notice to the other parties for an amendment, supplementation or variation of this order.

22. The first, second and third respondents are ordered, jointly and severally, to pay 50% of the costs of the applicants in this Court, and the High Court, such costs to include the costs of both teams of legal representatives employed by the applicants and the costs of two counsel where two counsel were employed.

Langa CJ, Moseneke DCJ, Mokgoro J, Ngcobo J, O'Regan J, Sachs J, Van der Westhuizen J and Yacoob J.[*]

[*] Although Madala J sat in the case, ill health prevented him from participating in the judgment.

ANNEXURE A TO THE ORDER OF COURT DATED 10 JUNE 2009

WEEK	ZONE	BLOCK	HOUSEHOLDS	TARGET DATE	RUNNING TOTAL	AVG WEEKLY
Week 1	32	D	45	17-Aug-09	45	45
Week 2	30	B	167	24-Aug-09	212	106
Week 3	30	B		31-Aug-09	212	71
Week 4	30	C	76	07-Sep-09	288	72
Week 5	32	C	159	14-Sep-09	447	89
Week 6	30	E	314	21-Sep-09	761	127
Week 7	30	E		28-Sep-09	761	109
Week 8	30	E		05-Oct-09	761	95
Week 9	32	B	219	12-Oct-09	980	109
Week 10	32	B		19-Oct-09	980	98
Week 11	30	H	7	26-Oct-09	987	90
Week 12	30	G	223	02-Nov-09	1210	101
Week 13	30	G		09-Nov-09	1210	93
Week 14	30	G		16-Nov-09	1210	86
Week 15	32	A	136	23-Nov-09	1346	90
Week 16	30	J	227	30-Nov-09	1573	98
Week 17	30	J		07-Dec-09	1573	93
Week 18	31	J	295	14-Dec-09	1868	104
Week 19	31	J		21-Dec-09	1868	98
Week 20	31	J		28-Dec-09	1868	93
Week 21	30	L	121	04-Jan-10	1989	95
Week 22	31	H1	198	11-Jan-10	2187	99
Week 23	30	H1		18-Jan-10	2187	95
Week 24	30	M	203	25-Jan-10	2390	100
Week 25	30	M		01-Feb-10	2390	96
Week 26	31	G	315	08-Feb-10	2705	104
Week 27	31	G		15-Feb-10	2705	100
Week 28	31	G		22-Feb-10	2705	97
Week 29	30	Q	401	01-Mar-10	3106	107
Week 30	30	Q		08-Mar-10	3106	104
Week 31	30	Q		15-Mar-10	3106	100
Week 32	30	Q		22-Mar-10	3106	97
Week 33	31	H2	66	29-Mar-10	3172	96
Week 34	31	F	79	05-Apr-10	3251	96
Week 35	31	E	196	12-Apr-10	3447	98
Week 36	31	E		19-Apr-10	3447	96
Week 37	31	D	309	26-Apr-10	3756	102
Week 38	31	D		03-May-10	3756	99
Week 39	31	D		10-May-10	3756	96
Week 40	31	C	119	17-May-10	3875	97
Week 41	31	B	169	24-May-10	4044	99
Week 42	31	B		31-May-10	4044	96
Week 43	31	A	342	07-Jun-10	4386	102
Week 44	31	A		14-Jun-10	4386	100
Week 45	31	A		21-Jun-10	4386	97

YACOOB J:

Introduction

[8] We must in this case consider the difficult and important question of the requirements, including those of fairness and justice, that must be complied with in the process of the relocation of a large community so that better housing may be built in these informal settlement areas. This is an application for leave to appeal against a judgment and a rather unusual order of the Western Cape High Court, Cape Town[1] for the relocation of 4 386 households (said to consist of around 20 000 residents) from a large informal settlement known as Joe Slovo settlement area (Joe Slovo settlement).[2] The settlement is about 10 kms to the east of Cape Town and adjacent to kwaLanga. I must say at this early stage that the relocation order was sought and granted in order to facilitate the development there of better quality housing than the informal housing presently in use. This is described in more detail later.

[9] The applicants are, in effect, all the people who are obliged by the order of the Western Cape High Court, Cape Town to relocate. They are represented in these proceedings (as they were in the High Court) by two committees. The one is described as the committee chaired by Mr Penze[3] while the other is referred to as a

[1] Previously referred to as the Cape High Court, the Court's name was changed to the Western Cape High Court, Cape Town under the Renaming of High Courts Act 30 of 2008, which commenced on 1 March 2009.

[2] *Thubelisha Homes and Others v Various Occupants and Others* Case No 13189/07, Western Cape High Court, Cape Town, 10 March 2008, unreported.

[3] Mr Siphiwe Penze.

task team chaired by Mr Mapasa.[4] Although each of these committees was separately represented, there seems little point in referring to them separately. Although the arguments submitted by the legal representative of each committee differed somewhat, they supported and complemented each other. In the circumstances, all the people who are subject to the order of the High Court and who are in effect the applicants for leave to appeal will be referred to as the applicants.

[10] The application for leave to appeal conveys that the two committees together represent the applicants and the entire Joe Slovo community. This was not questioned by anyone and this judgment will accept that this is so without qualification.

[11] The City of Cape Town (the City), the owner of the property occupied by the applicants, did not participate in the eviction proceedings. The relocation order was instead obtained at the instance of the three respondents. Thubelisha Homes, the first respondent, has been charged with the responsibility of developing the housing at the Joe Slovo settlement. The national and Western Cape provincial Ministers responsible for housing are the second and third respondents respectively. Although argument was filed separately on behalf of the first and third respondents on the one hand and the second respondent on the other, they make common cause on every issue and can be referred to simply as the respondents. They vigorously defended the High Court order.

[4] Mr Sifiso Lambert Mapasa.

[12] The Community Law Centre of the University of the Western Cape and the Centre on Housing Rights and Evictions were admitted as amici curiae. Both are non-governmental organisations. The Community Law Centre is born and based in our country and is committed to "promote the achievement of the social and economic rights in our Constitution". The Centre on Housing Rights and Evictions is on the other hand, international and seeks to protect the "right to adequate housing for everyone, everywhere". The amici were not separately represented and advanced additional dimensions in support of the applicants. These will be considered in due course.

[13] I have already described the High Court order as unusual. It reads as follows:

> "In the event it is ordered that:
>
> 1. 1.1 The various occupiers of the area known as Joe Slovo informal settlement are directed to vacate the area in accordance with the schedule annexed to the order and marked 'X', more particularly:
>
>   1.1.1 They are directed to move from the blocks (in the zones) set forth in the third (and in the second) columns set forth on annexure 'X' to the order;
>
>   1.1.2 They are directed to move on the dates set forth in the column styled 'Target Date' on annexure 'X' to the order.
>
> 2. Those who are subject to this order are interdicted and restrained – once they have vacated or been ejected from the area known as Joe Slovo informal settlement – from returning thereto for the purpose of erecting or taking up residence in informal dwelling.
>
> 3. 3.1 Those affected by this order shall be entitled to remove their informal structures upon leaving the Joe Slovo informal settlement;

3.2 After the dwelling situate at Joe Slovo informal settlement have been vacated in accordance with this order, Applicants are authorized to demolish such informal housing as remains in the areas vacated.

4. First Applicant is directed – in accordance with its tender to do so – to render assistance to the parties affected to move their possessions to the extent that it is able to do so.

5. In the event of the failure and/or refusal of the residents of Joe Slovo informal settlement to vacate their dwellings as set forth above, the Sheriff of this Court is authorized and directed to carry into execution this order in accordance with 'X' to the order, and:

5.1 In the event of the refusal of the occupants to move their movable possessions, the Sheriff is authorized to move all the movable items in the premises to an identified place in the temporary relocation area in Delft for safekeeping;

5.2 To eject such Respondents from their dwellings at the times indicated on annexure 'X' to the order.

6. Applicants are directed:

6.1 To report on affidavit at intervals of no less than 8 weeks (but at more frequent intervals should they deem it necessary) to report back to this Court as to:

6.1.1 The implementation of this order;

6.1.2 The allocation of permanent housing opportunities to those affected by this order.

6.2 To furnish copies of the affidavits comprising its reporting to the Legal Resources Centre, or to such other address as may be directed from time to time."

[14] The order is to be read with annexure "X". It will be convenient not to introduce that annexure here but to describe the effect of the Court order read with annexure "X". More than 4 000 families had to be relocated from the Joe Slovo settlement to an area known as Delft, about 15 kms away. The relocation was to occur

over 45 weeks and the households to be moved during each weekly or sometimes fortnightly period were identified. It is clear that, according to the order, an average of about 97 households were to be relocated each week.

The issues

[15] The matters raised in the High Court were more extensive than those before this Court. The issues ultimately raised before this Court in the attack on the High Court decision were:

(a) whether the applicants were unlawful occupiers for purposes of the PIE Act[5] and if not, whether their occupation was lawfully terminated;

(b) whether sections 5 or 6 of the PIE Act were applicable;

(c) whether the technical requirements of the PIE Act had been complied with;

(d) whether the relocation of the applicants was just and equitable;

(e) whether the applicant had a substantive legitimate expectation in relation to the allocation of housing opportunities in the Joe Slovo settlement to them and whether this expectation had been or could be fulfilled;

(f) is the eviction of the applicants in all the circumstances, reasonable; and

(g) the nature of the relief that is appropriate, just and equitable.

[16] It is necessary to say of the High Court judgment at this stage that it considered in detail all issues presented in that Court. It is however not appropriate to summarise

[5] Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998.

the findings in full. Those findings of the High Court that have been challenged by the applicants will be fully traversed in the relevant parts of this judgment.

Constitutional matters

[17] This case plainly raises constitutional matters. The constitutional matters, broadly speaking, are concerned with the obligations on the state to provide access to adequate housing in terms of section 26(1) and (2) of the Constitution, as well as whether the circumstances justify the relocation of the applicants. This case also concerns the interpretation and application of the PIE Act which, in my view, is legislation enacted to give effect to the provisions of section 26(3) of the Constitution.

Interests of justice

[18] I also conclude that it is in the interests of justice for leave to appeal to be granted. The case raises constitutional issues of considerable importance to reconstruction in South Africa and to the appropriate provision of housing. As I have already said, the case raises the vital issue as to the circumstances in which large communities of people can be legitimately relocated from informal settlements in order to allow for the development of housing in the informal settlement areas concerned. This is not the last time that this issue will confront those involved in the improvement of the quality of life of the people of our country, as well as our courts. It is necessary for this Court to grasp the mettle and determine when and in what circumstances relocation on this massive scale is constitutionally appropriate.

Facts

[19] The relevant facts must now be set out before going into the High Court judgment and the evaluation of the contentions of the parties. All the factual material is inter-related but can be said broadly to fall into three categories. The first concerns a short history of their occupation and the nature of the relationship between the applicants and the respondents. The second will hopefully lead us to an understanding of the Gateway housing project. The third aspect concerns what the applicants refer to as "broken promises".

Facts: the Joe Slovo settlement and the relationship between the applicants and the City

[20] The Joe Slovo settlement began to be occupied in the early 1990s. The land, owned by the City, was wholly undeveloped. It was necessary for those who occupied the land to clear away vast vegetation before rudimentary structures could be established on the land. During the early days of the settlement and during the apartheid years, security operatives repeatedly and forcibly removed the occupants from the land and cruelly destroyed their accommodation and possessions. But the occupiers of the time inevitably returned.

[21] The numbers grew considerably, especially during December 1994. The forced removals and demolitions soon ceased in the new South Africa. The City of Cape Town, understandably, began to adopt a consistently more humane attitude towards the residents. It began by providing them with water, then container toilets and

rudimentary cleaning facilities. After a fire had caused considerable devastation in 2000, apparently by 2002, the City provided tap water, toilets, refuse removal, roads, drainage and electricity. In addition each house was given a number.

[22] Much of this was done as a consequence of pressure, negotiations or demands by those representing the community in the area. At first, only one body represented all the residents. This was the committee which has already been described as that represented by Mr Penze. Later, in the negotiations between the City and the applicants, the community was represented by the two entities that represent them in this application. It must therefore be accepted as a fact that improvements to the conditions of life to the applicants were effected by the City as a consequence of consultation between the community and the City. I may say at this stage that although these extended negotiations resulted in considerable improvement in the lives of the people in the area, none of the community representatives provide any evidence on whether there had been any discussions concerning the rights of the residents to occupy. We must proceed on the basis that there was no interaction of this kind, for if there had been discussions favourable to the applicants, it is inconceivable that they would not have been mentioned.

[23] The Joe Slovo settlement community was not static. It grew as time went on. It also changed its character because some people moved out of the area and other people moved in. There is no indication that those people who moved in acknowledged the City as the owner of the property in any way. Nor is there any

indication that the City expressly acknowledged that the people who had settled on the property had the right to occupy it. There are at least two instances where applicants who moved into the settlement area later deposed to the fact that they had purchased their informal accommodation in transactions mediated by Mr Penze. Moreover, many of the applicants say, not that they occupied pursuant to permission by the City, but that they were given permission by a committee of the residents to occupy.

[24] A description of the conditions of life in the settlement is appropriate. People in Joe Slovo settlement live in overcrowded conditions, in makeshift accommodation built of insubstantial material. The conditions of life are unhygienic. There is no water-borne sewerage. Moreover, the area is unsafe particularly because the makeshift structures are fire prone in the extreme. I have already spoken of one fire and will describe another particularly devastating one later. It is no exaggeration to say that fires in the settlement have claimed lives and destroyed property at least every summer. The applicants live in deplorable circumstances unfit for reasonable human habitation. This, despite the improvements brought about by the City.

[25] The housing development at issue in this case is the N2 Gateway project which is briefly described later in this judgment. It is part of the national *Breaking New Ground* (BNG) policy aimed at eliminating informal settlements throughout South Africa. The Joe Slovo settlement was targeted for reconstruction in terms of this policy, no doubt because of the deplorable and inhuman conditions under which the people live.

[26] And it is incorrect to suggest that the applicants have had no notice of the fact that they will have to move or of the fact that the housing development was contemplated. In late 2004, the City began to persuade residents to move out of the area to facilitate the development. As I will show later the development was to be in three phases and efforts were made to persuade people to move so as to allow the commencement of phase 1. There is some debate in the papers as to why the people in fact did move to facilitate phase 1 of the project. But the only matters of importance for present purposes are that there were negotiations between the authorised representatives of the people and the people themselves; and that people moved pursuant to this engagement.

[27] Another fire in January 2005 caused more devastation of huge proportion leaving many families homeless. The mayor of the City, Ms Nomaindia Mfeketo, informed the residents that they could not rebuild their homes where they previously had been. There were a number of meetings between the mayor and the people at which the intention to undertake a housing project where the people lived and the possibility of their having to move to alternative accommodation was discussed.

[28] The N2 Gateway project was officially launched publicly, and with extensive media coverage, during February 2005. The affidavits demonstrate that the community was well aware of the Gateway project from its inception. More importantly, there were discussions concerning the project between the representatives

of the City and the representatives of the people. Indeed, the affidavits on behalf of the applicants, including those made by the representatives of the two entities that represented the people, are to the effect that the project initially met with the broad approval of the residents and the community, and its leaders supported the project enthusiastically.

Facts: the Gateway housing project

[29] The Gateway housing project is part of the national BNG policy. That project is aimed at the provision of decent reasonable housing for those living in informal settlements. The process of the development was carefully defined at the national level. It was to begin with surveys within the communities concerned to determine housing and structural needs of the community through a process of consultation. This was to establish the geo-technical and physical characteristics of the land so as to determine whether upgrading was possible without the removal of the people or whether it was necessary for people to be moved to alternative accommodation before appropriate development could take place. This stage of the process has been completed in Joe Slovo settlement and it has been determined that the people have to be moved.

[30] The process ends by the development of housing in response to community demand. It was thought that the housing may take a variety of forms including medium density housing and free standing housing. The housing development stage has been reached in the Gateway project itself. The housing was to be constructed in

three phases. Housing in all the phases was, according to the applicants, to consist of BNG housing available to poor people at minimal rentals, housing available at higher rentals, as well as bonded housing. Bonded housing can best be described as credit linked housing. This housing would be bought by people who could afford it on the basis of privately obtained loans on mortgage.

Facts: "broken promises"

[31] During 2006 - 2007 there was considerable effort to persuade the residents to move to Delft in order to enable Thubelisha Homes to proceed with the development of phase 2 of the project but these efforts failed. The applicants say that while they were initially happy with the project, they later became dissatisfied because of what they called "broken promises". I have already pointed out that there was to be a three-phase development and that poor people were to be provided with subsidised low rental accommodation in all three phases. Indeed, the applicants state that those who voluntarily moved from that part of Joe Slovo settlement intended for phase 1 development were to be allocated houses in phase 1. More specifically, it is said that community leaders were informed that housing in phase 1 would be occupied at rents of between R150 and R300 per month. These proposed payments were acceptable to the applicants.

[32] According to the applicants this promise was broken. In fact the rent payable in respect of the houses in phase 1 ranged from R600 to R1 050 per month. To make

matters worse, phase 2 has no housing for poor people in it at all. According to the respondents, it is reasonably feasible to construct only bonded housing in phase 2.

[33] The applicants assert that they had been promised that 70% of the houses built in the Joe Slovo settlement would be allocated to Joe Slovo residents who qualify. The applicants' second complaint is that the state had not kept this bargain in phases 1 and 2. Understandably, they feared that the promise would not be kept in phase 3 either.

[34] There were ultimately petitions and protests in relation to the development and the proceedings for the relocation of the residents were instituted in the High Court.

[35] At some stage during their occupation of the premises the City arranged for each of the occupiers to be given "red cards" which indicated that the holder had applied for housing with the municipality.

Unlawful occupier

[36] The case in the High Court was brought in terms of the PIE Act. A fundamental requirement for any eviction of any person in terms of this legislation is that the person concerned must be an unlawful occupier.[6] The term "unlawful occupier" is defined as follows:

[6] Id at sections 4, 5 and 6, which are concerned only with the eviction of unlawful occupiers.

> "[A] person who occupies land without the express or tacit consent of the owner or person in charge, or without any other right in law to occupy such land, excluding a person who is an occupier in terms of the Extension of Security of Tenure Act, 1997, and excluding a person whose informal right to land, but for the provisions of this Act, would be protected by the provisions of the Interim Protection of Informal Land Rights Act, 1996 (Act No. 31 of 1996)."

[37] The applicants contended both in the High Court and in this Court that the evidence had not established that the applicants were all "unlawful occupiers" within the meaning of the phrase as defined. The stance of the applicants was that the City of Cape Town, the owner of the property, had either expressly or tacitly consented to their occupation of the Joe Slovo settlement. In the circumstances their eviction in terms of the PIE Act was incompetent. The High Court rejected this contention.

[38] The absence or otherwise of the consent of the municipality is of more fundamental significance than would at first blush appear. The contention of the applicants is that the PIE Act is applicable only if the residents are in unlawful occupation and that municipal consent renders the PIE Act inapplicable. The more fundamental question not adverted to by the parties directly is whether the respondents are entitled to eject the residents at all. If there had been consent to the occupation and the right to occupy had not been terminated, the respondents would not have been entitled to any relocation order. Once there is a right to eject, however, (and this is so only if there was no municipal consent to occupy) the provisions of the PIE Act become applicable as a matter of protection to the person or people liable to eviction.

[39] It was common cause that all the services that the applicants relied upon for their contention that the City had consented to their occupation of the land had in fact been rendered. Ms Nomaindia Mfeketo was the mayor of Cape Town during the period 1998 to 2000 and then between 2002 and the end of the first quarter of 2006. Her evidence was to the effect that there was no intention on the part of the City to concede any right of occupation, but that the City had acted from humanitarian considerations.

Consent

[40] The argument that this evidence together with certain negative indicators referred to below amounted to the express or tacit consent by the City so that the Joe Slovo residents acquired some right to occupy was rejected by the High Court. The Court said:

> "In support thereof, they contended that they have been issued with 'red cards' which entitled them to remain in undisturbed possession of their houses, a fact which they averred was given further credence by the City's provision of certain services to them. Ms Mfeketo, the then Mayor of Cape Town, disputed such allegations. She stated that services were provided for 'basic humanitarian reasons' and should not be construed as consent by the City or granting the residents any enforceable right to remain in the area. It was always intended that informal settlements in general would be upgraded, moved or redeveloped in conformity with government's constitutional imperative to provide access to adequate housing on a progressive basis."[7]

[7] Above n 2 at para 37.

[41] The Court also concluded, in support of the finding that the residents occupied the land unlawfully, that the informal dwellings at Joe Slovo were illegal structures that did not comply with building regulations.[8]

[42] In the context of a contention that some of the applicants had acquired tenure rights in terms of the Interim Protection of Informal Land Rights Act,[9] as well as the Extension of Security of Tenure Act (the Tenure Act),[10] the applicants relied heavily on the case of *Rademeyer*[11] in the High Court. [12] Although this contention was not relied upon in this Court, the *Rademeyer* decision was. It was held in that case that a city council, by providing water, sanitation and other services to people occupying its property had, in the circumstances of that case consented tacitly to their occupation. It was contended that in this case, in like vein, the City had consented to the occupation of the applicants. The High Court disagreed, holding that:

> "This submission is flawed. It flies in the face of the evidence of former Mayor of Cape Town, Ms Mfeketo that services were provided to the Joe Slovo residents for humanitarian reasons and that it was always the intention to build proper houses thereby eliminating informal settlements. She further gave evidence that the Red Cards issued to Respondents were proof of applying for housing and served as recognition of receipt of basic services, not giving the bearer thereof entitlement to occupy property legally. In any event the *Rademeyer* decision was before the PIE Act came into operation and prior to the *Grootboom* decision which affirmed the

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[8] Id at para 38.

[9] 31 of 1996.

[10] 62 of 1997.

[11] *Rademeyer and Others v Western Districts Council and Others* 1998 (3) SA 1011 (SECLD); [1998] 2 All SA 547 (SE).

[12] See above n 2 at para 79.

> Department of Housing's obligation under the Constitution to provide adequate housing."[13]

[43] The applicants contended in this Court that the evidence had demonstrated the express or tacit consent of the City. They relied on the provision of services detailed above[14] as well as the issue of "red cards" to them.[15] They also depended on the fact that reconstruction work had been done by the City after the fire, and on the conduct of a City councillor who had asked residents to move from one area to another. The argument placed much emphasis on what the City had not done. It had not:

(a) ejected the residents;

(b) told the residents that they were in unlawful occupation;

(c) informed them that they would have to leave at any time; or

(d) told them that they had no right to occupy.

It was also urged upon us that the occupiers had been on the land for 15 years and that the services provided exceeded emergency services.

[44] It was argued on this factual foundation that the phrase "tacit consent" deserved a broad construction and that it was impossible to suggest that the tacit consent of the City had not been given. The applicants therefore had the right to occupy and were not unlawful occupiers. Since their right to occupy had not been terminated, the applicants did not fall within the purview of the definition of "unlawful occupier" in the PIE Act.

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[13] Id.

[14] See [21] above.

[15] See [35] above.

[45] All the respondents relied for their contentions on the affidavit of Ms Mfeketo who, I have already said, was the mayor of Cape Town during the period 1998 to 2000 and once again from 2002 until the end of the first quarter of 2006. I have already referred to reliance by the High Court on what the mayor had said as a basis for the rejection of the applicants' contention that they had the express or tacit consent of the City to occupy the Joe Slovo settlement. That affidavit is crucial and it is necessary that much of it be set out to facilitate an understanding of the argument of the respondents and of the approach proffered in this judgment.

[46] Paragraphs 5 and 6 read as follows:

> "5. When I became mayor in 1998, Joe Slovo was already a large informal settlement. Nothing, however, had been done by way of managing the settlement. Particularly:
>
> 5.1. There had been frequent fires in the area, which tended to recur every year in summer;
>
> 5.2. There were no records at all as to who resided in the informal settlement;
>
> 5.3. There were no services in the area;
>
> 6. The City of Cape Town, under my stewardship, had various interventions as regards the welfare of those living in the informal settlement:
>
> 6.1. Fire breaks were implemented. This was done in consultation with the residents and – as is alleged by Respondent – Councillor Gophe played a prominent role in this process.
>
> 6.2. The City embarked upon an exercise akin to a small census. The purpose was to compile records (as accurately as circumstances would permit) as to the number of dwellings in Joe Slovo informal settlement, and the number of persons who resided there. These records would be used to plan for the upgrading of the area, the orderly removal of the

residents from the area, and the long-term goal of providing access to adequate housing to the residents.

6.2.1. It was appreciated from the outset that, if a project of the magnitude of the upgrading of Joe Slovo was to be achieved, community co-operation should be secured as far as this was possible, and their fears allayed.

6.2.2. I realised that this 'census' would be controversial within the community, and could be treated with mistrust. In the circumstances, I was entirely open with the community regarding the City's intentions. Meetings were held, and the intention to conduct the 'census' (with a view ultimately to moving the residents) was explained.

6.2.3. I attended approximately four or five such formal meetings with the community. They were held at the Langa Community Sports Complex and were attended by many people.

6.2.4. There were several meetings that I did not attend and these were attended by the local councillor.

6.2.5. In addition to the City holding such meetings, I am aware that provincial government and national government held meetings as well.

6.2.6. At the very first of these meetings (which I attended) I explained the 'census'.

6.2.6.1. The community were informed in terms that there were plans to redevelop Joe Slovo to provide access to adequate housing, and the information obtained in the census would be used for this purpose.

6.2.6.2. It was moreover appreciated from the outset that Joe Slovo was a densely populated area, and that any redevelopment would – to a greater or lesser extent – involve the de-densification of the area. The practical consequence of this was that it would be impossible for all residents to return to Joe Slovo after development. This was known

from the outset, and the community was informed that it will be necessary for them to move to temporary accommodation, pending the allocation to them of housing on a permanent basis. Importantly, there was no guarantee given to anyone that they would return to the area of Joe Slovo. No such undertakings could be given. In the first instance it was impossible for all residents to return, and in the second instance, national policy had not yet been formulated and finalised and it would have been precipitate to give any undertakings against this background.

6.2.6.3. A time frame of six months was discussed for the commencement of the project. History has proved this to be optimistic, but it was genuinely intended at the time.

6.2.7. Although small sections of the community were averse to the census process, there was – by and large – community support for the process, which went ahead without significant opposition. During the process, the numbers of dwellings were identified and each accorded a number.

6.2.8. It is accordingly incorrect that this census, and the allocation of numbers to dwellings which formed a part of it, evidences the recognition of any manner of right by the City of Cape Town to the residents. To the contrary, and in context, it was just the opposite. It was one of the first steps taken in an endeavour to move the residents from the area.

6.3. When I became mayor, there was no services in Joe Slovo. There was no electricity, no sanitation, and no water was provided. For basic humanitarian reasons, the ANC government in the City of Cape Town adopted an approach – consistent with the ANC approach nationwide – that all residents in all informal settlements should be afforded such basic services as could progressively be realised, striving towards the

> value of dignity enshrined in the Constitution. In conformity with this approach:
>
> 6.3.1. Portable toilets were installed at Joe Slovo;
>
> 6.3.2. Water was reticulated to Joe Slovo by way of communal taps;
>
> 6.3.3. Over a period of time, electricity was laid on by way of overhead lines and pre-paid metering in dwellings.
>
> Respondents have – I understand – contended that the provision of these services constitutes a recognition by the City of Cape Town of their right to reside in the Joe Slovo informal settlement. I deny that this is the correct inference to draw from the provision of the services, or from any of the above interventions. The services were provided on humanitarian grounds, and should not be construed as a consent by the City – under my stewardship – for persons to regard themselves as having any enforceable right to remain in the area. To the contrary, and from the outset, it was always intended that informal settlements in general would be upgraded, moved or redeveloped, in conformity with government's constitutional imperative to provide access to adequate housing on a progressive basis."

[47] The respondents contended that the affidavit of the mayor demonstrated beyond argument that there could not have been any consent, express or tacit. The services were provided for humanitarian reasons, while the fact that there had been no ejectment was a direct result of the circumstance that alternative humane housing provision was being investigated. There was no intention on the part of the City to grant a right to occupy to any of the applicants.

[48] The rival contentions of the parties must now be discussed. This will be done by first defining the meaning of "tacit consent" and its requirements before investigating whether on an evaluation of the evidence as a whole it can be said that

the City did or did not give its consent. As will appear later in this judgment, it is not necessary to answer the vexed question whether it is the duty of the respondents to establish the unlawfulness of the occupation of the applicants on a balance of probabilities or whether, on the other hand, the applicants must show that they had the tacit consent to occupy. The question is complicated by the fact that if the respondents attract the onus, they will need to establish a negative proposition, namely that the City did not tacitly consent to the occupation by the applicants. I am of the view however that it is not necessary to decide the issue of onus in this case and I do not do so. It is evident from a conspectus of all of the facts that there was no consent.

[49] We remind ourselves that the occupiers become liable to eviction and attract the benefits of the PIE Act only if they are in unlawful occupation. In other words their eviction cannot take place whether in terms of the PIE Act, or at all, unless it is established that the applicants do not have the express or tacit consent of the owner. Now it must be understood that the applicants are required by the PIE Act to be in occupation on account of the actual consent of the owner. Express consent and tacit or implied consent, whatever the difference might be between them (and I discuss this soon enough), are both species of actual consent. Tacit or implied consent must not be confused by imputing concepts of estoppel into the concept of tacit consent required by the legislation. Permission by estoppel can easily be explained by a short discussion of the concept of authority. Authority may be actual or ostensible; and

actual authority may be express or implied.[16] Ostensible authority is based on the principle that where an entity creates the impression that a particular state of affairs exists and another person is prejudiced by the creation of that impression, the entity creating the impression cannot deny that the state of affairs exists.[17] If Thulile creates the impression that she has authorised her husband Marimuthoo to sign cheques on her behalf, it does not matter whether she has in fact granted the necessary authority. Thulile can be prevented from denying the authority of Marimuthoo to sign the cheques. She has no choice if sued to pay John, the holder of the cheque.

[50] There is no question of ostensible consent in this case. There must be actual consent. In the circumstances, it does not matter if the municipality created the impression that it consented to occupation of its property by the applicants and the applicants were prejudiced as a result; the municipality cannot be precluded from denying the absence of consent. There are two reasons for this. First, the PIE Act speaks of tacit consent which is a species of actual consent and has nothing to do with ostensible consent. If the purpose of the law maker was to confer a right of occupation consequent upon ostensible consent it would certainly have said so. Secondly, the applicants do not rely upon estoppel. In the circumstances, even if the PIE Act could be understood to refer to ostensible consent, the applicants have not begun to make out any case on that basis.

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[16] Lord Denning MR in *Hely-Hutchinson v Brayhead Ltd and Another* [1968] 1 QB 549 (CA) at 583A-G; [1967] 3 All ER 98 (CA), cited with approval by Schutz JA in *NBS Bank Ltd v Cape Produce Co (Pty) Ltd and others* 2002 (1) SA 396 (SCA); [2002] 2 All SA 262 (A) at para 24.

[17] Id.

[51] One other factor must be adverted to before we try to rein in the meaning of tacit consent in the legislation. It concerns an important implication that arises from the reference in the PIE Act to the claim of “any other right”. The PIE Act makes it plain that occupiers of property will not be regarded as unlawful occupiers unless the owner’s express or tacit consent is absent or if they occupy the property in terms of any other right. The question that must be answered in this context concerning the nature of the consent that is required is whether the ordinary meaning of consent to occupy is appropriate. That is consent to occupy that entails the creation of a right to occupy on the part of the occupier. On the assumption that there is a type of consent to occupation that does not entail the grant to the occupier of a right to occupy, we must determine whether the PIE Act speaks of this kind of nebulous consent or consent, as it were, in the air. I think not. The occupation is not unlawful if there is consent or some other right to occupy. It follows ineluctably that the consent referred to in the statute is consent to occupy or permission that creates a defensible right of occupation.

[52] In support of this conclusion, a proposition which many may take to be obvious must be stated. Occupation is either lawful or unlawful. It is true that it may not be possible in a particular case to determine on the evidence available whether the occupation is lawful or unlawful. That is quite beside the point. It is necessary to emphasise here that there are only two kinds of occupation: lawful or unlawful. Lawful occupiers cannot be evicted by virtue of the lawfulness of their occupation and

do not need the protection of the PIE Act. Only unlawful occupiers may be evicted and only they need the protection of the PIE Act.

[53] The question that will need to be answered in this case is whether the City has through its tacit consent conceded an enforceable right of occupation to the applicants.

The meaning of consent

[54] The Supreme Court of Appeal,[18] in the context of a somewhat contradictory argument that the fact that a party does have to give his consent does not mean that the cancellation is consensual, said the following:

> "The argument ignores the meaning of 'consent'. Its primary meaning as a noun is, according to the *Concise Oxford Dictionary*, 'voluntary agreement'."[19]

[55] I agree that the Supreme Court of Appeal was correct in adopting the Oxford Dictionary meaning of the word "consent". And it is in this primary sense which the concept of consent is employed in the PIE Act. What is required by the PIE Act is not just some kind of acquiescence by the owner or person in charge of land but the "voluntary agreement" of the owner or person in charge. The occupier will not be on the land with the consent of the owner or person in charge if the owner simply allowed the person to stay or occupy because he, she or it had no choice but to do so, or felt under a duty to do so, or for any other reason did not agree voluntarily. Secondly, the word "agreement" implies something bilateral. In other words consent as

[18] This was known at the time as the Appellate Division.

contemplated in the PIE Act is not unilateral consent but bilateral. It cannot be consent unless it was first asked for and later given, or unless it was accepted after it had been given even though it had not been requested. I will return later to the complications for the case of the applicants that they do not even know whether the consent upon which they rely was express or tacit.

[56] The definition of consent by the Supreme Court of Appeal was appropriately embraced by the Land Claims Court in the case of *Klaasen*[20] in the process of determining the meaning of consent for purposes of section 1(1) of the Tenure Act[21] which referred to express or tacit consent.[22] After referring to the acceptance of the Oxford Dictionary definition by the Supreme Court of Appeal[23] the Court explained:

> "There are two parties to any consent: the party giving it and the party receiving it. Consent, as envisaged in the definition of 'occupier' contained in the Tenure Act, is more than a mere indication of the inclination of the grantor. It creates legally enforceable rights and obligations between the grantor and the recipient. The requirement of the Tenure Act that an occupier must have or must have had consent to reside on the land, means that the person concerned must be or must have been a party to a consent agreement with the owner of the land or with the person in charge, or with the predecessor in title of any of them."[24] (Footnotes omitted.)

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[19] *Tsaperas and Others v Boland Bank Ltd* 1996 (1) SA 719 (A) at 724G–H; [1996] 4 All SA 312 (A) at 316B.

[20] *Landbounavorsingsraad v Klaasen* 2005 (3) SA 410 (LCC).

[21] Above n 10.

[22] Section 1(1)(i) provides:

> "[E]xpress or tacit consent of the owner or person in charge of the land in question, and in relation to a proposed termination of the right of residence or eviction by a holder of mineral rights, includes the express or tacit consent of such holder".

[23] Above n 20 at para 20.

[24] Id at para 21.

[57] There is no reason why consent in the PIE Act should have another meaning. It means voluntary agreement. If consent means voluntary agreement, then tacit consent means a tacit voluntary agreement. The meaning of tacit consent is therefore inextricably bound up with what is meant by a tacit agreement.

[58] A tacit agreement is not an agreement of a different kind from that of an express agreement. The distinction really revolves around the question of evidence and proof. The evidence of an express agreement consists of proof of either a written express agreement or a verbal one. A tacit agreement is one which is established by evidence short of that relating to an express agreement. I agree with Corbett JA[25]—

> "that a court may hold that a tacit contract has been established where, by a process of inference, it concludes that the most plausible probable conclusion from all the proved facts and circumstances is that a contract came into existence".[26]

This reasoning may properly be applied to the concept of consent. This Court may hold that there has been the tacit consent of the municipality to occupy only if we were to conclude, by a process of inference, that the most plausible and probable conclusion from all proved facts and circumstances is that there was actual consent by the municipality. In cases where the only inference to be drawn is that there was tacit consent, there can be no difficulty. However, where more than one inference is legitimate, we must select that which is the most probable or the most plausible in all the circumstances.

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[25] *Joel Melamed and Hurwitz v Cleveland Estates (Pty) Ltd; Joel Melamed and Hurwitz v Vorner Investments (Pty) Ltd* 1984 (3) SA 155 (A); [1984] 2 All SA 110 (A).

[26] Id at 165B-C.

[59] One more case concerning tacit consent and unlawful occupation must be mentioned. In *Atkinson*[27] the Court was concerned with the tacit consent to occupy for the purposes of the Tenure Act. The Court said:

> "However, in the absence of any explanation to the contrary, the probability is that the plaintiff, as owner, would have been aware of a person who occupied one of his employee's cottages with the consent of the employee. If he was aware of her occupation and did not object to it when the employment contract still subsisted, that would have been sufficient to constitute tacit consent."[28]

The phrase that must be emphasised from the above quotation is the phrase "in the absence of any explanation to the contrary". Furthermore, as I will show, there are important differences between a private entity or person on the one hand, and a municipality on the other, in relation to consent. An important difference is that a person or private entity does not necessarily have to take an authorised resolution in order to consent to the occupation of its land. A municipality does.

Broad meaning to consent?

[60] As I have already pointed out, it was submitted in argument that we are required to give a broad meaning to the word "consent". The applicants did not put any evidence of tacit consent before us nor did they rely on any estoppel. Indeed, we were not told precisely what the word "consent" in its broad construction would mean. I would assume that what was intended was a broader meaning to the word "consent"

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[27] *Atkinson v Van Wyk and Another* 1999 (1) SA 1080 (LCC).

[28] Id at para 9.

than has been determined in this judgment. The contention was that it was necessary to give consent a broad meaning in order to protect the vulnerable people to whom the PIE Act applies. In my view, there is no room for such a broad meaning if the words "tacit consent" are understood in the way in which they had been understood at the time the legislation was prepared and adopted. Parliament deliberately used the phrase "express or tacit consent of the owner" and it must be taken that the law maker understood the meaning of the words "express" and "tacit" and that the purpose of the definition was to impute to these terms the meaning that has always been ascribed to them. I may mention that, to the best of my knowledge, no other meaning has been ascribed to these words by our courts even after the PIE Act was passed.

[61] There are moreover contextual elements that support the approach suggested in this judgment.

[62] It is beyond doubt that the PIE Act was brought into force in order to give effect to the provisions of section 26(3) of the Constitution. That section provides:

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

[63] At the time this constitutional provision came into force, the legal position was that people could be evicted from their homes, provided that they were not in lawful

occupation, without taking into account any other circumstance.[29] It was understood at the time the Constitution was drafted that there were, as a consequence of the evil of apartheid, literally millions of people who occupied housing without any right, that is, unlawfully. The constitutional prescript was aimed at ensuring that even people in unlawful occupation were not to be evicted without taking into account all the circumstances. The purpose, in my view, was not to obliterate the distinction between lawful and unlawful occupation as then understood but to ensure that unlawful occupiers were treated fairly.

[64] The PIE Act must be interpreted in this context. The purpose of the PIE Act, to the extent relevant, is "to provide for procedures for the eviction of unlawful occupiers". In conformity with this, the Preamble provides:

> "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 the 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".

[29] It is true that the provision also safeguards against arbitrary evictions but the present topic is not concerned with this matter.

[65] It is evident that the purpose of the PIE Act and its Preamble say nothing at all about the broadening of the definition of "consent" or of the narrowing of the definition of "unlawful occupiers". These parts of the Act do not evince the purpose of ensuring that occupiers who would have been regarded as unlawful in the past should be regarded, in terms of the PIE Act, as having a right of occupation. The objective in relation to unlawful occupiers is not to define them differently from the way in which they were defined before but "to provide for procedures" for their eviction. The way in which the purpose is expressed begins to herald the notion that what the PIE Act purports to achieve is fair procedures to be followed when unlawful occupiers are to be evicted. The idea is that an unlawful occupier, despite the absence of the tacit consent of the owner, is a human being and must be treated as a human being. A person in occupation of property without the tacit or express consent of the owner must be treated fairly.

[66] One is therefore not surprised when the Preamble expressly states that "it is desirable that the law should regulate the eviction of unlawful occupiers from land in a fair manner". But that part of the Preamble goes further and makes it clear that fairness to the unlawful occupier is not the only ingredient. The PIE Act at the same time recognises the right of land owners to apply to a court for an eviction order "in appropriate circumstances". Indeed, in my view, the most important of the circumstances which must exist before any eviction order is granted is that the eviction and its timing must be just and equitable.

[67] There is nothing new about the definition of "unlawful occupier". It is the traditional definition. Anyone who occupies without the consent of the owner or without any other right to occupy is, and has always been, an unlawful occupier. Anyone with a right to occupy is and has always been a lawful occupier. There is also nothing new or earthshaking about the inclusion of the phrase "tacit consent". In terms of the law of the country as it was before the PIE Act came into effect, and as it is now, anyone who occupied with the tacit consent of the owner occupied lawfully. I can think of no more appropriate definition of the term "unlawful occupier" than that which is contained in the Act. And that definition is consistent with the Act as a whole.

[68] Any contention that the PIE Act was aimed at ensuring that the meaning to be given to tacit consent was broader than had traditionally been the case ignores the balance required by the PIE Act itself. The PIE Act provides in sections 4 and 6 for procedural and substantive protection for unlawful occupiers. That protection is extensive and fair. As I have already pointed out, no one may be evicted unless it is just and equitable to do so. To opt for a broad definition of "tacit consent" and, at the same time, to hold the owner seeking eviction to strict standards of justice and equity would be to fly in the face of the avowed purpose of the PIE Act and the balance between the rights of the owner and the unlawful occupier that the legislation intends to achieve.

[69] It is true that the term "unlawful occupier" has a deeply painful and pejorative connotation. It is anathema to me that in the days of apartheid black unlawful occupiers of public property were in particular regarded not as human beings but as objects devoid of any humanity. There was no justice and equity requirement for their eviction. They could have been, and were often, evicted without regard to any humane consideration. It did not matter what the personal circumstances of the people concerned were. The PIE Act has changed that completely. Those who are unlawful occupiers are now to be treated as human beings. It is not appropriate therefore, in the interpretation of the term "tacit consent" in the PIE Act, to proceed on the basis that the negative and shameful connotations referred to earlier have been perpetuated. The PIE Act has virtually completely destroyed these archaic notions.

[70] The idea that consent must be given a broader meaning in the circumstances of this case and the associated approach that the applicants must be found to be lawful occupiers because they occupy public land also has no basis in the Constitution, in the PIE Act or in any other law. Indeed, the PIE Act is expressly made applicable to the state in the sense that an owner is defined as including "an organ of state".[30] And an organ of state is often a public institution. Yet, the PIE Act does not differentiate between a public body that is the owner of the land and a private entity or person whose consent is required. Consent is defined in exactly the same way for both.

[30] Above n 5 at section 1.

[71] There is accordingly no justification for a broad definition of the phrase "tacit consent". Nor has anyone suggested the scope of this so-called broad definition or the precise meaning to be attached to the word "tacit" in the circumstances.

Was there tacit consent in this case?

[72] It is now necessary to determine whether there was tacit consent in this case.

[73] There is no evidence of any express consent on the part of the municipality. That express consent would have been proved only if there had been evidence to the effect that an authority that had the power to grant consent had in fact done so. Evidence of this kind is simply absent. Indeed, as I show later, there is considerable doubt whether evidence of this kind exists. If the position is that no authority within the City duly authorised to do so consented to the occupation of the applicants, there is no actual consent. In these circumstances it is impossible to understand the contradictory averments under oath by all the applicants to the effect that they are in occupation as a result of the express or implied consent of the City. It is startling, if they have the consent of the City, that the applicants had no idea whether that consent is express or implied. But more importantly, they must know that they do not have the express consent of the City and that they rely on tacit consent. It is impossible for the applicants to prove by direct evidence that there has been a resolution by an authorised entity of the City consenting to their occupation. They cannot prove consent by direct evidence, that is evidence of a resolution by an authorised entity, but

what they have tried to do in this case is to prove actual consent, that is an appropriate resolution by the City by inference.

[74] The question to be asked therefore is whether the most plausible inference from all the evidence is that the City had in fact consented following its internal procedures, or whether the most plausible inference is that it had not. It is emphasised that regard must be had to all the evidence for the purpose of drawing the appropriate inference. In addition, equal weight must be given to all the relevant evidence. The applicants would have it that the mayor’s evidence is vague and that it is in addition exceptionable because Ms Mfeketo had been the mayor only for a limited period. It is further pointed out that there is no effort to put up any resolution of the City. I reject this attack on the evidence of the mayor particularly in the light of the fact that the correctness of the evidence was not challenged. It is true that the mayor’s evidence was put up only in reply to the allegations of tacit consent and the evidence proffered in support of it. Nevertheless, the importance of this evidence for the applicants’ case must have been apparent and one would have expected that any material available to gainsay this evidence would have been tendered. In the circumstances, the unchallenged evidence of Ms Mfeketo must be accepted at face value. What the facts mean must be determined on that basis. It would be improper to ignore the evidence of the mayor.

[75] A second important aspect that must be borne in mind is that the City had at all times constitutional duties towards the applicants and all other vulnerable people who

occupied its land. The Constitution requires the state, and therefore the City, to respect, protect, promote and fulfil all fundamental rights.[31] Arguably one of the most significant rights, particularly in the context of the present case, is the right to have the inherent dignity of everyone respected and protected.[32] More specifically the objects of local government in the Constitution are, amongst other things, "to ensure the provision of services to communities in a sustainable manner"[33] and "to promote a safe and healthy environment".[34] A municipality is obliged to try to achieve these objectives.

[76] The Municipal Systems Act[35] echoes this and obliges a municipality to provide all members of communities with "the minimum level of basic municipal services."[36] Moreover this Court's jurisprudence obliges the state, including municipalities, to treat vulnerable people with care and concern and to treat human beings as human beings.[37]

[77] Ms Mfeketo says that this accorded with the policy of the political party in power at the time in that municipality, and the duties that municipalities had towards

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[31] Section 7(2) of the Constitution.

[32] Section 10 of the Constitution.

[33] Section 152(1)(b) of the Constitution.

[34] Section 152(1)(d) of the Constitution.

[35] Local Government: Municipal Systems Act 32 of 2000.

[36] Id at section 73(1)(c).

[37] *Port Elizabeth Municipality v Various Occupiers* [2004] ZACC 7; 2005 (1) SA 217 (CC); 2004 (12) BCLR 1268 (CC) at paras 29 and 39; and *Government of the Republic of South Africa and Others v Grootboom and Others* [2000] ZACC 14; 2001 (1) SA 46 (CC); 2000 (11) BCLR 1169 (CC) at paras 44 and 82-3.

the people, that these basic services were provided. The houses were given numbers in the process of conducting a census for future housing planning purposes. This is both coherent and convincing. The mayor at the relevant time is emphatic that there was no intention on the part of the municipality during her period of tenure of over six years to concede any right of occupation. That means that no resolution was passed by an authorised entity of the City to grant any right of occupation to the applicants. Although this is not said in so many words, it follows inevitably from the proposition that there was no intention to concede a right of occupation. The idea, suggested on behalf of the applicants, that there may have been some resolution or an intention on the part of the Council to concede rights of occupation during the time when Ms Mfeketo was not the mayor is still-born and without merit. The evidence speaks beyond dispute to the efforts made during the period 2006 - 2008, after the Gateway project had been announced, to get people to leave the area to facilitate the Gateway development. A resolution taken during this time, conceding a right of occupation, would have yielded an entirely different approach. If any resolution had been taken before 1998, it is inconceivable that Ms Mfeketo would have been unaware of it, would not have referred to it, and would have persisted with her contention that the City evinced no intention to concede a right of occupation.

[78] The intention not to concede a right of occupation is therefore wholly consistent with the provision of services, the numbering of households as well as the laudable care and concern that has been demonstrated by the City in this case. It is also consistent with the City having allowed the occupants to live in the area over long

periods. The City thought it inopportune and wrong to evict people until and unless it was done in a humane way and until appropriate housing provision had been planned and made. The fact that "red cards" were issued to the applicants was perfectly consistent with the absence of tacit consent. These cards were issued simply to show that the applicants had applied to the City for housing.

[79] All the City was doing here was carrying out its constitutional mandate and moral duty with responsibility and care. If this conduct were to result in an inference that an enforceable right of occupation has been conceded, it would mean that the performance of a constitutional duty by the City would inexorably lead to the concession of a right of occupation. It follows that the City would have no choice, in circumstances with which we are here concerned, but to concede a right of occupation. This is because it has no choice but to perform its constitutional duty. This cannot be. The element of compulsion removes the occupation of the applicants from the category of occupation by voluntary agreement. There is no merit in the contention that the City ought to have expressly told the people concerned that no rights of occupation had been conceded. No duty of this kind existed in the circumstances. In any event the occupiers ought to have been under no illusion. They ought to have known, in all the circumstances, that no right to occupation had been conceded.

[80] There is much evidence of interaction between the authorised representatives of the applicants and the representatives of the City about the physical conditions of their

accommodation and about the voluntary relocation of the applicants to Delft. But there is no evidence of any interaction at all concerning a voluntary agreement to occupy. Indeed, some of the evidence goes the other way. I refer here to those applicants who say under oath that they purchased their right of occupation from some other party under Mr Penze's facilitative influence and to those applicants who expressly say that they got permission to stay at Joe Slovo settlement from a residents' committee of sorts. No one got the permission of the City.

[81] Another factor to be taken into account is the approach of the applicants on affidavit to the issue of the ownership of the Joe Slovo settlement by the City of Cape Town. If they had had the consent of the owner to occupy in the sense of the voluntary agreement to occupy and in the sense of a relationship with the owner of the property, one would have expected unequivocal acknowledgement of the fact that the City of Cape Town is the owner of the property. Yet the applicants blew hot and cold on this aspect. Mr Sopaqa, the main deponent authorised on behalf of all the applicants, says in the one breath that the applicants have no knowledge whether the City of Cape Town is the owner of the property that constitutes the Joe Slovo settlement and puts the respondents to the proof thereof. Later in the same affidavit, Mr Sopaqa admits the allegation that the City of Cape Town is the owner of the property. This equivocation is inconsistent with any genuine tacit consent.

[82] I may mention one more factor that might be thrown into the balance here. It is apparent that no rent or water charges are being paid to the municipality by any of the

occupiers in respect of their occupation. While it is understandable that the applicants would do everything possible to stay rent-free on municipal property, the circumstance points away from any concession of a right to occupation. The right to occupy, if it existed, would have been one free of charge. It is highly improbable that a concession of this kind would have been made.

[83] Finally, in this connection, I must address the argument premised on the decision in the case of *Rademeyer*.[38] I have already referred to the way in which the High Court approached and disposed of this argument.[39] I remind myself, that in *Rademeyer*, a High Court held that a municipality had tacitly consented to the occupation of a large number of vulnerable people on its land merely on the basis that essential services had been provided to the people concerned for an extended period. The submission is that, by parity of reasoning, the City must be taken to have conceded the right of occupation to the applicants in this case. The argument is untenable, tries without justification to equate two incomparable situations and ignores fundamental distinctions between the two cases. In *Rademeyer*, residents of surrounding areas wanted the municipality, which was content with vulnerable people continuing to reside on its property, to take steps to evict them on the basis that they were a nuisance. The municipality did not contend in that case that it had not conceded a right of occupation and the High Court concerned was arguably right in concluding that the municipality had tacitly consented. But any suggestion that that conclusion has any relevance for the determination of the dispute in relation to

[38] Above n 11.

consent in this case does not begin to bear scrutiny and is rejected. As I have already pointed out, the evidence of the mayor of the City disputes that the City had consented to the occupation by the applicants and provides a cogent explanation consistent with the absence of consent for why the applicants were treated humanely. Whether there is consent is a factual question and the approach that each case must be determined on its own facts has not fallen into disuse.

The broad basis of consent and termination

[84] Even if it is so that consent ought to be more broadly defined than is considered appropriate in my judgment, it is my view that consent of that kind was terminated by necessary implication. It will be inconsistent to allow for a broad definition of consent and for a narrow definition of the method of termination. The idea that each of these families had to be given formal notice of termination is unacceptable. The residents knew through their representatives as early as 2004 that upgrading was to take place. They knew that they would have to move to facilitate that upgrading. Indeed they were at one stage happy to move. The fact that they refused to move means that they had notice. There was no need to submit memoranda to any authority unless they had notice that they had to be relocated. Nor was there any need for protest if the applicants had been given no notice. Indeed, the applicants knew and the applicants objected. No one was taken by surprise; there was no allegation to this effect and nor could there have been any.

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[39] See [35] above.

Conclusion on consent

[85] I conclude therefore that the occupants enjoyed no right of occupation. It was therefore not necessary for the City to terminate that right. The essentially technical defence by the applicants that they had a right of occupation which had not been terminated fails. That does not mean that they can be evicted or relocated without more. The requirements of the PIE Act must be complied with. I must say immediately that the most important of the requirements of the PIE Act for present purposes is the requirement that their eviction must be just and equitable. I come to that later. First, however, certain essentially technical objections based on the PIE Act and taken by the applicants must be carefully considered.

Objections based on PIE requirements

[86] Quite apart from the contention that it was not just and equitable for the residents to be evicted, a matter which I discuss under the next heading, the applicants took two other points. First, they emphasised that proceedings against them had been instituted against them in terms of section 5 of the PIE Act, the requirements of section 5 had not been complied with and that, in any event, section 5 does not authorise any court to grant a final order of eviction as the High Court did in this case. The second objection, based on the proposition that section 6 of the PIE Act was rightly applied by the High Court, concerned the correct interpretation of section 6(1). I deal with each in turn.

Was the High Court right in granting an order for eviction in terms of section 6 of the PIE Act?

[87] It is true that the proceedings were instituted as a matter of urgency in terms of section 5 of the PIE Act, and that the order eventually made by the High Court was competent only in terms of sections 4 or 6 and not in terms of a section 5 application. Sections 5 and 6 are set out below for convenience.

[88] Section 5 provides:

> "Urgent proceedings for eviction
>
> (1) Notwithstanding the provisions of section 4, the owner or person in charge of land may institute urgent proceedings for the eviction of an unlawful occupier of that land pending the outcome of proceedings for a final order, and the court may grant such an order if it is satisfied that—
>
> *(a)* there is a real and imminent danger of substantial injury or damage to any person or property if the unlawful occupier is not forthwith evicted from the land;
>
> *(b)* the likely hardship to the owner or any other affected person if an order for eviction is not granted, exceeds the likely hardship to the unlawful occupier against whom the order is sought, if an order for eviction is granted; and
>
> *(c)* there is no other effective remedy available.
>
> (2) Before the hearing of the proceedings contemplated in subsection (1), the court must give written and effective notice of the intention of the owner or person in charge to obtain an order for eviction of the unlawful occupier to the unlawful occupier and the municipality in whose area of jurisdiction the land is situated.
>
> (3) The notice of proceedings contemplated in subsection (2) must—

(a) state that proceedings will be instituted in terms of subsection (1) for an order for the eviction of the unlawful occupier;

(b) indicate on what date and at what time the court will hear the proceedings;

(c) set out the grounds for the proposed eviction; and

(d) state that the unlawful occupier is entitled to appear before the court and defend the case and, where necessary, has the right to apply for legal aid."

[89] Section 6 provides:

"Eviction at instance of organ of state

(1) An organ of state may institute proceedings for the eviction of an unlawful occupier from land which falls within its area of jurisdiction, except where the unlawful occupier is a mortgagor and the land in question is sold in a sale of execution pursuant to a mortgage, and the court may grant such an order if it is just and equitable to do so, after considering all the relevant circumstances, and if—

(a) the consent of that organ of state is required for the erection of a building or structure on that land or for the occupation of the land, and the unlawful occupier is occupying a building or structure on that land without such consent having been obtained; or

(b) it is in the public interest to grant such an order.

(2) For the purposes of this section, 'public interest' includes the interest of the health and safety of those occupying the land and the public in general.

(3) In deciding whether it is just and equitable to grant an order for eviction, the court must have regard to—

(a) the circumstances under which the unlawful occupier occupied the land and erected the building or structure;

> *(b)* the period the unlawful occupier and his or her family have resided on the land in question; and
>
> *(c)* the availability to the unlawful occupier of suitable alternative accommodation or land.
>
> (4) An organ of state contemplated in subsection (1) may, before instituting such proceedings, give not less than 14 days' written notice to the owner or person in charge of the land to institute proceedings for the eviction of the unlawful occupier.
>
> (5) If an organ of state gives the owner or person in charge of land notice in terms of subsection (4) to institute proceedings for eviction, and the owner or person in charge fails to do so within the period stipulated in the notice, the court may, at the request of the organ of state, order the owner or person in charge of the land to pay the costs of the proceedings contemplated in subsection (1).
>
> (6) The procedures set out in section 4 apply, with the necessary changes, to any proceedings in terms of subsection (1)."

[90] It is apparent that section 5(1) sets out certain very stringent requirements to obtain an urgent eviction pending the determination of proceedings for a final order of eviction of the applicants. In proceedings in terms of section 5 therefore, any issue in relation to whether an order for eviction should be granted and, in particular, whether it is just and equitable to grant the eviction order would be entirely irrelevant. The PIE Act contemplates that urgent proceedings in terms of section 5 will be separate, independent and distinct from the substantial eviction proceedings contemplated in section 6. The High Court found that "the applicants had clearly complied with the procedure laid down in section 5 of PIE" on the basis of certain notices that had been issued by that Court.[40] One would ordinarily have expected an urgent eviction order to have been obtained upon proof of the stringent requirements of section 5 of the PIE

[40] Above n 2 at para 32.

Act, including the existence of a real and imminent danger of substantial injury or damage to any person or property.[41] In the event, although an urgent order in terms of section 5 was applied for, no order was in fact obtained.

[91] What happened was this. Although the application was initially a section 5 application, the order asked for was not a section 5 order but one for a final eviction and relocation, competent only in terms of section 6 of the PIE Act. The notice to residents had in the meantime made it plain that a final eviction order would be asked for. It will be seen that section 6 issues, that have nothing to do with an interim eviction order and which are relevant to a grant of a final order of eviction, were dealt with in the papers. These issues include whether the eviction should be ordered in all the circumstances and whether it is just and equitable to evict. Argument was heard on whether a final eviction order should be granted and that order was in fact granted.

[92] The High Court would have put form above substance if it heard the case on the ultimate date of hearing as a section 5 case. By the time the matter was heard about three months after the application had been filed, much water had passed. Notices of intention to oppose had been filed and the parties had dealt in detail with the section 6 issues in the papers. The urgent section 5 application had been overtaken by events. In the circumstances the High Court was right to deal with the case as one which started as a section 5 case and which, by the time it was argued, had matured into a fully-fledged section 6 application. In my view, there could indeed have been no

[41] Above n 5 at section 5(1)(a).

opposition of substance had the respondents applied for an amendment in the High Court shortly before the date of hearing; an amendment to regularise the matter and to make explicit what was already implicit that an eviction was, at the date of hearing, being sought in terms of section 6. In the circumstances the question whether the stringent requirements of section 5 had been met was not material before the High Court as at the date on which the matter was finally heard. Indeed the section 5 issues were never material because no order in terms of section 5 had ever been sought. It is therefore unnecessary for me to decide in this case whether the stringent section 5 requirements had been complied with.

[93] The High Court was undoubtedly right in ultimately deciding the case, and making an order, in terms of section 6 of the PIE Act.

The section 6 interpretation issue

[94] It is now appropriate to consider the contention advanced by the applicants concerning the proper construction of section 6(1)(a) and (b). We must recall that section 6 is concerned with evictions at the instance of an organ of state. Leaving aside material not germane to the point taken by the applicants, section 6 orders are competent if—

(a) the "consent of that organ of state is required for the erection of a building or structure on that land or for the occupation of the land, and the unlawful

occupier is occupying a building or structure on that land without such consent having been obtained”;[42] or

(b) “it is in the public interest to grant such an order.”[43]

For completeness I point out that the Act defines public interest so as to include “the interest of the health and safety of those occupying the land and the public in general.”[44]

[95] The applicants contend that the “or” in between subsections (a) and (b) is what has come to be referred to in legal parlance as a “conjunctive or”. Put in simple terms, the use of this phrase connotes that in the context of section 6(1)(a) and (b), the “or” should be read as “and”. The necessary consequence of the proposed reading of the word is that it will be necessary for the requirements in both (a) and (b) to be complied with as pre-requisites to an ejectment order being competently granted and, conversely, that proof of either (a) or (b) on its own, and without the accompaniment of the other, can never result in a competent ejectment. The point has the potential to signal victory for the applicants in the dismissal of the order sought because section 6(1)(a) has not been and cannot be complied with. The reason for this is that on a proper construction of section 6(1)(a), the consent of an organ of state that seeks ejectment must be necessary and not have been obtained. The consent of the parties seeking ejectment is not required, but the consent of the City is. The City is not an applicant.

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[42] Id at section 6(1)(a).

[43] Id at section 6(1)(b).

[44] Id at section 6(2).

[96] The applicants seek to satisfy us therefore that, absent the section 6(1)(a) allegation, the respondents cannot succeed. In other words, that it is essential for the respondents to establish that the consent required for the erection of the structure or building must be given by one of the respondents. What has to be decided therefore is whether the respondents must establish the requirements of section 6(1)(a) as a pre-requisite to their entitlement to relief pursuant to section 6. The "or" is equal to "and" contention is designed to achieve this result, for if the "or" is read as "or", section 6(1)(a) would not be an essential requirement.

[97] Support for the proposition that the "or" means "and" is sought in the following passage in *Baartman*:[45]

> "Although ss 1 *(a)* and *(b)* of s 6 of the Act are separated by the disjunctive 'or', which might arguably indicate that a court may grant an eviction order without having regard to the public interest when the person sought to be evicted occupies a building or structure which had been erected without the consent of the organ of State concerned, it is, in my view, imperative in this case, as will probably be the position in the majority of cases of eviction, that the question whether it is in the public interest to grant such an order also be considered. The interests of the public inevitably impact upon the justness and equitability of the order."

[98] The passage does not establish either that the "or" in between sections 6(1)(a) and 6(1)(b) is conjunctive or that section 6(1)(a) reflects an essential pre-requisite to a successful section 6 ejectment or relocation order. It says the following:

(a) Sections 6(1)(a) and 6(1)(b) are separated by the disjunctive "or".

[45] *Baartman and Others v Port Elizabeth Municipality* 2004 (1) SA 560 (SCA) at para 9.

(b) This might arguably indicate that a court may grant an eviction order without having regard to the public interest in circumstances where the person sought to be evicted occupies the building or structure erected without the consent of the organ of state concerned.

(c) It was imperative in that case, as would probably be so in most eviction cases, that the question whether it is in the public interest to grant an eviction order also be considered.

(d) The interests of the public inevitably impact upon the justness or equitability of the order.

[99] I agree with this passage. It means that, on a contextual interpretation of section 6, and despite the use of the disjunctive "or", the public interest element will have to be established in most section 6 eviction cases as an element of the justice and equity evaluation. The case of *Baartman* is authority for the proposition that the fulfilment of the section 6(1)(a) requirement will not be enough on its own in most cases because, for the eviction to be just and equitable, it would ordinarily also have to be in the public interest. It is difficult to imagine how an eviction that is not in the public interest can ever be just and equitable in the ordinary course. It is important to emphasise the difference between the public interest being necessary as part of the justice and equity evaluation, in most cases, on the one hand, and it being necessary in all cases as an indispensable allegation required by section 6(1)(a) on the other hand. The Supreme Court of Appeal did not rule that, however just and equitable the eviction order may be and even if the public interest requirement is fully satisfied, an

organ of state can never obtain an order for ejectment unless the consent of that organ of state for the erection of a building or structure occupied by the person sought to be ejected is required and has not been obtained. There is no warrant for this construction. The existence of a structure constructed contrary to the requirements of the very organ of state seeking the ejectment is not a pre-requisite for a section 6 ejectment order to be made.

[100] That does not mean that the issue whether the structure that is occupied has been made consistently with the requirements of the municipality within whose area it is situated is irrelevant. It would be highly germane to the justice and equity enquiry in a case where the organ of state seeks the eviction of an occupier from premises that have been constructed in full compliance with the building regulations of the municipality. But it is not a pre-requisite.

[101] The word "or" at the end of section 6(1)(a) does mean "or". It does not mean "and". However this finding is subject to the qualification that an eviction cannot ordinarily be just and equitable unless the public interest requires it. It will accordingly be appropriate that public interest be established. The point fails.

[102] I have found, consistently with the judgment in *Baartman*, that it is essential in most cases for the ejectment or relocation of the applicants to be in the public interest. The question whether this is so in the present case will be considered in the discussion of the justice and equity requirement, which I go to immediately.

The justice and equity requirement

[103] It is as well to repeat the provisions of section 6(3) at this stage:

> "In deciding whether it is just and equitable to grant an order for eviction, the court must have regard to—
>
> *(a)* the circumstances under which the unlawful occupier occupied the land and erected the building or structure;
>
> *(b)* the period the unlawful occupier and his or her family have resided on the land in question; and
>
> *(c)* the availability to the unlawful occupier of suitable alternative accommodation or land."

[104] Essential elements of the approach to the determination of whether an order for eviction or relocation would be just and equitable appear from the following excerpt of the judgment in the *Port Elizabeth Municipality*[46] case:

> "There is nothing in s 6 to suggest that the three specifically identified circumstances are intended to be the only ones to which the court may refer in deciding what is just and equitable. They are peremptory but not exhaustive. It is clear both from the open-ended way in which they are framed and from the width of decision-making involved in the concept of what is just and equitable, that the court has a very wide mandate and must give due consideration to all circumstances that might be relevant. Thus the particular vulnerability of occupiers referred to in s 4 (the elderly, children, disabled persons and households headed by women) could constitute a relevant circumstance under s 6. Similarly, justice and equity would take account of the extent to which serious negotiations had taken place with equality of voice for all concerned. What is just and equitable could be affected by the reasonableness of offers made in connection with suitable alternative accommodation or land, the time scales proposed relative to the degree of disruption involved, and the willingness of the occupiers to respond to reasonable alternatives put before them.

[46] *Port Elizabeth Municipality* above n 37 at paras 30-1.

> The combination of circumstances may be extremely intricate, requiring a nuanced appreciation of the specific situation in each case. Thus, though there might be a sad uniformity in the conditions of homelessness and desperation which lead to unlawful occupations, on the one hand, and the frustration of landowners at being blocked by intruders from enjoyment of their property, on the other, the actual details of the relationships involved are capable of infinite variation. It is not easy to classify the multitude of places and relationships involved. This is precisely why, even though unlawfulness is established, the eviction process is not automatic and why the courts are called upon to exercise a broad judicial discretion on a case by case basis. Each case, accordingly, has to be decided not on generalities but in the light of its own particular circumstances. Every situation has its own history, its own dynamics, its own intractable elements that have to be lived with (at least, for the time being), and its own creative possibilities that have to be explored as far as reasonably possible. The proper application of PIE will therefore depend on the facts of each case, and each case may present different facts that call for the adoption of different approaches." (Footnote omitted.)

[105] Although the prescriptions in section 6(3) of the matters to be taken into account are not exhaustive, it is perhaps appropriate to start there.

(a) First, section 6(3)(a). The applicants occupied the land and built their rudimentary structures in circumstances of dire need. They had nowhere to go. They had come to the urban centre in search of work. Their circumstances require empathy, care and concern.

(b) Section 6(3)(b) is next. Various families have occupied the Joe Slovo settlement for differing periods of up to 15 years.

(c) The section 6(3)(c) requirement is vital to the justice and equity evaluation. The position in relation to the availability of alternative accommodation here may be summarised as follows. Those applicants who require this will be moved to temporary relocation units (TRUs). All the families to be relocated

will be provided with alternative accommodation at the expense of the state. This alternative accommodation is situated at Delft, about 15 kms away. Each family will occupy a TRU which is at least 24m², which will probably be provided with electricity, and the walls and roofs of which will be constructed of synthetic protective material. This material is fire-resistant. This will mean that the frequent deaths and destruction caused by fire in the Joe Slovo settlement will be averted. Each TRU will have access to ablution facilities that will be provided with water-borne sewerage and from which fresh water will be available. It is probable that much of this temporary accommodation will be at least in physical terms better than that at Joe Slovo. It is certainly more hygienic and less dangerous.

[106] It is now necessary to move out of the section 6(3) terrain. The availability of temporary accommodation is not the full story. The plan is that each of the families that is now moved will be provided, if they qualify in terms of the state criteria, with permanent accommodation in the N2 Gateway development. There will be enough accommodation in the new development to accommodate everyone. Indeed, the new development, if it goes according to plan, is expected to accommodate 20 000 families. This is the one respect in which this case differs from other cases that have come before this Court in which eviction was required. Here the respondents in effect offer relocation. The people ejected will not be out in the cold.

[107] It is true, as is emphasised by the amici, that this relocation would entail immense hardship. I have considerable sympathy with the applicants, but there are circumstances in which this Court and all involved have no choice but to face the fact that hardship can only be mitigated but can never be avoided altogether. The human price to be paid for this relocation and reconstruction is immeasurable. Nonetheless it is not possible to say that the conclusion of the City of Cape Town, to the effect that infrastructural development is essential in the area and that the relocation of people is necessary, is unreasonable. There are circumstances in which there is no choice but to undergo traumatic experiences so that we can be better off later. Significantly, they are ameliorated by the state undertaking to provide transport and to ensure that schooling is available to children and that people moved to Delft can get to work.

[108] The next factor relevant to justice and equity is that the purpose of the relocation is to facilitate appropriate housing development in compliance with the obligations of the state. We must take into account the fact that thousands of people will benefit from the development, as well as the circumstance that the conditions at Joe Slovo are far from ideal. Indeed the applicants live in difficult physical circumstances despite the fact that the City has made considerable efforts to improve their position. We cannot lose sight of the fact that the area represents a health hazard and that fires have regularly claimed lives in the Joe Slovo settlement. The sooner the relocation occurs the sooner the development can begin; and the sooner some residents will be returned to housing in the area. The relocation is undoubtedly in the public interest.

[109] The applicants make a point that is highly relevant to the justice and equity enquiry. They say that there have been broken promises and that it is not possible to trust what the respondents say in the future. They also complain of not being fully consulted in the process. It is admitted though that there has been some consultation. The promises were not deliberately broken but were the results of changing circumstances. I do not think that these factors are sufficient not to grant an order facilitating relocation.

[110] There was extensive argument concerning the legitimate expectation that 70% of houses built in the Joe Slovo settlement would be allocated to Joe Slovo residents who qualify. The applicants point out correctly that this was not done in the first two phases of the three-phase development. But the respondents say that this failure was due to circumstances beyond their control. It is not necessary to go into the complex argument concerning substantive and procedural legitimate expectation so competently advanced before us. The issue can be appropriately accommodated in the justice and equity analysis. To my mind, the highest at which the legitimate expectation argument can be put is that there was a promise that, as far as was possible, 70% of the accommodation would be made available to Joe Slovo residents who qualify. The state says that it has not been possible to accommodate Joe Slovo residents in phases 1 and 2. The state is now prepared to consent to an order in terms of which 70% of the houses yet to be constructed at Joe Slovo will be allocated to Joe

Slovo residents. The legitimate expectation of the applicants will be sufficiently satisfied to render the relocation just and equitable.

[111] Finally, it must be borne in mind that the state owns the land and that it is the state that pays for the construction of housing. The state must be afforded some leeway in the design and structure of housing provided that it acts reasonably.

[112] The amici curiae have made extensive and helpful submissions. The most useful way of evaluating their submissions is to evaluate them within the context of the justice and equity investigation. They do not attempt to fit their submissions into the framework of the PIE Act. However, if I understand the submissions correctly, they say that the order of the High Court should not be upheld because it is neither just nor equitable to grant the order of eviction. They base this conclusion principally on three supporting arguments. First, they emphasise that the provision of housing is not about bricks and mortar alone but about the consideration and integration of the human factor. This the state did not do, having been guilty of the exclusive bricks and mortar approach. Second, they criticise the state roundly for not engaging sufficiently with the applicants. Third, they take the view that a development on site without the relocation of the applicants is perhaps a feasible option.

[113] It is certainly true that the state could and should have been more alive to the human factor and that more intensive consultation could have prevented the impasse that had resulted. Having given these issues careful consideration, I do not think that

these factors in themselves are sufficient to tilt the scale against eviction and relocation. I must bear in mind that the applicants themselves do not contend with any force that the decision not to develop the land while the applicants remain in occupation is so unreasonable that it ought to be set aside. It must be borne in mind here that the project has already begun and more than 1 000 people have moved from the Joe Slovo settlement to facilitate the development. The applicants' complaints are principally about broken promises and their legitimate expectations. The difference of opinion about whether it is necessary for the applicants to be relocated to facilitate the proposed housing development is, in my view, not of sufficient moment to render the eviction and relocation inconsistent with justice and equity. The engagement submissions have been taken into account in the order in which the respondents are directed to engage meaningfully with the applicants during the relocation process.

[114] I have come to the conclusion that, provided that the order for the eviction and relocation of the applicants makes appropriate provision for the safe, dignified and humane relocation of all the people involved, the eviction and relocation of the applicants will be in accordance with justice and equity. I would propose an order that would, as far as possible, achieve this.

Is the eviction of the applicants, in all the circumstances, reasonable?

[115] The applicants are being evicted and relocated in order to facilitate housing development. In the circumstances their eviction constitutes a measure to ensure the progressive realisation of the right to housing within the meaning of section 26(2) of

the Constitution.[47] It must be remembered in relation to the requirement of reasonableness that:

> "The measures must establish a coherent public housing program directed towards the progressive realisation of the right of access to adequate housing within the State's available means. The program must be capable of facilitating the realisation of the right. The precise contours and content of the measures to be adopted are primarily a matter for the Legislature and the Executive. They must, however, ensure that the measures they adopt are reasonable. In any challenge based on s 26 in which it is argued that the State has failed to meet the positive obligations imposed upon it by s 26(2), the question will be whether the legislative and other measures taken by the State are reasonable. A court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent. The question would be whether the measures that have been adopted are reasonable. It is necessary to recognise that a wide range of possible measures could be adopted by the State to meet its obligations. Many of these would meet the requirement of reasonableness. Once it is shown that the measures do so, this requirement is met."[48]

[116] Eviction is a reasonable measure to facilitate the housing development programme. In addition, all the factors discussed in relation to the question whether it is just and equitable to grant the eviction order also justify a conclusion that the eviction is, in the circumstances, reasonable.

[117] In all the circumstances, the respondents have acted reasonably in compliance with the state's housing obligations and there has been reasonable engagement almost

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[47] Section 26(2) provides:

> "The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right."

[48] *Grootboom* above n 37 at para 41.

all the way.[49] It would have been ideal for the state to have engaged individually and carefully with each of the thousands of the families involved. But reasonableness involves realism and practicality. There has been reasonable engagement. The representatives of the City have reasonably engaged with the community through its representatives during the period 2004 to the time when proceedings were instituted.

[118] I conclude therefore that the eviction is reasonable and that the respondents and the City have acted reasonably.

The order

[119] As far as the content of the order is concerned, members of the Court expressed concern during argument that if an eviction order were to be made it should provide sufficient protection for the dignity of those to be moved. The order must ensure that the evictions or relocations are consistent with justice and equity. In the circumstances, the parties were asked to try to agree to an order that might be granted. The state has produced a draft order with an accompanying motivation. Both documents have been sent to the applicants' attorneys.

[120] The response by the applicants is not particularly helpful. They insist that no eviction order should be granted because there had been no engagement and because the applicants were not liable to eviction. In effect they ask for further engagement.

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[49] *Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg v City of Johannesburg and Others* [2008] ZACC 1; 2008 (3) SA 208 (CC); 2008 (5) BCLR 475 (CC) at paras 10-21; *Port Elizabeth Municipality* above n 37 at paras 39 and 43-7; and *Grootboom* above n 37 at paras 82-3.

[121] It is necessary to explain some parts of the order that will be made. Paragraphs 19 and 20 of the order have become necessary because in the material submitted to this Court, together with the draft amended order after argument had been completed, it was pointed out that the first respondent may be replaced as developer. It was therefore suggested that these paragraphs of the order were necessary.

[122] Paragraphs 5 to 7, 11 and 22 of the order are considered appropriate for two reasons. First, much time has passed from September last year when the respondents made proposals in relation to exactly when certain identified households would be moved to Delft. In the circumstances it was inappropriate for our order to be a final one. Secondly, it is in my view appropriate for the parties to engage meaningfully about the nuts and bolts of the relocation process.

Costs

[123] The applicants have raised important matters of concern. They have also succeeded in some measure in effecting significant changes to the High Court order. The state has however been substantially successful. In the circumstances, the fairest way to manage the issue of costs is to order the respondent to pay half of the applicants' costs both in this Court, and in the High Court.

[124] In the circumstances, I agree with the order made in the judgment of the Court.

Langa CJ and Van der Westhuizen J concur in the judgment of Yacoob J.

MOSENEKE DCJ:

Introduction

[125] This case is about landless people who live in an informal settlement known as Joe Slovo. On all accounts their housing is meagre, crowded, vulnerable and deplorable. The settlement is located on publicly owned land alongside the N2 highway near Cape Town. Over 15 years the settlement has grown to be a community of over 4 000 households estimated to consist of approximately 20 000 residents. In issue in this case is whether the residents occupy the land lawfully and if not, whether it would be just and equitable for the government to evict them forcibly from their modest homes for the purpose of erecting permanent houses on the land they occupy. The dispute between the residents and the government requires us to determine whether the coercive eviction and relocation of the residents is permissible under our Constitution and legislation that prevents arbitrary eviction from, and the unlawful occupation of, land.

[126] The City of Cape Town (the City) owns the land on which Joe Slovo is situated. Even so, the eviction and relocation of this community was not sought by the owner of the land but by Thubelisha Homes Ltd (Thubelisha). This is a public company

established by the government to undertake several of its housing functions as a national public entity and agency.[1] Thubelisha is responsible for implementing the N2 Gateway Project – a major housing project initiated by government to build permanent homes in Joe Slovo and other adjacent areas in order to end the informal settlement. It must be added that the national Minister for Housing (the Minister) and the Member of the Executive Council for Housing and Local Government in the Western Cape (the MEC) supported the eviction sought as second and third applicants respectively. I shall refer to them and Thubelisha collectively as the government respondents.

[127] In order to secure the eviction and relocation of the residents of Joe Slovo, Thubelisha brought an urgent application in the Western Cape High Court, Cape Town. For that relief, it initially relied on the provisions of section 5 of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE).[2]

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[1] Thubelisha is listed in schedule 3 of the Public Finance Management Act 1 of 1999.

[2] Section 5 states:

> "(1) Notwithstanding the provisions of section 4, the owner or person in charge of land may institute urgent proceedings for the eviction of an unlawful occupier of that land pending the outcome of proceedings for a final order, and the court may grant such an order if it is satisfied that—
>
> > (a) there is a real and imminent danger of substantial injury or damage to any person or property if the unlawful occupier is not forthwith evicted from the land;
> >
> > (b) the likely hardship to the owner or any other affected person if an order for eviction is not granted, exceeds the likely hardship to the unlawful occupier against whom the order is sought, if an order for eviction is granted; and
> >
> > (c) there is no other effective remedy available.
>
> (2) Before the hearing of the proceedings contemplated in subsection (1), the court must give written and effective notice of the intention of the owner or person in charge to obtain an order for eviction of the unlawful occupier to the unlawful occupier and the municipality in whose area of jurisdiction the land is situated.
>
> (3) The notice of proceedings contemplated in subsection (2) must—
>
> > (a) state that proceedings will be instituted in terms of subsection (1) for an order for the eviction of the unlawful occupier;

Later in the proceedings, it resorted to the provisions of section 6 of PIE.[3] Together with the Minister and the MEC, Thubelisha advanced the argument that the residents are unlawful occupiers and that it is just and equitable that they be ejected from their homes in order that the government respondents may build subsidised permanent housing on the site of the Joe Slovo settlement.

> (b) indicate on what date and at what time the court will hear the proceedings;
>
> (c) set out the grounds for the proposed eviction;
>
> (d) state that the unlawful occupier is entitled to appear before the court and defend the case and, where necessary, has the right to apply for legal aid."

[3] Section 6 states:

> "(1) An organ of state may institute proceedings for the eviction of an unlawful occupier from land which falls within its area of jurisdiction, except where the unlawful occupier is a mortgagor and the land in question is sold in a sale of execution pursuant to a mortgage, and the court may grant such an order if it is just and equitable to do so, after considering all the relevant circumstances, and if—
>
> (a) the consent of that organ of state is required for the erection of a building or structure on that land or for the occupation of the land, and the unlawful occupier is occupying a building or structure on that land without such consent having been obtained; or
>
> (b) it is in the public interest to grant such an order.
>
> (2) For the purposes of this section, 'public interest' includes interest of the health and safety of those occupying the land and the public in general.
>
> (3) In deciding whether it is just and equitable to grant an order for eviction, the court must have regard to—
>
> (a) the circumstances under which the unlawful occupier occupied the land and erected the building or structure;
>
> (b) the period the unlawful occupier and his or her family have resided on the land in question; and
>
> (c) the availability to the unlawful occupier of suitable alternative accommodation or land.
>
> (4) An organ of state contemplated in subsection (1) may, before instituting such proceedings, give not less than 14 days written notice to the owner or person in charge of the land to institute proceedings for the eviction of the unlawful occupier.
>
> (5) If an organ of state gives the owner or person in charge of land notice in terms of subsection (4) to institute proceedings for eviction, and the owner or person in charge fails to do so within the period stipulated in the notice, the court may, at the request of the organ of state, order the owner or person in charge of the land to pay the costs of the proceedings contemplated in subsection (1).
>
> (6) The procedures set out in section 4 apply, with the necessary changes, to any proceedings in terms of subsection (1)."

[128] In the case it made before the High Court, Thubelisha and other government respondents undertook to relocate temporarily the residents who were to be evicted from Joe Slovo to a residential area known as Delft some 15 kms away. However, they did not undertake to allocate any of the permanent houses to be built on the site of Joe Slovo to the residents who were to be evicted.

[129] The residents strenuously resisted the eviction proceedings on several grounds. They are represented primarily by two committees, the one chaired by Mr S Penze, and the other, referred to as the Task Team, chaired by Mr S Mapasa. The residents challenged the standing and right of Thubelisha to seek their eviction. They denied that their occupation was unlawful and asserted that throughout the lifespan of the settlement, the City was aware of and actively supported their occupation and in effect consented to it. They made the argument that the City has never terminated its consent and that, in any event, even if it had, it was neither just nor equitable for the residents to be evicted from their homes and relocated to some distant temporary abode. In addition, the residents claimed that they had a legitimate expectation that no less than 70 percent of the permanent housing to be provided at Joe Slovo would be made available to them and that the High Court should make a declaratory order to that effect.

[130] The High Court granted the order for the eviction of the residents from Joe Slovo and their relocation to Delft. It, however, refused to make the declaratory order

that the residents of Joe Slovo were entitled to any percentage of the permanent houses to be built and subsidised by the government at Joe Slovo. It merely ordered that the government respondents must report back on affidavit on the allocation of permanent housing opportunities to those affected by the order of eviction. In other words, the court order does not link the eviction and relocation of the residents to their ultimate access to adequate housing to be provided by the government on the land from which they were evicted. This says that whilst the High Court found it just and equitable to order the residents to vacate their homes in order to make way for the erection of better homes, it declined to give the evicted residents the comfort that they will be the primary, if not exclusive, beneficiaries of the new housing scheme.

[131] For the sake of completeness, I draw attention to the counter-application that was made by the residents in the High Court. In it they sought an order to review and set aside the land availability agreements from which Thubelisha derived its right granted by the government respondents to occupy and develop Joe Slovo. It is unclear how in its judgment the High Court dealt with the counter-application. The significance of the possible invalidity of the land availability agreements was that Thubelisha would have had no standing to bring the eviction proceedings and no authority, as the owner of the land would have had, to end the permission the residents had to live on the land. In this Court the residents do not persist in the claims they made in the counter-application. They concede that at the very least the MEC, as a government functionary, has standing to bring eviction proceedings against them under PIE. They further stress that neither Thubelisha nor any of the government

respondents claimed that they had revoked the permission the residents say they have to occupy the land. The respondents' case is instead that, no such consent was ever given and that therefore, there can be no consent to be revoked. Nothing more need be said about the counter-application.

[132] Being aggrieved by the decision of the High Court, the residents of Joe Slovo approached this Court for leave to appeal against the eviction order of the High Court.

[133] I have had the distinct benefit of reading the separate judgments of my esteemed colleagues Ngcobo J, O'Regan J, Sachs J and Yacoob J. I am in substantial agreement with the reasoning to be found in the elegantly crafted judgments of Ngcobo J and Sachs J, in which I concur. I support, not without considerable hesitation, the order that Yacoob J proposes. I do so for different reasons which I set out later. First, I look at the form of the order proposed.

The form of the order

[134] Yacoob J grants the application for leave to appeal, upholds the appeal in part, and upholds, also in part, the order of the High Court that the residents must vacate Joe Slovo informal settlement on specified target dates and that the government respondents must provide alternative accommodation in the form of temporary residential units to the applicants who so vacate. Yacoob J however goes further than the High Court by also directing, amongst other ancillary orders, that the government respondents must allocate 70 percent of the government-subsidised houses to be built

at the site of the Joe Slovo informal settlement area to the current and former residents of Joe Slovo who applied and qualify for housing.

[135] In a strongly reasoned judgment, Yacoob J arrives at this order by holding that the applicants were unlawful occupiers and that because they occupied the land in question without the express or tacit consent of the owner, there was no obligation on the part of Thubelisha and the other government respondents to give notice to residents that the consent to occupy had been terminated. He consequently holds that section 6 of PIE is applicable and further, that all factors considered, it is just and equitable to evict the occupiers of Joe Slovo under that legislation.

[136] In my view, the form the present order takes – that the appeal must succeed in part – is the correct one. This is so because not only does Yacoob J set aside and replace the order of the High Court but because he also makes an additional and substantive order that the government respondents must allocate 70 percent of the government subsidised houses to be built on the site of Joe Slovo to the current and former residents who applied for and qualified for housing. In terms of the order, the Minister and the MEC must ensure that the successor to Thubelisha is bound by the terms of the additional order.

[137] The additional order securing 70 percent of the new housing for the residents who stand to be evicted and relocated amounts to substantial success on appeal in favour of the applicants. Even before the litigation, the applicants demanded the

assurance that they will be the primary beneficiaries of the new housing to be erected in phases 2 and 3 of the N2 Gateway Project. This is the declaratory order the applicants expressly sought before the High Court. The government respondents resisted the granting of the order strenuously. The High Court expressly declined to make an order to this effect and yet found that the eviction of the residents is just and equitable under PIE. This is the order we make, albeit with the consent of the government respondents.

[138] I must emphasise that, on the facts of this case, I would have had great difficulty in holding that it is just and equitable to forcibly evict the residents of Joe Slovo and to relocate them far from their homes and modest comfort zones in order to give way to the construction of new subsidised homes in circumstances where the evicted residents would have had no reasonable prospects of satisfying their own dire need to access adequate housing. That eviction and relocation order would have made the residents of Joe Slovo sacrificial lambs to the grandiose national scheme to end informal settlements when the residents themselves stood to benefit nothing by way of permanent and adequate housing for themselves.

[139] In this Court, the government respondents properly conceded that the eviction and relocation order should be buttressed by the guarantee that the applicants will be the primary beneficiaries of the N2 Gateway Project. Seen in this way, the court order we make becomes an integral part of a process to ensure access to adequate housing by the necessitous residents of Joe Slovo. For these reasons, the applicants have had

substantial success on appeal and the order we make does reflect that outcome. It will be noticed that the order goes further by requiring that the residents and the government respondents must, through their respective representatives, engage meaningfully with each other with a view to reaching an agreement on the date and on the manner in which the relocation must be accomplished. The agreement resulting from the engagement or the failure to reach an agreement is itself a matter which is subject to the supervision of the Court.

[140] In what is to follow I focus on two issues only. The first is whether the applicants were unlawful occupiers and if not, whether their occupation was unlawfully terminated. The second question is whether the eviction of the applicants was just and equitable under the provisions of PIE.

Consent and unlawful occupation

[141] I consider it necessary to express myself on a constitutional matter that has caused me considerable agony. And that is whether landless people who have no access to adequate housing and who as a result erect homes and live on vacant public land with the knowledge and prolonged support of its owner, a government body, should be regarded as no more than unlawful occupiers who fall to be evicted under PIE without a right to any or adequate prior notice.

[142] Our Constitution bears a transformative purpose in the terrain of socio-economic rights. It evinces a deep concern for the material inequality closely

associated with past exclusion and poverty that is manifested by lack of proper housing. That explains why section 26(1) of the Constitution provides in express terms that everyone has the right to have access to adequate housing. The state is required to take reasonable measures within its available resources to provide everyone with access to adequate housing. Section 26(3) in particular, creates an important shield to anyone who may be subject to eviction from their home or to have their home demolished. The Constitution makes judicial intervention mandatory by requiring that eviction from or demolition of a home must occur through a court order made after considering all relevant circumstances. PIE in particular, was enacted in order to give effect to the guarantees against arbitrary eviction which are found in section 26(3).

[143] Section 1 of PIE, in relevant part, defines an "unlawful occupier" as:

> "[a] person who occupies land without the express or tacit consent of the owner or person in charge, or without any other right in law to occupy such land . . .".

"Consent" in turn is defined as:

> "[t]he express or tacit consent, whether in writing or otherwise, of the owner or person in charge to the occupation by the occupier of the land in question".

[144] It is plain that an unlawful occupier would be one who occupies land without consent of the owner or without any other right in law to occupy. The consent required is of the owner or the person in charge. It may be express or tacit and it may be in writing or otherwise. This definition is cast in wide terms. It envisages explicit

consent but it also contemplates consent that may be tacit or, put otherwise, that may be unsaid but capable of being reasonably inferred from the conduct of the owner in relation to the occupier. The permission envisaged may be in writing but need not be so. The permission may be given other than in writing. In other words, the absence of a written resolution or of a written instrument evidencing consent or permission to occupy is not conclusive that there is no consent.

[145] At a textual level, the definitions of "unlawful occupier" and of "consent" are cast in wide language with an explicitly broad tenor. However, their purpose must be understood in the context of the purpose of the legislation in which the definitions appear. In this case the operative legislation is PIE. It is a statute which was passed to give effect to the constitutional commitment that no one may be evicted from their home or have their home demolished without an appropriate intervention by a court of law and no legislation may permit arbitrary evictions.[4] As we well know, this protection against arbitrary eviction is entrenched in our Bill of Rights and lives side by side with a salutary, if not complementary, right to have access to adequate housing. To that end, our Constitution enjoins the state to take reasonable and other legislative measures within its available resources to achieve the progressive realisation of the right of access to adequate housing.[5] We are obliged to attribute to the word "consent" a meaning which provides the widest possible protection to an evictee against arbitrary or unfair eviction. This is so for a number of good reasons.

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[4] Section 26(3) of the Constitution.

[5] Section 26(1) and (2) of the Constitution. See also *Government of the Republic of South Africa and Others v Grootboom and Others* [2000] ZACC 14; 2001 (1) SA 46 (CC); 2000 (11) BCLR 1169 (CC) at para 38.

[146] Firstly, the interpretive injunction in section 39(2) of the Constitution directs us to interpret the words "consent" and "unlawful occupier" when found in legislation, in a manner that is consistent not only with the broader purpose of PIE, but also with the spirit, purport and objects of the Bill of Rights. We are accordingly required to understand the provisions concerned, to the extent that it is feasible, in a way that is protective of people who are homeless or otherwise vulnerable to arbitrary evictions. I am accordingly unable to support an understanding of the notion of consent that seeks to make a distinction between ostensible and actual consent; that equates consent that is required in the statute to a requirement of "voluntary agreement"; and that seeks to rely on concepts of estoppel and ostensible consent in the law of contract in order to narrow down the proper reach and protection afforded by the word "consent" in the sphere of public law. Section 39(2) of the Constitution requires a court to craft a just outcome that is in harmony with the guarantees of the Constitution rather than a mechanistic application of legal rules of private law in a terrain which is clearly intended to give fulsome protection derived from the Bill of Rights.

[147] Another important consideration for adopting a generous understanding of "consent" is embedded in our dark history of spatial apartheid and forced removals from land. Both policies led to endemic land displacement and homelessness of the majority of our citizens.[6] In enacting PIE, the legislature recognised that there are and there will be ample instances in which homeless or landless people will be forced to

occupy land without formal or written proof of the right to be on the land or initial consent of the owner. For obvious historical reasons occupation of land often occurs without formal or explicit acknowledgment of the owner of the land. South Africa's most vulnerable, the unemployed, women and children, by and large had no formal title to own and occupy land. It is this vulnerable class of citizens who have located themselves in open spaces, sometimes owned by the state and other times owned by private individuals. Consequently, their right to occupy will ordinarily not be evidenced by express agreements or formal resolutions of public entities but by the tacit acquiescence of the owner.

[148] In my view, where the occupiers reside on land owned by the state or one of its organs, different and more stringent considerations may well apply given the obligations under section 26(2) of the Constitution. The state, alive to its onerous constitutional obligations to facilitate access to housing and to prevent and protect people from arbitrary eviction, cannot lightly escape these obligations by simply resorting to treating occupiers who have nowhere else to go as mere unlawful occupiers liable to eviction. Also, the longer the occupation upon state land, the greater the state's obligation to afford occupiers due and lawful processes consistent with constitutional protections on eviction and access to housing. This Court in *Port Elizabeth Municipality*, whilst finding that there is "no unqualified constitutional

[6] *Grootboom* above n 5 at para 6.

duty" on state authorities to provide alternative housing to victims of evictions,[7] stated the following:

> "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."[8]

This approach was affirmed in the *Modderklip* case.[9] The facts of that case concerned a settled community that had established itself on a privately owned farm over a period of many years.[10] Of relevance to the appropriate relief, Langa CJ took into account the behaviour of the state (which had been consistently negative) regarding its obligation towards the residents, the residents' investment in and commitment to the community, and the requirements of PIE and the Constitution.[11] He ordered therefore, *inter alia*, that not only should the state expropriate the land, but that the residents would be permitted to remain on the land until suitable alternative accommodation had been located by the state.[12]

Did the residents occupy with the consent of the City?

[149] Yacoob J concludes that the residents of Joe Slovo had no right of occupation because they occupied without the consent of the City and in turn it was not necessary

[7] *Port Elizabeth Municipality v Various Occupiers* [2004] ZACC 7; 2005 (1) SA 217 (CC); 2004 (12) BCLR 1268 (CC) at para 28.

[8] Id.

[9] *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd* [2005] ZACC 5; 2005 (5) SA 3 (CC); 2005 (8) BCLR 786 (CC) at para 56.

[10] Id at para 54.

[11] Id at paras 54-5.

[12] Id at para 68.

for the City to terminate the right. Regrettably, I am unable to agree with this conclusion. I think that the surrounding facts seen as a whole allow a reasonable inference that the City, as owner of the land, gave the applicants its consent to occupy Joe Slovo settlement.

[150] The residents have been on the land for a very long period. It is not contested that some of them have been there for as long as 15 years. There is no evidence that in that time span, the City has ever tried to remove the occupiers from the land or to convey that their presence on the land was without its consent. On the contrary, the City acted responsibly towards the *de facto* mushrooming of informal settlements around Cape Town arising from the housing shortage. The applicants correctly point out that the housing crisis was a direct result of apartheid housing policies, not the least of them being the "coloured labour preference policy", which was imposed in the Western Cape, and the influx control pass laws. These policies resulted in a deliberate stance that no housing would be provided for Africans in Cape Town in order to stem or minimise African presence and family life in Cape Town. The City must have realised the futility and inhumanity of evicting people of Joe Slovo from the land which they occupied under circumstances where there were no other houses available for them. From the conduct which I will describe in a moment, the City accepted the presence of the occupiers on its land even if it was on a temporary basis and for that reason actively provided them with basic services.

[151] The City took several steps, both positive and negative, that point to acknowledgment and acceptance of the occupation of the residents. The following positive steps emerged from the evidence. It made provision for substantial services of a permanent nature and these included laying out streets, allocating house numbers, connecting residents to the electricity grid and providing basic municipal services in an ongoing long term fashion. The City issued "red cards" to residents evidencing their personal particulars and stand numbers in order to identify them as such. The residents viewed this as permission to be on the land. The City requested residents not to locate themselves under power lines. Those who did not heed this warning and nevertheless lived under power lines were denied services which were given to people living elsewhere in Joe Slovo. It is clear from the record that at the beginning of the development of phase 1 in Joe Slovo, the City advised and assisted residents of that part of the settlement to take up occupation of the vacant parts in phases 2 and 3.

[152] Some of the things the City omitted to do led to the reasonable inference that it acknowledged and accepted occupation of the residents. These include the fact that at no stage over a period of 15 years did the City ever tell the residents they are not permitted to reside at Joe Slovo or that they should vacate the land. If anything, from 1993 the number of residents increased by leaps and bounds. It appears clearly that the authorities accepted that it was practically impossible to remove the occupiers, that they would continue to remain on the site and therefore that services should be provided to them at the place where they were. None of this evidence has been disputed by any of the City officials.

[153] The High Court reasoned that the City did not consent to the occupation because the previous mayor, Ms Mfeketo, disputed the claim that the "red cards" permitted the occupiers to remain in undisturbed possession and that she stated that the services that the City had provided had been for humanitarian reasons and should not be construed as consent by the City. The Court accepted the mayor's evidence that the City always intended that informal settlements in general would be upgraded, moved, or redeveloped with the passage of time.

[154] I am unable to support the reasoning of the High Court. In my view it misunderstood the submissions made on behalf of the residents. Its very finding that informal settlements would be upgraded, moved, or redeveloped on a progressive basis, implies that they would remain where they were until those steps were taken in due course. In other words, the occupiers were implicitly allowed on a temporary basis to continue to occupy the land until housing would be provided on a progressive basis. To hold otherwise, as the High Court did, in effect, means that although our constitutional scheme accepts that the right to have access to adequate housing will be achieved progressively and within available resources, those who live on state land waiting to be provided housing do so as perpetual outlaws and are thus open to eviction as unlawful occupiers. In my view, the correct position to take is that ordinarily temporary occupation of this kind occurs with the consent of the state entity that owns the land subject to its right to give proper and lawful notice intended to terminate the right to occupy.

[155] I do not understand the case of the residents to be that the provision of services in itself amounts to consent. The duty to provide basic services even to informal settlements stems from the Constitution and from legislation.[13] Indeed, Yacoob J states at paragraph 75 of his judgment:

> "The Constitution requires the state, and therefore the City, to respect, protect, promote and fulfil all fundamental rights. Arguably one of the most significant rights, particularly in the context of the present case, is the right to have the inherent dignity of everyone respected and protected. More specifically the objects of local government in the Constitution are, amongst other things, 'to ensure the provision of services to communities in a sustainable manner' and 'to promote a safe and healthy environment'. A municipality is obliged to try to achieve these objectives." (Footnotes omitted.)

However, it is fair to state that the provision of basic services is legitimate evidence of the City's state of mind that the residents are a reality and will have to be accepted and provided for in a humane manner for a considerable period of time until access to adequate housing is realised. The provisions of basic services must, taken together with several other factors I have referred to earlier, lead to the irresistible inference that the City had tacitly given its permission for the occupation.

[156] This conclusion is underscored by facts I have alluded to before. The owner took no steps to have the occupiers removed until the present eviction proceedings; it has never advised the occupiers that their presence is unlawful and forbidden; the

[13] Section 83(1), (2) and (3) of the Local Government: Municipal Structures Act 117 of 1998 read with sections 156 and 229 of the Constitution.

occupiers have remained on the land for as long as 15 years and have grown considerably in number to approximately 18 000 – 20 000 people living in 4 500 informal dwellings; the owner provided an ever-increasing range of services which were not only emergency services, but also included the installation of electricity, building roads, arranging refuse collection, providing private toilets and other long term amenities. In conclusion, the totality of the evidence, in my view, leads to the irresistible inference that the owner of the land has consented to the occupiers continued presence in Joe Slovo.

Has the City revoked its consent?

[157] All of this does not however mean that the owner's consent is irrevocable. The residents have never asserted any right to occupy other than the consent of the owner. They accept that there was no contractual obligation which binds the City to allow the occupiers to reside in Joe Slovo in perpetuity. In argument, the residents sought to persuade us that the legal nature of their right of occupation is an equivalent of the common law *precarium* which is possession or occupation which may be terminated at any time.[14] It is, however, unnecessary, for the purposes of this case to characterise this right of occupation any wider than being a right to occupy with the express or tacit consent of the owner of the land in question and which may be terminated by the state organ concerned subject to its constitutional obligations in relation to providing access to adequate housing.

[14] On the nature of a *precarium* and its difference from a *commodatum*, see *Adamson v Boshoff and Others* 1975 (3) SA 221 (C) at 225.

[158] It seems to me that once a finding is made that the residents of Joe Slovo occupy with the consent of the owner and that they are not unlawful occupiers, their residence may be terminated at any time by the owner on good cause shown and on reasonable notice of termination. I need not, for present purposes, define what would constitute good cause. However, once an owner has properly notified the occupier of the intention to terminate consent, the occupier would be hard pressed to contend that the occupation continues to be lawful. It must be added that if the owner is a public authority and the consequence of termination is that the occupiers will be rendered homeless or compelled to leave under intolerable conditions, the termination may not be on good cause. Our courts have often held that an action by a public authority which results in a denial of a constitutional right is not good cause.[15]

[159] I have reached the conclusion that the applicants occupy Joe Slovo with the consent of the City of Cape Town and consequently that they are lawful occupiers. The City and other government respondents do not contend that they have given any notice terminating the consent to occupy. In fact, their case is that because no such consent was given, no notice was necessary. Ordinarily, it would have followed that the respondents were not entitled to an eviction order under PIE in as much as the residents of Joe Slovo were not unlawful occupiers. That however, cannot be the end of the matter on the facts of this case.

[15] See for example *Port Elizabeth Municipality* above n 7 at paras 56-9.

[160] It is common cause that no formal notice of the termination of the consent to occupy was given to the residents of Joe Slovo. I nonetheless agree with Sachs J that by the time the eviction proceedings were initiated in this matter the residents had participated in extensive negotiations around the N2 Gateway Project. In fact, phase 1 of the Project had been completed and the applicants were well aware that in time they would be required to relinquish their homes in order to make way for the construction of new homes on phases 2 and 3. In as much as the consent which was given to them was implicit, on the facts of this case, the termination of the consent was also implicit. All facts are consistent with the inference that the applicants knew that the owner of the land required them to cease occupying it and that they could voluntarily relocate to Delft as a temporary residential area. It must follow, in my view, that it was open to the government respondents to resort to the provisions of section 6 of PIE in order to procure an order to evict and to relocate the applicants.

The requirements of justice and equity and of public interest

[161] It seems to me that if the applicants were to fail in their contention that they were not unlawful occupiers, it would then be necessary to determine whether their eviction is just and equitable as required by section 6 of PIE. That section requires that before an eviction order is granted, two crucial findings must be made by the court. A court must first find that it is just and equitable to grant an eviction order after considering all the relevant circumstances and second, whether it is in the public interest to do so. In turn, section 6(3) of PIE prescribes that, in deciding whether it is just and equitable to grant an order for eviction, regard must be had to three crucial

factors. These are: the circumstances under which the unlawful occupier occupied the land; the period of occupation; and the availability of suitable alternative accommodation or land. In *Port Elizabeth Municipality*[16] this Court emphasised that the thread that runs right through the legislative scheme of PIE, or, if you will, the governing concept underpinning the statute, is the requirement of justice and equity.

[162] Although the considerations set out in section 6(3) of PIE are peremptory, in the sense that a court must consider these circumstances in deciding whether to grant an eviction order, the High Court judgment did not explicitly deal with these requirements. In submissions made on behalf of the applicants represented by Mr Penze's committee and adopted by the applicants represented by the Task Team, the point was made that the High Court failed to take into account a number of relevant circumstances which properly arise in the consideration of whether to grant an eviction order in this case. They contended, correctly so in my view, that the High Court has failed to take into consideration the historical and policy context relevant to the occupation; the period and circumstances under which the land was occupied; the response of the City and other government respondents to the occupation; the hardship to be suffered as a consequence of the eviction order; the alternative of an upgrade of the informal settlement without evicting its residents; and lastly, the availability of alternative accommodation.

[16] Above n 7 at para 14.

[163] In relation to the historical and policy context, it is necessary to give due regard to all the historical circumstances that have conspired to lead to the acute housing shortage that exists in the Western Cape and which led to large affluent urban areas co-existing with over-crowded pockets of impoverished and insecure informal neighbourhoods. As I said earlier, these are consequences of a rigidly enforced racial distribution of land in the past. In this regard, this Court observed in *Port Elizabeth Municipality*[17] that section 25(4) to 25(9) of the Constitution, read together with PIE, explicitly give recognition to the historical quest for housing on the part of those who suffered under past racist policies.

[164] Implicit in this legislative recognition is the precarious position of people living in informal settlements and the need for their legislative protection.[18]

[165] I turn briefly to the period and circumstances under which the land was occupied. Of prime importance is that the land is public land and is owned by the City. The early residents of Joe Slovo found it unused and cleared it for occupation. The owner of the land has allowed the community to live in undisturbed occupation for nearly 15 years. The City has never attempted to evict the residents and as we already know, it did not join the respondents in seeking to evict the community of Joe Slovo. Equally important, is that the size of the settlement and the number of its

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[17] Id n 7 at paras 16-9.

[18] For additional legislative protection see for example section 2(1) of the Housing Act 107 of 1997 which requires amongst other things that all levels of government must—

> "(a) give priority to the needs of the poor in respect of housing development;

occupants that have steadily increased over the years to tens of thousands of residents literally under the owner's nose. Moreover, this Court has observed before, that an eviction order will not be readily sustained if it arises from proceedings that were instituted after a long period of occupation without objection.[19] Considerations of fairness require special concern where settled communities face the threat of being uprooted to other neighbourhoods distant from employment, schooling and other social amenities.[20] Once basic services are installed, the general pattern is that conditions gradually improve until the settlement becomes a settled part of the town or city. The High Court, in my view, failed to give due weight to these circumstances of occupation of the land in issue.

[166] In *Occupiers of Olivia Road*, this Court made the point that a municipality that launches eviction proceedings must include a complete and accurate account of engagement that is conducted, including the reasonable efforts made by it within that process.[21] The Court held that secrecy is counter productive to the process of engagement and at odds with the constitutional value of openness.[22] It is therefore a relevant circumstance in terms of section 6 of PIE, whether the state institution seeking an eviction order made an attempt at mediation. Equally relevant is whether

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(b) consult meaningfully with individuals in communities affected by housing development".

[19] Above n 7 at para 27.

[20] Id.

[21] *Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg v City of Johannesburg and Others* [2008] ZACC 1; 2008 (2) SA 208 (CC); 2008 (5) BCLR 475 (CC) at para 21.

[22] Id.

the government respondents made an effort to engage the community rather than imposing its decisions taken at a political level.

[167] In the present case the government respondents openly admit that they have not given so much as a formal notice before the urgent eviction application was launched against the residents of Joe Slovo. It follows that they did not give the residents of Joe Slovo the courtesy and the respect of meaningful engagement which is a pre-requisite of an eviction order under section 6 of PIE. This failure to engage the residents is compounded by a history of what appears to be the government respondents' "broken promises" to the residents.

[168] There remain two considerations which I think the High Court should have given more weight. These are: the hardships which would result from the eviction and relocation order; and whether the residents of Joe Slovo who are to be evicted and relocated to Delft will ultimately become the primary beneficiaries of the N2 Gateway Project for which they have to give way and endure considerable human cost associated with relocation.

[169] First, our history sketches a bleak picture of several decades of forced removals. In fact, between 1963 and the late 1980s, a period where forcible evictions reached their most frequent, South Africa saw approximately 3,5 million people forcibly removed. On these statistics, Professor Bundy comments:

> "There is a sense in which these appalling figures have been cited so often that we are used to them: that we cease to realize their import, their horror – what they mean in terms of degradation, misery, and psychological and physical suffering."[23]

Bundy makes the point that "trauma, frustration, grief, dull dragging apathy and [the] surrender of the will to live"[24] are indeed some of the effects of forcible evictions on the human condition. And, the consequences span over multiple areas of social life: frequently it is the case that families are left homeless, their social support structures severed and their welfare services, jobs and educational institutions, rendered inaccessible.

[170] In the wake of our new constitutional dispensation, Parliament has enacted a cluster of legislation designed to protect and secure the tenure of those who reside on land unlawfully. Even so, evictions may still take place legally, but their consequences can be just as devastating as they have been in the past for many poor South Africans. In turn, our courts have correctly held that the government's obligations in terms of section 26(2) mean that eviction sought by the state should not occur without the provision of alternative housing.

[171] The second and compelling consideration in evaluating whether the eviction is justified in this case is whether the deleterious effect of relocation on the applicants would be properly mitigated by the reasonable prospect of access to adequate housing after the temporary stay in Delft. The High Court declined to make an order that

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[23] Bundy "Land, Law and Power: Forced Removals in the Historical Context" Murray and O'Regan (eds) *No Place to Rest: Forced Removals and the Law in South Africa* (Oxford University Press, Cape Town 1990) at 8.

secured the applicants future prospect of acquiring upgraded housing and yet it authorised their eviction and relocation. I have intimated earlier that I am unable to support that eviction and relocation order as just and equitable.

[172] Any government decision taken and consequent order made regarding the forced eviction of a group of people cannot ignore the enormous impact that a potential forced removal will have on the individual, family, and community at large. No matter how commendable the government's intentions are regarding the intended use of the land from which the community has been removed without the solid promise of alternative housing, evictions may turn out to be a method of brutal state-control and a far cry from the progressive realisation of the socio-economic rights our Constitution guarantees. Courts must remain vigilant to ensure that when the government seeks to evict a community in pursuit of commendable housing plans, the plans must include the guarantee that those who are evicted and relocated have a reasonable opportunity of accessing adequate housing within a reasonable time in relation to the housing projects concerned.

[173] In this Court, the government respondents properly conceded that the applicants are entitled to a solid undertaking that they will be the primary beneficiaries of the upgraded houses to be erected at the site of Joe Slovo. They made an undertaking that at least 70 percent of the upgraded houses will be allocated to the applicants. The

[24] Id at 10-1.

court order we make incorporates the undertaking. In this form the court order goes a long way in assuaging the immediate melancholy associated with relocation by offering a rock hard promise of adequate housing and restored human dignity.

[174] Lastly, I have not lost sight of the contention that the upgrade of Joe Slovo can advantageously be carried out as an in situ upgrade, without having to uproot this established community. I agree with Sachs J that it cannot be said that the choice to relocate the applicants in order to undertake the construction work in time to secure the occupants better and stable housing is so unreasonable as to justify this Court's substituting its judgment for that of the government respondents. The respondents' preferred approach to relocate the applicants before the construction of the remaining phases may not be the best practice, but it cannot be said to be unreasonable.

[175] On balance I find that it is just and equitable to make the order of eviction and relocation coupled with a further order guaranteeing that the applicants shall be allocated the specified proportion of the new houses to be built on the site of Joe Slovo within a process of meaningful engagement with the people who are the subject of the eviction and relocation order. I would accordingly uphold the appeal in part and support the order proposed by the Court.

Sachs J concurs in the judgment of Moseneke DCJ.

NGCOBO J:

Introduction

[176] There are two related questions presented in this application for leave to appeal. The first is whether, at the time of the institution of these proceedings in the High Court, the applicants were unlawful residents of government land within the meaning of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (PIE).[1] If the applicants were indeed unlawful residents at the time, the second question which arises is whether it is just and equitable to evict the applicants and relocate them to Delft. All members of the Court agree that it is just and equitable to evict the applicants and relocate them to Delft. There is a difference of opinion on whether the applicants were, for the entire period of their occupation of the land, unlawful residents.

[177] Yacoob J holds that the applicants did not at any stage enjoy a right of occupation in respect of the land in question and were, therefore, unlawful residents. Moseneke DCJ[2] and Sachs J[3] hold that prior to the commencement of eviction proceedings the applicants occupied the land with the tacit consent of the City of Cape Town, the owner of the land. This consent, they hold, was implicitly terminated when the applicants were required to move in order to give way to the implementation of the

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[1] 19 of 1998.

[2] See [154]-[158] above.

N2 Gateway Project. They conclude that by the time the proceedings commenced in the High Court, the applicants no longer had any consent to reside on the land.

[178] In this case, we are only required to decide whether, at the time of the institution of the present proceedings, the applicants were occupying the land without the consent of the City of Cape Town and were thus unlawful residents within the meaning of PIE. In my view, prior to the institution of the present proceedings, the applicants were aware that Joe Slovo was going to be upgraded and decent houses were to be built in accordance with the N2 Gateway Project, a policy that was adopted to upgrade all informal settlements. The residents of Joe Slovo, including many of the applicants, embraced this Project. And they knew that they would have to relocate to temporary relocation units (TRUs) in order to allow the project to be implemented. Indeed, when they were requested to relocate, a considerable number of the residents relocated voluntarily to Delft. At the time of the institution of these proceedings, the applicants, who did not relocate, therefore knew that they had no consent to remain on the land. The applicants were, therefore, at the time of instituting these proceedings, unlawful residents of Joe Slovo within the meaning of PIE. All my colleagues at least agree that this was the position.

[179] However, the views expressed by Yacoob J on the one hand, and, on the other hand, those expressed by Moseneke DCJ and Sachs J, raise the fundamental question concerning the status of the occupation of the land by the applicants. In particular,

[3] See [368]-[369] below.

they raise the question whether, by not evicting the applicants for over 15 years, and providing them with services, the government consented to the occupation of the land by the applicants. In view of the importance of this question, in particular, whether the mere fulfilment of a constitutional obligation in relation to landless people gives rise to consent to occupy the land, I consider it necessary to express my views on this issue.

[180] I agree with Yacoob J that the mere fulfilment of a constitutional obligation in relation to the residents did not in itself give rise to consent. Yet I agree with Moseneke DCJ and Sachs J that on the facts and circumstances of this case the residents cannot be regarded as "unlawful occupiers". In my view this case must be approached on the footing that the residents were allowed to remain on the land until suitable alternative accommodation to alleviate their plight could be found. While the residents remained on the land under these circumstances, they cannot be said to be unlawful residents. Their occupation became one without consent after they were requested to move to Delft so that Joe Slovo could be upgraded. The ultimate question for determination in this case is whether it is in the public interest, and thus just and equitable, to evict the residents in order to implement a programme aimed at providing them with adequate and secure housing.

[181] I write separately, therefore, to explain my approach to the issues raised in this case.

[182] Before doing so however it is necessary to have regard to the facts. The background facts are set out in the judgments of my colleagues. I will only refer to those that are necessary for the purposes of this judgment.

Background

[183] The applicants are the residents of an informal settlement known as Joe Slovo which is situated alongside the N2 highway in Cape Town. When litigation commenced, it was estimated that there were 4 500 informal dwellings in the settlement and that there were approximately 18 000 to 20 000 people living in these informal dwellings. According to the government, the figure of 4 500 households has since dropped to between 3 200 and 3 500 households. The settlement has been in existence for about 15 years.

[184] The conditions under which the residents have been living in this area are no different from any informal settlement; they are deplorable. The area is overcrowded. The dwellings are small and cramped. They are built mostly of combustible material. All these structures are built in substantial non-compliance with building laws and regulations. They pose a significant fire risk. Indeed at least in 2000, 2005 and 2006 the area was devastated by fires which left thousands of residents homeless. The informal settlements are the manifestation of the housing crisis in Cape Town that we described in *Grootboom*.[4] I will return to this crisis later in this judgment.

[4] *Government of the Republic of South Africa and Others v Grootboom and Others* [2000] ZACC 19; 2001 (1) SA 46 (CC); 2000 (11) BCLR 1169 (CC) at para 6.

[185] Initially the dwellings in the settlement had no running water, no toilets, no roads and no electricity. However, over time the municipality provided the residents with basic services. These services included the supply of water, container toilets and rudimentary cleaning services. As of 2002, the municipality performed an extensive upgrade at the settlement, and provided a range of utilities and services including water, private toilets, refuse removal, roads, drainage and electricity. The provision of all these services ameliorated, but did not eliminate, the conditions that still prevail in the settlement.

[186] It is the people living under these conditions that the government wishes to relocate under its policy to eradicate informal settlements and provide with adequate housing.

[187] The government wishes to develop Joe Slovo in order to provide the residents and people from other informal settlements with adequate housing in it as part of its policy to upgrade informal settlements. The government has now, however, guaranteed the residents 70% of the houses that will be built on the upgraded area. The other 30% will be occupied by people who are living in the backyards of houses in Kwa-Langa, an adjacent residential area.

[188] However, for the building operations to commence, the government says it requires the residents to relocate to TRUs specially built for that purpose in Delft which is 15 kms from Joe Slovo. After development, some residents will be allocated

permanent houses in Joe Slovo. The government alleges that the density of the population in Joe Slovo makes it impossible to resettle all residents in the area once it has been developed. Those who cannot be accommodated in Joe Slovo after it has been developed will be allocated permanent houses in Delft. All this is in accordance with the policy for the upgrading of informal settlement areas nationwide.

[189] Attempts by the government to get the residents to relocate voluntarily to the TRUs pending the development of Joe Slovo have not been completely successful. However, as Mr Sopaqa tells us, a considerable number of residents have voluntarily relocated to the TRUs in Delft. The applicants, who are the remaining residents, are resisting the relocation. Faced with this resistance, the government approached the Western Cape High Court and obtained an order for the structured relocation of the residents under the provisions of PIE.[5] The present application for leave to appeal against the decision of the High Court is the sequel.

[190] The issues raised in this application for leave to appeal must be understood in the context of the housing crisis facing our country, the mushrooming of informal settlements and their hazardous conditions and the government's response to these challenges, in particular, to informal settlements. It is to these issues that I now turn.

The housing crisis

[5] In the High Court these proceedings commenced as section 5 proceedings which deal with urgent evictions. However, by the time the case was argued, the proceedings had matured into section 6 proceedings which deal with evictions at the instance of an organ of state. I agree with Yacoob J that the High Court correctly dealt with this case as an application for eviction under section 6. See [91]-[93] above.

[191] The cause of the housing shortage in our country lies fundamentally in our history, in particular, apartheid. Referring to this history is necessary in the context of housing because, as we pointed out in *Grootboom*, the right of access to adequate housing must be interpreted and understood in its social and historical context.[6] This history serves to remind us where we have come from as a nation and where we are going. Indeed it serves to remind us of the goal that we have fashioned for ourselves in the Constitution, namely, to establish a new society founded on human dignity, equality and fundamental freedoms. It also helps us to understand the plight of millions of people living in deplorable conditions and in great poverty. It reminds us that at the heart of our constitutional democracy lies the commitment to address these conditions and to transform our society into one in which there will be human dignity, freedom and equality.[7] This history enables us to understand the difficult challenge facing government in addressing the housing shortage.

[192] At the centre of apartheid was the control of the movement of African people into urban areas which were considered to be the exclusive preserve of White people.[8] This policy was notoriously called influx control. African people were tolerated in urban areas as long as they were willing to serve the labour needs of these areas which were reserved for Whites. Africans were by law confined to rural areas where there was poverty and lack of employment opportunities. In the Western Cape, influx

[6] Above n 4 at para 25.

[7] *Soobramoney v Minister of Health, Kwa-Zulu-Natal* [1997] ZACC 17; 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (CC) at para 8.

[8] When talking about apartheid South Africa, the use of racial terms such as "African" to refer to indigenous natives of South Africa; "Indian" to refer to South Africans of Indian descent; "Coloured" to refer to citizens of

control was rigorously enforced and gave preference to "the Coloured community" under "the labour preference policy." In terms of this policy, "Coloured people" were preferred labourers in the Western Cape.[9]

[193] Once they were in the urban areas, African people were confined to townships. Their residence in these townships was conditional upon proof of employment or registration as a work seeker. In effect, African people were recycled through these townships based on employment or registration as work seekers. Townships served as labour reservoirs to accommodate the number of African people necessary to meet the labour requirements of the urban areas. As this Court pointed out in *Western Cape Provincial Government and Others: In Re DVB Behuising (Pty) Ltd v North West Provincial Government and Another*:[10]

> "The Natives (Urban Areas) . . . Consolidation Act 25 of 1945 . . . authorised the local authority, '(s)ubject to the approval of the Minister after reference to the Administrator', to 'define, set apart and lay out one or more areas of land for the occupation, residence and other reasonable requirements of natives . . .'. Only Africans who were 'necessary to supply the reasonable labour requirements of the urban area(s)' were allowed to remain in [the urban] areas . . . . Unemployed or 'idle' Africans were liable to be sent to their 'home(s)' or to 'be sent to and detained for a period not exceeding two years in a farm colony, work colony, refuge, rescue home or similar institution . . . and perform thereat such labour as may be prescribed under [the Prisons and Reformatories Act 13 of 1911] or the regulations made thereunder for the persons detained therein . . .'."[11] (Footnotes omitted.)

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mixed descent; and "White", is unavoidable. These racial terms which formed the basis of segregation are relevant when describing our history. It is for that purpose, and that purpose only that they are used here.

[9] Above n 4 at para 6.

[10] [2000] ZACC 2; 2001 (1) SA 500 (CC); 2000 (4) BCLR 347 (CC).

[194] 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.

[195] The influx control policy was but an aspect of residential segregation which was the cornerstone of apartheid. Residential segregation was enforced through legislative measures and policies that confined Africans to 13% of South Africa's land. In the pursuit of this policy, the government embarked on a relentless policy of forced removals which resulted in the uprooting of millions of Africans from designated white areas into homelands. Confining African people, who constituted the majority of the population, to 13% of the land left millions of African people landless. The areas to which they were confined were largely barren and there were little or no employment opportunities in these areas.

[196] But forced by hunger and lack of employment opportunities in the rural areas, African people were compelled to move to the cities, at times at great risk to their lives and those of their families. Confronted by the lack of accommodation in the townships, they were compelled to live in informal settlements, either in vacant land or in the backyards of formal houses in a township. Despite constant harassment by the police, informal settlements mushroomed all over the country. These are the circumstances under which the residents moved into Joe Slovo. As Mr Sopaqa explains, residents were regularly subjected to demolitions of their informal dwellings

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[11] Id at para 44.

and they were driven off the land by police, only to return days later and re-erect their dwellings.

[197] Therefore what apartheid bequeathed to the new democratic government was poverty, landlessness, inadequate housing with resultant overcrowding and the mushrooming of informal settlements. These are the conditions that prevailed on the eve of our constitutional democracy. Our Constitution was adopted, amongst other things, to address these conditions. The inclusion of justiciable socio-economic rights in the Constitution is a manifestation of the commitment to addressing these conditions. On the very first occasion when this Court was called upon to adjudicate on social and economic rights, it acknowledged these disparities and said:

> "We live in a society in which there are great disparities of wealth. Millions of people are living in deplorable conditions and in great poverty. There is a high level of unemployment, inadequate social security, and many do not have access to clean water or to adequate health services. These conditions already existed when the Constitution was adopted and a commitment to address them, and to transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order. For as long as these conditions continue to exist that aspiration will have a hollow ring."[12]

[198] Most, if not all people in informal settlements live at the edge of survival. Space in these areas is at a premium. There is no infrastructure. Dwellings are not built according to municipal or building laws. Plots are arbitrarily drawn. The areas are invariably densely populated. There is no space left for community services. The layout makes installation of basic services either expensive or impossible. The

dwellings are poorly built. The dwellings are largely unhygienic. They present fire risks. Indeed, fires are a common occurrence in these areas, with devastating effects on the residents. Residents of Joe Slovo have had at least three fires which left most residents homeless. As the dwellings in informal settlements are very close to each other, and some are attached to each other, when one dwelling catches fire, the rest of the settlement faces the risk of catching fire. Given the narrow access ways, many people find it difficult to escape the fires. Death in such fires occurs far too often. Firefighters find it difficult, if not impossible to access the area. The result is that the entire settlement faces the risk of being razed to the ground.

The Housing Act

[199] As is apparent from the above, one of the key challenges that faced the government at the inception of our democracy was the provision of adequate housing to a previously excluded majority of citizens. Its approach to solving these challenges commenced, among other things, with the enactment of the Housing Act 107 of 1997 (the Housing Act). The Housing Act was enacted to give effect to the right of access to adequate housing guaranteed in section 26 of the Constitution. Its declared purpose is to facilitate "a sustainable housing development process." The primary objective of the Housing Act is to undertake housing development to ensure integrated "habitable, stable and sustainable public and private residential environments" that is conducive to viable households, where communities "have access to economic opportunities, and to health, educational and social amenities."

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[12] Above n 7 at para 8.

[200] In addition, the Housing Act sets out general principles that are applicable to housing development. These include giving priority to the needs of the poor,[13] and the promotion of "the establishment, development and maintenance of socially and economically viable communities and of safe and healthy living conditions to ensure the elimination and prevention of slums and slum conditions."[14] These general principles are binding on all spheres of government.[15] It is plain from the general principles that one of the objectives of the Housing Act is therefore to eradicate informal settlements. Finally, the Housing Act makes provision for the adoption of the National Housing Code which contains national housing policy.[16]

The Housing Code

[201] Pursuant to the Housing Act, the government has adopted the National Housing Code (the Code). Broadly speaking, its primary objective is to ensure access to affordable and adequate housing for the poor and vulnerable. The Code recognises that delivery of housing through the Housing Subsidy Scheme "did not make inroads into existing backlogs" and that informal settlements will continue to grow.[17] Noting that the Housing Subsidy Scheme was not specifically designed for informal settlement upgrading, the Code introduces a new policy which targets informal

[13] Section 2(1)(a).

[14] Section 2(1)(e)(iii).

[15] Section 2(1).

[16] Section 4.

[17] The "scheme provides a subsidy to all households earning up to R3 500 per month so as to assist them to acquire secure tenure, basic services and a top structure." The objectives of the scheme are, as the Code

settlements, namely, the *National Housing Programme: In Situ Upgrading of Informal Settlements*. The main objective of this programme is to facilitate the structured upgrading of informal settlements with minimal relocation. Chapter 13 of the Code is devoted to the upgrading of informal settlements.

[202] The adoption of the Housing Code, however, did not halt the growth of informal settlements, which itself was fuelled by the continuing housing shortage. Indeed the scale of the housing need and demand for adequate housing has increased. In 2001 it was indicated that 21% of Cape Town households were without formal shelter. This was exacerbated by the increase in the urban population resulting from urbanisation and natural growth. The number of households living in informal settlements and backyards increased from 1.45 million in 1996 to 1.84 million in 2001, an increase of some 26%. In January 2005, the number of households in Cape Town that did not have access to formal housing was estimated at 260 000, 110 000 lived in informal settlements and 50 000 lived in backyards.

The Breaking New Ground policy

[203] Against this background, in September 2004, Cabinet approved and adopted the Comprehensive Plan for the Development of Sustainable Human Settlements. This policy sets out a comprehensive plan for the development of sustainable human settlements in the country. It is appropriately known as the "*Breaking New Ground policy*" (*BNG*). The objective of this plan is to give effect to the right of access to

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indicates, "to help households access housing with secure tenure, at a cost they can afford, and of a standard that satisfies the norms and standards determined by the Minister of Housing."

adequate housing in a manner that promotes sustainable development. One of the aims of the plan is to integrate residents of informal settlements into the formal housing sector: its objective is to halt the growth of informal settlements and where appropriate upgrade informal settlements by the construction of adequate housing. The vision of this plan is that all the people in this country living in desperate housing circumstances will be accommodated within the phases of the housing projects to be implemented under this policy.

[204] As its name suggests, the plan seeks to break new ground in respect of informal settlements. It was introduced as part of the initiative to "move beyond the provision of basic shelter towards achieving the broader vision of sustainable human settlements and more efficient cities, towns and regions." The *BNG* involves a fundamental shift in the official response to informal settlements. It adopts a new approach to informal settlements which is described in paragraph 4.1 of the plan as follows:

> "There is a need to respond positively and proactively to processes of informal housing development which are taking place across the country. A more responsive state-assisted housing policy, coupled to delivery at scale is expected to decrease the formation of informal settlements over time. There is however a need to acknowledge the existence of informal settlements and recognise that the existing housing programme will not secure the upgrading of informal settlements. There is also a need to shift the official policy response to informal settlements from one of conflict or neglect, to one of integration and co-operation, leading to the stabilisation and integration of these areas into the broader urban fabric."

[205] The implementation of the plan requires the eradication of informal settlements. The government, however, recognises that the eradication of informal settlements

cannot be achieved overnight. The plan therefore seeks to achieve progressive eradication of informal settlements through a plan which is described in paragraph 3.1 of the plan as follows:

> "Informal settlements must urgently be integrated into the broader urban fabric to overcome spatial, social and economic exclusion. The Department will accordingly introduce a new informal settlement upgrading instrument to support the focused eradication of informal settlements. The new human settlements plan adopts a phased in-situ upgrading approach to informal settlements, in line with international best practice. Thus, the plan supports the eradication of informal settlements through in-situ upgrading in desired locations, coupled to the relocation of households where development is not possible or desirable. The upgrading process is not prescriptive, but rather supports a range of tenure options and housing typologies. Where informal settlements are upgraded on well-located land, mechanisms will be introduced to optimise the locational value and preference will generally be given to social housing (medium-density) solutions. Upgrading projects will be implemented by municipalities and will commence with nine pilot projects, one in each province building up to full programme implementation status by 2007/8." (Emphasis added.) (Footnote omitted.)

The N2 Housing Gateway Project

[206] The N2 Housing Gateway Project (the project) is a product of the *BNG*. It is the first of the nine pilot projects for the implementation of the *BNG*. The project is a joint initiative of all three spheres of government, namely, the National Department of Housing, the Western Cape Provincial Department of Housing and Local Government, and the City of Cape Town. It envisages the provision of between 25 000 and 30 000 housing opportunities. It contemplates the upgrading of all informal settlements along the N2 highway of which Joe Slovo was the starting point. The number of households involved are said to be in excess of 15 000, of which

approximately 4 500 are in Joe Slovo. In addition, it also targets over 6 000 households that are in the backyards of formal houses and supports the District Six Area Programme with a view to building some 500 housing opportunities there. The goal of the project is to deliver adequate housing to each household.[18]

[207] To sum up therefore, the government's response to the housing crisis, and, in particular, the informal settlements with all their hazardous conditions has been, among other things, to enact the Housing Act, adopt the Housing Code, develop a comprehensive plan for integrated sustainable human settlement and to implement these legislative and policy measures through, among other things, a pilot project, namely, the N2 Housing Gateway Project. At the core of these measures is the eradication of informal settlements by upgrading informal settlements through in-situ

[18] In the papers before the High Court it was stated that the final houses that will be constructed are 40 square metre houses to be built on plots of 90 to 100 square metres to ensure the area is not overdensified. Most of the houses will be semi-detached. They will be built with brick and mortar and will have solid concrete foundations and flooring as well as tiled roofs which will be insulated with a fire-resistant polystyrene product. The houses will have two separate bedrooms, a bathroom (with a bath and a toilet), an open plan living area (of which a portion will serve as a kitchenette) and two doors (front and back) with windows in each room. The houses will be fully serviced with waterborne sewerage and running water and electricity run through a pre-paid metre. In addition there will be a tarred road infrastructure to ensure easy access both to the area and arterial roads.

The beneficiaries of the project will acquire ownership of the houses on the following terms: households with an income below R1 500 per month will receive a house for free; households with income of between R1 501 and R3 500 per month will be required to make a once-off payment of R2 479. The government envisages that approximately 80% of the residents will qualify for one or the other of the two schemes. Those with an income between R3 501 and R7 500 will be expected to buy houses in the open market with the assistance of a subsidy.

When completed, the project will have constructed 9 500 houses in Delft and 1 885 in Joe Slovo. Between 200 and 300 of the houses in Delft have already been handed over to beneficiaries. The development of Joe Slovo has been divided into three phases: the first phase is already complete. It comprises a block of flats which is intended for rental to residents. It consists of 705 units. The second phase will comprise 680 units and will be a mixture of credit-linked houses and *BNG* houses. The third phase will comprise solely of *BNG* houses and no less than 500 houses will be built.

However, before this Court some of these figures have now changed and according to the record, Qubudile Richard Dyantyi, a deponent on behalf of the respondents has indicated that only 35 "credit-linked" houses will be built in phase 2 and that the original number has been reduced substantially. The housing to be built during phase 3 of the project will comprise only *BNG* housing. In a further affidavit filed at the request of the Court, the respondents say that 8 135 *BNG* permanent houses will be built in Delft and no less than 1 500 *BNG* permanent houses will be built at Joe Slovo.

upgrading where possible and the relocation of households where in-situ development is not possible or desirable.

[208] It is within this context that the question whether the residents should be relocated to Delft must be considered. But before doing so it is necessary to address the residents' argument based on consent. The residents contended that they are occupying the land with the consent of the City and that this consent can only be terminated upon a reasonable notice and on good cause. None of these conditions has been satisfied by the City, they argued. In support of this contention, the residents relied upon the fact that they have been occupying the land in question for over 15 years, that during this period they have never been evicted and that instead, the City has provided them with services. To counter these arguments, the former mayor of the City of Cape Town maintained that the City allowed the residents to remain on the land and provided them with services out of humanitarian considerations. This was an attempt to refute consent.

The effect of the failure to evict residents and providing them with services

[209] The effect of the failure by the City to evict the residents and its willingness to provide them with services must be understood in the context of the obligations imposed on the government in relation to access to adequate housing. In *Grootboom*, we held that the right of access to adequate housing, for some, requires the government to provide "access to services such as water, sewage, electricity and

roads."[19] This obligation is not limited to lawful residents. It is imposed in respect of all who are living in deplorable circumstances. The government has an obligation to act positively to ameliorate the conditions of those who have no access to basic services. As we pointed out in *Port Elizabeth Municipality*, while awaiting access to new housing development programmes, homeless people must be treated with dignity.[20] When the City provided services to the residents it was doing no more than fulfilling its statutory and constitutional obligations.[21]

[210] The residents accept that, given the housing crisis in Cape Town, their eviction without the provision of alternative accommodation "would [have] achieve[d] nothing but to cause human misery and social dislocation and conflict." The City was mindful of the fact that it could not evict people and render them homeless. Had it evicted them in those circumstances, its conduct may well have been inconsistent with the Constitution. In *Grootboom* we held that "every step at every level of government must be consistent with the constitutional obligation to take reasonable measures to provide adequate housing."[22] And in *Occupiers of 51 Olivia Road* we held that "every

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[19] Above n 4 at para 37.

[20] *Port Elizabeth Municipality v Various Occupiers* [2004] ZACC 7; 2005 (1) SA 217 (CC); 2004 (12) BCLR 1268 (CC) at para 12.

[21] As Yacoob J points out above [75], the object of local government is "to ensure the provision of services to communities in a sustainable manner" (section 152(1)(b) of the Constitution) and "to promote a safe and healthy environment" (section 152(1)(d)). The Local Government: Municipal Systems Act 32 of 2000 gives effect to these constitutional duties and requires municipalities to provide communities with the "minimum level of basic municipal services" (section 73(1)(c) of the Municipal Systems Act). And this Court has held that the obligation of the state to the poor and the most vulnerable includes treating them as human beings and providing them with services. See for example *Grootboom* above n 4 at paras 44 and 82-3; *Port Elizabeth Municipality* above n 20 at paras 29 and 39.

[22] Above n 4 at para 82.

step taken in relation to a potentially homeless person must also be reasonable if it is to comply with s 26(2)."[23]

[211] Given the constitutional duty of the government to provide access to adequate housing, including basic services, I am unable to accept that the mere performance of these constitutional obligations without more, constitutes consent to occupy the land. Construing mere performance of a constitutional obligation as conferring consent places the government in an invidious position. If it performs its constitutional obligations, its conduct may well be regarded as indicating consent to occupy the land and would justify a refusal to vacate the land, a stance taken by the residents in this case. If it fails to perform its constitutional obligations in relation to people living in deplorable conditions, then its conduct may well be held to be inconsistent with the Constitution. This may have a chilling effect on the extent to which the government may be willing to perform its obligations in relation to people living in deplorable conditions.

[212] Apart from this, the Constitution, by imposing these obligations, does not purport to confer consent by constitutional fiat. In *Port Elizabeth Municipality*, we held that "the Constitution is strongly supportive of orderly land reform, but does not purport to effect transfer of title by constitutional fiat. Nor does it sanction arbitrary seizure of land, whether by the State or by landless people."[24] (Footnotes omitted.)

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[23] *Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg v City of Johannesburg and Others* [2008] ZACC 1; 2008 (3) SA 208 (CC); 2008 (5) BCLR 475 (CC) at para 17.

[24] Above n 20 at para 20.

[213] Nor can it be said the residents were in unlawful occupation of the land during the period when the government tolerated their presence on the land pursuant to its constitutional obligations.

[214] The question whether the residents are unlawful residents must be determined in the light of the constitutional obligation that government has towards landless people and people who live in deplorable conditions. It is by now axiomatic that government may not evict landless people from its land and render them homeless. Its conduct, as pointed out earlier, must be consistent with its constitutional obligation to take reasonable steps to facilitate access to adequate housing. It owes a duty to landless people to provide them with access to adequate housing. It is this duty which prevents government from evicting landless people from its land and rendering them homeless. As long as this duty operates, the landless may not be evicted until alternative accommodation is found.

[215] In *Port Elizabeth Municipality*, we held that "[t]he rights involved in s 26(3) are defensive rather than affirmative."[25] The constitutional duty therefore provides landless people with a shield against eviction. The government is compelled by this constitutional obligation not to evict residents and render them homeless. In these circumstances, it is difficult to understand how the residents can be said to be in

[25] Id.

unlawful occupation of government land from which they may not be evicted. Different considerations may well apply to private land.

[216] All that the government wishes to achieve in these proceedings is to move the residents to the TRUs and, once Joe Slovo is upgraded, provide residents with permanent housing in Joe Slovo. In effect therefore this is a temporary relocation of residents so that Joe Slovo can be upgraded and thereafter some of the residents will be allowed to return there while others who cannot be accommodated in the area will be allocated houses elsewhere. Where, as here, there is a dispute between the residents and the government on whether the residents should be moved in order to implement the policy to provide residents with adequate housing and secure tenure, the requirement of "unlawful occupier" in PIE does not address the real problem. This is so because the government has constitutional duties towards the residents who are landless; it may not simply evict them and render them homeless. The government is therefore compelled by its constitutional duty to allow the residents to reside on its land until it can find alternative accommodation to address their plight.

[217] It seems to me that when people in the position of the residents of Joe Slovo are sought to be relocated in order to pave the way for the implementation of a government programme aimed at providing residents with adequate housing, the proper question to ask is not whether the residents are unlawful occupiers, but whether it is in the public interest and thus just and equitable to relocate them for that purpose. This is more so because the very purpose of the relocation is to upgrade the area they

occupy and thereafter resettle them in the same area after it has been upgraded. This would be consistent with section 6(1)(b) of PIE. But this approach to the problem is immediately undermined by section 6(1) which requires "unlawful occupier" as a precondition to trigger the provisions of section 6(1)(b).

[218] It seems to me that on the facts and the circumstances of this case, it is not necessary to first "brand" residents as "unlawful occupiers" before they may be relocated. This is inimical to the foundational values of human dignity as evidenced by the provisions of sections 26 and 25 of the Constitution. It would be more consonant with human dignity of landless people to pose the questions whether it is in the public interest and thus just and equitable to evict the residents for the purposes of implementing the government plan aimed at providing the residents with adequate housing. To this extent I have grave doubts whether the provisions of section 6(1) of PIE are the appropriate vehicle for dealing with the situation of the residents in this particular case.

[219] That said, the government has resorted to the provisions of PIE because it is the statute that deals with evictions. It is therefore understandable why the government would contend that the residents are "unlawful occupiers". PIE requires it to do so. It is equally understandable why the residents would resist the notion that they are "unlawful occupiers" of the land which they have occupied for about 15 years without being evicted. Effect must, however, be given to the statute that the government has resorted to in order to secure the eviction and the relocation of the residents.

The proper approach to this case

[220] Given the constitutional and statutory obligations of the government towards people who are in the position of the residents, this case must be approached on the footing that the constitutional duty that the government owes towards landless people required the government to allow the residents to remain on the land until the government could develop and implement a policy that addresses their plight as well as the plight of all people living in desperate circumstances in informal settlements.

[221] The *BNG* and the N2 Gateway Project are measures that were adopted by the government in order to address the plight of people, like the residents who live in deplorable conditions in informal settlement areas. The reasonableness of these measures has not been impugned. Indeed, Mr Sopaqa states that "the community and its leaders enthusiastically co-operated with the N2 Gateway Project in its early stages." The implementation of the *BNG* would require the residents to relocate in order to give room for the development of the area. The residents were aware of the fact that they would be required to relocate once the implementation of the project got underway.

[222] Well before August 2006 the residents were requested to move in order to allow for the further implementation of the project. In this regard Mr Sopaqa states that "in about August 2006" Thubelisha "became more aggressive in their attempts to persuade all Joe Slovo residents to move to Delft." Indeed, a considerable number of

residents relocated to Delft voluntarily as a result. The applicants apparently opposed the relocation to Delft because they "had heard many reports from Joe Slovo residents who had voluntarily relocated, about the poor conditions at Delft, ranging from lack of access to transport, to poor employment prospects and high crime levels." The residents have therefore known for some time prior to the eviction proceedings that they had to relocate to Delft. While the concerns of the applicants' relocation to Delft may be understandable, the fact of the matter is that they must relocate to give way to the development aimed at benefiting them and thousands of others in their situation. They have known for some time that they had to vacate the land and they were told to vacate some time ago.

[223] I am therefore satisfied that when the present proceedings were instituted, the residents knew that they were required to relocate to Delft to give way to the implementation of the N2 Gateway Project. They were, in these circumstances, "unlawful occupiers" within the meaning of PIE.

[224] The question to be answered then is whether on the facts and circumstances of this case it is just and equitable for the residents to be relocated to Delft. A relevant factor in deciding whether it is just and equitable to relocate the residents is the purpose of the relocation. And the purpose of the relocation must be viewed in the light of the right of access to adequate housing, and, in particular, the constitutional duty of the government to facilitate the progressive realisation of the right of access to adequate housing imposed by section 26(2) of the Constitution.

The right of access to adequate housing

[225] The right of access to adequate housing is guaranteed in section 26 of the Constitution which provides:

> "(1) Everyone has the right to have access to adequate housing.
>
> (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.
>
> (3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions."

[226] In *Grootboom* we held that section 26 requires the government to "establish a coherent public housing program directed towards the progressive realisation of the right of access to adequate housing within the State's available means."[26] Legislative measures adopted by the government must be supported by policies and programmes. And policies adopted must be reasonable "both in their conception and implementation."[27] Reasonable measures are 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 is most in peril".[28]

[227] The measures and policies adopted must "facilitate access to temporary relief for people who have no access to land, no roof over their heads, for people who are

[26] Above n 4 at para 41.

[27] Id at para 42.

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."[29] And in *Treatment Action Campaign* we held that the government "is obliged to take reasonable measures progressively to eliminate or reduce the large areas of severe deprivation that afflict our society."[30]

[228] As pointed out above, the government has initiated the *BNG* policy whose primary objective is to eradicate informal settlements over time, through in-situ upgrading of informal settlements and the relocation of households where development is not possible or desirable. This plan involves the construction of decent housing in upgraded settlements and other locations. The policy is intended to give effect to the right of access to adequate housing. It targets people "living in extreme conditions of poverty, homelessness or intolerable housing."[31] As pointed out above, the residents have not challenged the reasonableness of this policy. They could hardly have done so, having regard to the desperate conditions of people living in informal settlements.

[229] In my view, the Housing Act, the Housing Code, the *BNG* policy and the N2 Gateway Project, constitute "reasonable legislative and other measures within [the government's] available resources, to achieve the progressive realisation of [the right

[28] Id at para 44.

[29] Id at para 52.

[30] *Minister of Health and Others v Treatment Action Campaign and Others (No 2)* [2002] ZACC 15; 2002 (5) SA 721 (CC); 2002 (10) BCLR 1033 (CC) at para 36.

[31] Above n 4 at para 24.

of access to adequate housing]" as contemplated in section 26(2) of the Constitution. The government requires the remaining residents to relocate to the TRUs so that it can implement these measures. And the government should not be obstructed in the fulfilment of its constitutional obligations imposed by section 26 of the Constitution. I agree with Yacoob J that, in these circumstances, the eviction and relocation of the residents is a reasonable measure to facilitate the housing development programme.[32] Neither the Constitution nor PIE precludes the relocation sought by the government.

The Constitution and evictions

[230] The Constitution, in particular section 26(3), recognises that at times it may be necessary for the government to relocate landless people and people who are living in deplorable conditions in order to provide them with access to adequate housing. This may be necessary either because the land they occupy must be upgraded or developed in order to provide decent houses for them in that area, as the present case illustrates, or because they are occupying the land without the permission of the land owner and the land owner requires the land. However, these relocations must take place in accordance with the Constitution and the law, in particular section 26(3) and the provisions of PIE.

[231] The Constitution requires that all evictions must be carried out in accordance with the values that underlie our constitutional democracy. These include human dignity, equality and fundamental human rights and freedoms. Section 26(3) prohibits

[32] See [118] above.

the eviction of anyone from his or her home or the demolition of a home "without an order of court made after considering all the relevant circumstances." In addition, it prevents arbitrary evictions. And no statute "may permit arbitrary evictions."[33] Section 26(3) underscores the importance of a house, no matter how humble. As we have pointed out in *Port Elizabeth Municipality*, "[s]ection 26(3) evinces special constitutional regard for a person's place of abode. It acknowledges that a home is more than just a shelter from the elements. It is a zone of personal intimacy and family security."[34]

[232] International human rights law recognises that development may require evictions. Thus General Comment No. 7 on forced evictions recognises that "[e]victions may be carried out in connection with . . . development and infrastructure projects . . . land acquisition measures associated with urban renewal, housing renovation, [and] city beautification programmes . . . ".[35] However, evictions should not result in people being rendered homeless. And where the people affected by the eviction are unable to provide for themselves, "the [government] must take all appropriate measures, to the maximum of its available resources, to ensure that

[33] We have held that this provision was a response to the wholesale evictions of poor and landless African people under the apartheid legal order. See above n 20 at paras 11-2. The history of arbitrary evictions is well known. Under the Prevention of Illegal Squatting Act No 52 of 1991, evictions were accomplished through the criminal law and not the civil courts, where the only issue was whether the occupation of land was unlawful. This statute was also used to achieve the goals of the apartheid policy of dispossessing African people of their land and forcibly removing them to areas reserved for them.

[34] Above n 20 at para 17.

[35] General Comment No. 7 (1997) of the Committee on Economic, Social and Cultural Rights at para 7.

adequate alternative housing, resettlement or access to productive land, as the case may be, is available."[36]

Eviction under PIE

[233] PIE was enacted to give effect to section 26(3) of the Constitution. It was enacted with the manifest objective of overcoming the abuses of eviction "and ensuring that evictions, in future, took place in a manner consistent with the values of the new constitutional dispensation."[37] It recognises that, having regard to our history of land dispossession of the majority of people, it was inevitable that there would be millions of people who would be without land. PIE also recognises that people may, out of desperation from their circumstances, move onto any vacant land without necessarily obtaining the permission of the land owner, not out of disregard for the owner's right but because the owner is perhaps not known to them. As we pointed out in *Port Elizabeth Municipality*, PIE replaced "the overall objective of facilitating the displacement and relocation of poor and landless black people for ideological purposes . . . by [the] acknowledgment of the necessitous quest for homes of victims of past racist policies."[38]

The purpose of the relocation in this case

[234] The government seeks the relocation of the residents in order to implement the *BNG* and the N2 Gateway Project. The primary objective in implementing these

[36] Id at para 16.

[37] Above n 20 at para 11.

[38] Id at para 12.

measures is to upgrade informal settlements, including Joe Slovo. This will provide informal settlement dwellers with access to permanent, habitable, stable and sustainable residential structures with secure tenure. And in addition, this will provide residents of informal settlements with safe and healthy living conditions. Moreover, the implementation of these measures will benefit thousands of informal settlement dwellers who are living in deplorable conditions. A considerable number of residents of Joe Slovo voluntarily moved to Delft some three years ago in order to allow the implementation of the project. The reasonableness of the *BNG* and the N2 Gateway Project cannot be gainsaid. As I have held above, the implementation of *BNG* and the Project and the eviction and relocation of the residents, constitute reasonable measures contemplated in section 26(2) of the Constitution.

[235] Having regard to the purpose of the relocation, I consider it therefore to be in the public interest that the residents be relocated to allow the implementation of the project aimed at benefitting them consistently with the obligation of the government to facilitate progressive realisation of the right of access to adequate housing. What remains to be considered is whether, having regard to all the circumstances, it is just and equitable to relocate the residents. The question must be answered in the light of the duty of the government when relocating people under its policies and the concerns raised by the residents.

The duty of the government when relocating people under its policy

[236] General Comment No. 7 of the Committee on Economic, Social and Cultural Rights requires certain procedural protections to be complied with before any eviction can take place. These include an opportunity for genuine consultation with the people affected; adequate and reasonable notice prior to the date of the eviction; people affected must be provided with information concerning the purpose of the eviction; where groups of people are involved, government officials or their representatives should be present during an eviction; people carrying out the evictions must be properly identified; and evictions should not take place during bad weather or at night unless the affected people consent.

[237] General Comment No. 7 provides a useful guide to determining the obligations of government when it seeks to relocate people for the purposes of providing them with adequate housing. The requirement of genuine consultation with the people affected by relocation under General Comment No. 7 is consistent with the requirement of engagement that we have insisted upon before people are evicted. It is also consistent with our jurisprudence on PIE. In my view General Comment No. 7 must, as a general matter, be followed in relocations such as the ones involved in this case.

[238] In my view, the key requirement in the implementation of a programme is engagement. There must be meaningful engagement between the government and the residents. The requirement of engagement flows from the need to treat residents with respect and care for their dignity. Where, as here, the government is seeking the

relocation of a number of households, there is a duty to engage meaningfully with residents both individually and collectively. Individual engagement shows respect and care for the dignity of the individuals. It enables the government to understand the needs and concerns of individual households so that, where possible, it can take steps to meet their concerns.

Meaningful engagement

[239] In *Occupiers of 51 Olivia Road* we considered the requirement of meaningful engagement in the context of evictions by the City of Johannesburg based on safety and health considerations. The evictions in issue would have resulted in the residents being rendered homeless. We held that:

> "Engagement is a two-way process in which the city and those about to become homeless would talk to each other meaningfully in order to achieve certain objectives."[39]

And we pointed out that:

> "Engagement has the potential to contribute towards the resolution of disputes and to increased understanding and sympathetic care if both sides are willing to participate in the process. People about to be evicted may be so vulnerable that they may not be able to understand the importance of engagement and may refuse to take part in the process. If this happens, a municipality cannot walk away without more. It must make reasonable efforts to engage and it is only if these reasonable efforts fail that a municipality may proceed without appropriate engagement. It is precisely to ensure that a city is able to engage meaningfully with poor, vulnerable or illiterate people

[39] Above n 23 at para 14.

> that the engagement process should preferably be managed by careful and sensitive people on its side."[40]

[240] While pointing out that "[t]here is no closed list of the objectives of engagement",[41] we held that some of the objectives of engagement in the context of a city wishing to evict people who might be rendered homeless consequent upon eviction would be to determine—

> "(a) what the consequences of the eviction might be;
> (b) whether the city could help in alleviating those dire consequences;
> (c) whether it was possible to render the buildings concerned relatively safe and conducive to health for an interim period;
> (d) whether the city had any obligations to the occupiers in the prevailing circumstances; and
> (e) when and how the city could or would fulfil these obligations."[42]

[241] These considerations apply equally where the government, as here, seeks to relocate people living in deplorable conditions pursuant to a programme aimed at providing such people with decent housing. It must consider the needs of each household so as to assess the nature and the extent of the disruption that relocation would cause and how this disruption might be ameliorated. People must know in advance the area to which they are to be relocated, and the date of such relocation; this is necessary to enable people to organise and plan their lives accordingly.

[40] Id at para 15.

[41] Id at para 14.

[42] Id.

[242] In the context of the implementation of a programme to upgrade informal settlements, the primary objective of engagement must be to provide the residents with the details of the programme, its purpose and its implementation. In particular:

(a) the purpose of the programme;

(b) the purpose of relocation;

(c) arrangements for TRUs where in-situ development is not possible;

(d) how and when relocations will take place;

(e) the amount of notice to be given before relocation actually takes place;

(f) consequences of relocation, including the extent to which the lives of the residents will be disrupted;

(g) whether the government will help to alleviate any dire consequences;

(h) the criteria for determining who of the residents will be resettled in the area that has been developed; and

(i) where those residents who cannot be accommodated in the developed area will be provided with permanent housing.

[243] In this case, the government was apparently mindful of its obligation to engage with the community. This appears from the memorandum of understanding which was concluded by the City, the MEC for Housing and Local Government and the Minister for Housing which acknowledges the need for a "communication and engagement strategy agreed and implemented by all three spheres of government to ensure optimal community awareness and support for the project." In addition, the draft order proposed by the government includes an element of engagement with

individual households on how and when relocation would take place; the provision of transport facilities to the affected residents from the TRUs to public amenities, including school, health facilities and places of work; and the prospect, in due course, of allocation of permanent housing. That the various spheres of government acknowledge this obligation is laudable. Indeed these are some of the objectives that meaningful engagement should seek to achieve in this case.

[244] What must be stressed, however, is that the process of engagement does not require the parties to agree on every issue. What is required is good faith and reasonableness on both sides and the willingness to listen and understand the concerns of the other side. The goal of meaningful engagement is to find a mutually acceptable solution to the difficult issues confronting the government and the residents in the quest to provide adequate housing. This can only be achieved if all sides approach the process in good faith and with a willingness to listen and, where possible, to accommodate one another. Mutual understanding and accommodation of each others' concerns, as opposed to reaching agreement, should be the primary focus of meaningful engagement. Ultimately, the decision lies with the government. The decision must, however, be informed by the concerns raised by the residents during the process of engagement.

Engagement in this case

[245] It is difficult to establish from the papers the nature and the extent of the engagement that occurred in this case. What is clear is that after the launch of the

project, officials from all spheres of government, including the MEC, Mayor, and a councillor addressed the residents at various times about the Project. It is also apparent that Thubelisha, the implementing agent, played a key role in the process. At one point, it requested that the residents move to Delft. I think it can fairly be accepted that the Project was explained to the residents. Indeed as Mr Sopaqa tells us, the project was met with broad approval from the residents, and a considerable number of residents have already voluntarily left for the TRUs.

[246] The former Mayor of Cape Town, Ms Mfeketo, has given details of the various meetings that she held with the residents and what was discussed at those meetings. She stated that the community was informed of the plans to develop Joe Slovo to provide access to adequate housing. The community was also informed that, as Joe Slovo was densely populated, it would be impossible for all residents to be allocated houses in Joe Slovo after development. In addition, the community was informed that it would be necessary for them to move to temporary accommodation, pending the allocation of permanent houses to them. The record therefore shows that there was engagement with the residents on the project.

[247] As pointed out above, various City, provincial and national government officials and Thubelisha spoke to the residents on different occasions. This approach to the problem was bound to generate misunderstanding or confusion. Different messages and perhaps conflicting information is more likely to be conveyed in these circumstances. This is particularly so where statements are left unexplained. And the

possibility of a misunderstanding looms large in these circumstances. Structured and co-ordinated meaningful engagement between, on the one hand, representatives of the City, the provincial and national governments, and the implementing agent, and, on the other hand, the residents, may have helped to prevent any misunderstanding or confusion about the details of the project. Indeed it would have reduced the possibility of different messages being conveyed to the residents. This would probably have prevented the mistrust that now prevails in the minds of the residents. And that mistrust has prevented any meaningful engagement on relocation from taking place without the intervention of this Court. However, this does not mean that engagement on the details of relocation should not take place. It must.

The concerns of the residents

[248] One of the concerns of the residents appears to be that they will not all be accommodated in Joe Slovo once the project is complete. The government has undertaken to allocate 70% of the new houses to be constructed in Joe Slovo to the residents. The other 30% will be allocated to residents from other informal settlements, in particular, to those who live in the backyards of formal houses in Kwa-Langa. However, as the Joe Slovo area is densely populated and overcrowded, the government says that it will not be possible to allocate all current residents of Joe Slovo new houses in the same area. Those who cannot be accommodated back into the developed Joe Slovo area will be allocated permanent houses in Delft.

[249] In my view, the government cannot be faulted in requiring the occupants of Joe Slovo to share houses in the area with backyard dwellers. It is for the government to decide how to allocate houses in the new area. If the government, in its wisdom, decides to allocate some of the houses in the newly developed Joe Slovo to backyard dwellers from Kwa-Langa, which is close to Joe Slovo, this cannot be faulted unless it is unreasonable. There is no suggestion that it is unreasonable to do so. On the contrary, it is intended to make sure that some of the backyard dwellers of Kwa-Langa are accommodated as near as possible to Kwa-Langa so that relocation does not seriously disrupt their lives.

[250] What must be emphasised is that the government has a wider range of needs to meet. As we held in *Grootboom*, "housing must be made more accessible not only to a larger number of people but to a wider range of people".[43] There are those who can afford to buy houses and there are those who cannot. Income determines what form of housing people can afford. In developing a policy to provide access to adequate housing, the government must endeavour to address all these needs. And the primary obligation to achieve the progressive realisation of the right of access to adequate housing rests on government. It must determine how and when this should be done. This, however, is subject to the requirement of the progressive realisation of the right – it must progressively facilitate accessibility. How and when the obligation must be fulfilled depends on the availability of resources, in particular, the availability of land.

[43] Above n 4 at para 45.

[251] Nor can the government be faulted in making provision for houses for different income groups. Residents of Joe Slovo who can afford payment of the rent of R600 per single unit or R1 050 for two-room flats are entitled to have their needs taken into consideration in making provision for housing. The residents' complaint is that these rentals "are completely unaffordable to most Joe Slovo residents." As I understand this complaint, the residents are not suggesting that none of the residents can afford the rent required to occupy the flats in question. Their complaint is that a majority of them cannot afford this rent. As we held in *Grootboom*, housing must be made more accessible to a wider range of people.[44]

[252] In considering reasonableness, the enquiry is not "whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent."[45] Rather, the enquiry should be confined to the question whether the measures that have been adopted are reasonable, bearing in mind "that a wide range of possible measures could be adopted by the State to meet its obligations."[46] Thus in determining whether the government has complied with its obligation to provide access to adequate housing, courts must acknowledge that the government must determine and set priorities but must ensure that, in setting those priorities, it has regard to its constitutional obligations. In short, the obligation of government must not be construed in a manner that ties its hands and makes it impossible to comply with its constitutional obligations.

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[44] Id.

[45] Id at para 41.

[46] Id.

[253] The residents have also challenged the need to relocate to the TRUs. As pointed out above, the government says that in-situ development is not feasible. The residents, relying on their expert, contend otherwise. It is not for the courts to tell the government how to upgrade the area. This is a matter for the government to decide. The fact that there may be other ways of upgrading the area without relocating the residents does not show that the decision of the government to relocate the residents is unreasonable. It is not for the courts to tell the government how best to comply with its obligations. If, in the best judgement of the government it is necessary to relocate people, a court should be slow to interfere with that decision, as long as it is reasonable in terms of section 26(2) of the Constitution and just and equitable under PIE.

[254] Some of the reasons advanced by the residents for refusing to relocate to the TRUs in Delft are a lack of schools and other amenities and a lack of employment. What must be stressed here is that relocation is necessary to develop Joe Slovo so that decent housing can be built there. This will benefit the residents. Moreover, the Constitution does not guarantee a person a right to housing at government expense at the locality of his or her choice. Locality is determined by a number of factors including the availability of land. However, in deciding on the locality, the government must have regard to the relationship between the location of residents and their places of employment.[47]

[47] *City of Johannesburg v Rand Properties Ltd and Others* 2007 (6) SA 417 (SCA); 2007 (6) BCLR 643 (SCA) at para 44.

[255] As indicated above, Delft is some 15 kms away from Joe Slovo. However, the government has offered free transport to take children to schools in Kwa-Langa. In addition, it has committed itself to building more schools and clinics in Delft and pensioners have a choice of getting their pension either in Delft or in Kwa-Langa. In short, the government has taken some steps in order to ameliorate the hardships that may be caused by relocation.

[256] In the past we have stressed that the government faces an extremely difficult task in addressing the injustices of the past. This is compounded by the limited availability of resources, including the availability of land where decent houses can be built. These factors will invariably compel the government to provide access to adequate housing in areas available to it. And these areas will invariably not be located close to the areas from which people are being relocated. This is a consequence of our history. All that the government can and should do is, as far as is possible, have regard to the proximity of schools and employment opportunities when it seeks to relocate people for the purposes of providing them with decent houses.

[257] In some instances this may be possible, in others it may not. Where this is not possible, all that the government can do is ameliorate the disruptive effect of relocation by providing access to schools and other public amenities as the government has done in this particular case. In this case, the government, consistently with its obligation to promote access to adequate housing, has committed itself to

alleviating the consequences of relocation. What must be stressed here is that it is the primary responsibility of the government to provide adequate housing. This responsibility carries with it the authority to determine how and where to provide adequate housing. However, in doing so, the government must act reasonably.

[258] The Housing Code acknowledges these challenges and outlines the guiding principle in upgrading informal settlements as follows:

> "Residents living in informal settlements are often dependent on fragile networks to ensure their livelihoods and survival. A guiding principle in the upgrading of these communities is the minimisation of disruption and the preservation of community cohesion. The Programme accordingly discourages the displacement of households, as this not only creates a relocation burden, but is often a source of conflict, further dividing and fragmenting already vulnerable communities.
>
> In certain limited circumstances, it may however be necessary to permanently relocate households living in hazardous circumstances or in the way of essential engineering or municipal infrastructure. In all such cases and where feasible and practicable, the relocation must take place at a location as close as possible to the existing settlement and within the context of a community approved relocation strategy that must be submitted with the final business plan for approval by the MEC."

[259] What is also significant in this case is that a number of residents from Joe Slovo have already relocated to Delft. There are thousands of other residents from informal settlements who are awaiting to be provided with access to housing in the N2 Gateway Project. The applicants have all along known that they will have to relocate. Others have done so. The applicants' continued refusal to relocate to the TRUs in Delft is frustrating the project aimed at fulfilling the government's constitutional obligation.

This is to the prejudice not only of the residents themselves but to thousands of other people who have already relocated and who are awaiting to be provided with decent houses in the developed areas. The residents have not challenged the reasonableness of the project. The policy that has been developed by the government to address the plight of people living in informal settlements is reasonable both in its conception and its implementation.

[260] To sum up, it is true the residents have been in occupation of the land for over 15 years. They moved onto the land because they had no accommodation. Their presence on the land was tolerated because there was no alternative accommodation for them. The government then took a decision to upgrade all informal settlements in order to provide the residents of these settlements with decent housing and with secure tenure. This would also improve their living conditions and in particular, provide them with healthy and safe living conditions. The government has arranged temporary accommodation for them at Delft from where some will return to Joe Slovo after it has been developed. Those who cannot be accommodated in Joe Slovo will be provided with permanent houses in Delft. In doing this, the government is fulfilling its constitutional obligation to facilitate the right of access to adequate housing. It should not be obstructed in carrying out its duties. In all these circumstances, I consider that it is just and equitable to relocate the residents. It now remains to consider how relocations should be structured for it to be in accordance with justice and equity.

The manner in which relocation should take place

[261] Relocation should be conducted in a manner that is fair to the residents and that has regard to the Constitution. To achieve this, relocation must be individualised. Here meaningful engagement is crucial. This in turn requires all parties to put aside their occasional differences and focus on common ground. The common goal is to give the government the space to fulfil its constitutional obligation to provide access to adequate housing for people living in desperate circumstances and to eradicate informal settlements. And in the process of doing so, the government must treat residents with dignity and respect. It must pay attention to concerns the residents might have and, where possible, accommodate these concerns in a manner that is compatible with its obligations under the Constitution. The order that the Court makes meets these requirements.

[262] For these reasons, I concur in the order of the Court.

Moseneke DCJ and Sachs J concur in the judgment of Ngcobo J.

O'REGAN J:

[263] I have had the benefit of reading the judgments prepared in this matter by Yacoob J, Moseneke DCJ, Ngcobo J and Sachs J. I do not propose to repeat the facts

of the case which are set out in full in the judgment of Yacoob J. Like all my colleagues, I concur in the order proposed in the judgment of the Court.

[264] This is a difficult case. Like earlier cases we have heard, it is a real-life example of the challenges faced by our new government in seeking to undo the legacy of our apartheid and colonial history. In this case, that legacy is sharply reflected in the desperate shortage of adequate housing for African people in one of our major urban centres, Cape Town. As several of my colleagues have described, that shortage arose in part because of the apartheid government's "Coloured labour preference policy" in terms of which African people were not afforded rights to reside in the Western Cape; and housing was not built for them.

[265] In considering this and similar cases, courts need on the one hand to be aware of the enormity of the task that government must perform in seeking to "[i]mprove the quality of life of all citizens"[1] and be astute not to impair government's ability to perform this task. On the other hand, courts must not permit government to treat citizens in a manner that is not consistent with human dignity while pursuing laudable programmes. As we said in *Premier, Mpumalanga,* there are, in cases such as this, two constitutional imperatives:

> "The first is the need to eradicate patterns of racial discrimination and to address the consequences of past discrimination which persist in our society, and the second is the obligation of procedural fairness imposed upon the government. Both principles are based on fairness, the first on fairness of goals, or substantive and remedial

[1] See the Preamble to the Constitution.

> fairness, and the second on fairness in action, or procedural fairness. A characteristic of our transition has been the common understanding that both need to be honoured."[2]

[266] The difficulty lies in seeking an appropriate balance between these two constitutional imperatives. The Western Cape High Court in Cape Town granted the respondents an order to evict the applicants, and they now approach this Court to have the eviction order overturned. It is common cause that the respondents seek to evict the occupiers of Joe Slovo informal settlement, the applicants in this case, in order to use the land for its N2 Gateway Housing Project in terms of which low-cost housing will be built on the land where the settlement is situated. The N2 Gateway Project is one developed in terms of national government's housing policy which seeks to meet government's constitutional obligation to take reasonable and other measures to provide adequate housing.[3] Ngcobo J has described in careful detail the government's housing policy and in particular the *Breaking New Ground* policy, of which the N2 Gateway Project is an early example, in paragraphs 203 to 208 of his judgment. It is not necessary to repeat that description here. I agree with him that there can be no doubt that the goal sought to be achieved by the N2 Gateway Housing Project is constitutionally desirable in that it seeks to provide adequate housing to those who have none.

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[2] *Premier, Mpumalanga, and Another v Executive Committee, Association of State-aided Schools: Eastern Transvaal* [1998] ZACC 20; 1999 (2) SA 91 (CC); 1999 (2) BCLR 151 (CC) at para 1.

[3] Section 26 of the Constitution provides:

> "(1) Everyone has the right to have access to adequate housing.
>
> (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.
>
> (3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions."

[267] The applicants' first argument is that they are not "unlawful occupiers" within the meaning of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE). If they are correct in this submission, they argue that the eviction order should not have been granted and should be set aside. They submit, in the alternative, that if they are "unlawful occupiers" within the meaning of PIE, it is not just and equitable that they should be evicted.

[268] The applicants also argue that residents of the Joe Slovo informal settlement have a legitimate expectation that they will be allocated 70% of the housing to be built on the site of Joe Slovo. In phase 1, this expectation was not honoured by the respondents, and indeed the failure to do so, in large part, caused the breakdown between the parties in this case. The applicants rely on statements made to the community as the basis for the expectation that 70% of the housing to be built in the housing development would be allocated to occupiers of Joe Slovo.

[269] The judgment of the Court makes plain that in order for government to obtain an eviction order in circumstances such as these where the eviction is sought to enable housing to be built in pursuance of government's section 26(2) constitutional obligations, government needs to show both that the eviction is one within the contemplation of PIE, and that in seeking the eviction in the manner that it does, the government is acting reasonably within the meaning of section 26(2) of the

Constitution.[4] These twin requirements ensure that the constitutional imperative of procedural fairness is honoured, even where the conduct of government is in pursuance of its substantive constitutional obligation to take reasonable steps to provide access to adequate housing. We need to answer the question, therefore, whether government has met both these requirements.

[270] In this judgment, thus, I first address the question of whether the applicants are "unlawful occupiers" within the meaning of PIE; I then consider whether the respondents have shown that they have acted reasonably in seeking to evict the applicants; I then consider the legitimate expectation argument; and finally I consider whether it is just and equitable to issue an order of eviction, and the appropriate terms of that order.

Are the applicants "unlawful occupiers" within the meaning of PIE?

[271] PIE provides that an "unlawful occupier" is a person who occupies land without the express or tacit consent of the owner.[5] The land on which Joe Slovo is situated is owned by the City of Cape Town (the City). The City is not a party to this case and thus is not actively seeking the eviction of the applicants. The eviction order was sought by the three respondents in this Court (the national Minister for Housing, the

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[4] Id at section 26(2).

[5] "Unlawful occupier" is defined in section 1 of PIE as follows:

> "'unlawful occupier' means a person who occupies land without the express or tacit consent of the owner or person in charge, or without any other right in law to occupy such land, excluding a person who is an occupier in terms of the Extension of Security of Tenure Act, 1997, and excluding a person whose informal right to land, but for the provisions of this Act, would be protected by the provisions of the Interim Protection of Informal Land Rights Act, 1996".

provincial Minister for Housing and Thubelisha Homes, a private corporation contracted by national and provincial government to build the houses). Nevertheless the former Mayor of Cape Town, Ms Nomaindia Mfeketo, lodged a replying affidavit on behalf of the respondents.

[272] Before reaching the question of whether the occupiers are indeed "unlawful occupiers", it is necessary briefly to deal with a preliminary issue, namely that the respondents originally in their notice of motion sought an order in terms of section 5 of PIE. That section provides for urgent interim orders of eviction.[6] By the time the matter was considered by the High Court after the exchange of lengthy affidavits, the High Court approached the matter on the basis that a permanent order of eviction was being sought in terms of section 6 of PIE. In this Court the applicants agreed that the matter should be dealt with as a section 6 case. I agree with Yacoob J, for the reasons he gives at paragraphs 87 to 93 of his judgment, that this application for leave to appeal is concerned with whether an eviction order was properly granted in terms of section 6. Nothing further need be said about section 5.

[273] Section 6 of PIE provides that:

> "(1) An organ of state may institute proceedings for the eviction of an unlawful occupier from land which falls within its area of jurisdiction, except where the unlawful occupier is a mortgagor and the land in question is sold in a sale of execution pursuant to a mortgage, and the court may grant such an order if it is just and equitable to do so, after considering all the relevant circumstances, and if—

[6] See text of section 5 at [88] above.

> *(a)* the consent of that organ of state is required for the erection of a building or structure on that land or for the occupation of the land, and the unlawful occupier is occupying a building or structure on that land without such consent having been obtained; or
>
> *(b)* it is in the public interest to grant such an order.
>
> (2) For the purposes of this section, 'public interest' includes the interest of the health and safety of those occupying the land and the public in general.
>
> (3) In deciding whether it is just and equitable to grant an order for eviction, the court must have regard to—
>
> *(a)* the circumstances under which the unlawful occupier occupied the land and erected the building or structure;
>
> *(b)* the period the unlawful occupier and his or her family have resided on the land in question; and
>
> *(c)* the availability to the unlawful occupier of suitable alternative accommodation or land.
>
> (4) An organ of state contemplated in subsection (1) may, before instituting such proceedings, give not less than 14 days' written notice to the owner or person in charge of the land to institute proceedings for the eviction of the unlawful occupier.
>
> (5) If an organ of state gives the owner or person in charge of land notice in terms of subsection (4) to institute proceedings for eviction, and the owner or person in charge fails to do so within the period stipulated in the notice, the court may, at the request of the organ of state, order the owner or person in charge of the land to pay the costs of the proceedings contemplated in subsection (1).
>
> (6) The procedures set out in section 4 apply, with the necessary changes, to any proceedings in terms of subsection (1)."

[274] On an ordinary reading of section 6, an organ of state may only evict "unlawful occupiers". There is no authority in PIE to evict occupiers who are lawful. An eviction order can only be granted if the occupiers are indeed "unlawful occupiers" within the meaning of PIE. The question is thus whether the occupiers had the consent of the City to reside at Joe Slovo at the time that the eviction proceedings

were instituted. I agree with Yacoob J that this is a factual question to be answered on a consideration of all the facts.

[275] The applicants urge in argument that it must be inferred that they did have the City's consent to occupy Joe Slovo. They base their inference on the following facts. The occupiers have been resident on the land for many years, some as long as 15 years. During this time, the City has never explicitly told them that their occupation was unlawful. Moreover, since 1994, the City has not sought to evict them and has provided them with some services, including the supply of electricity and the issuing of "red cards" which constituted an acknowledgement of receipt of an application for housing. The applicants argue further that the affidavit of Ms Mfeketo is not dispositive of the matter because she does not state in terms that the City did not consent to the occupation.

[276] The applicants also rely on the decision of *Rademeyer and Others v Western Districts Council and Others*[7] to assert that by providing the occupiers with basic services, the City must be understood to have tacitly consented to their occupation of the land. I would like to deal briefly with this argument. I am not persuaded that the provision of services by a municipality to indigent people living in informal settlements on land owned by the municipality should, without more, be understood to constitute tacit consent for the purposes of PIE or the Extension of Security of Tenure Act 62 of 1997 – the Act in question in *Rademeyer.*

[7] 1998 (3) SA 1011 (SECLD).

[277] Local government has both statutory and constitutional obligations to provide basic services to those who live within their municipalities. It does not follow that a municipality's performance of its constitutional obligations gives rise to a factual inference of tacit consent. It seems to me that local government must do more to give rise to such an inference. We should avoid creating a factual inference of tacit consent when basic services are provided, so as not to discourage local governments from meeting their constitutional and statutory obligations to provide such services. Each case will need to be determined on its own facts but the provision of basic services to those living in informal communities cannot, without more, be held to give rise to an inference of tacit consent. The correct factual inference from the provision of such services is that they are quite correctly being provided in fulfilment of constitutional and statutory obligations. The provision of services on its own will thus not ordinarily rise to an inference of tacit consent.

[278] Turning back to the question of tacit consent in this case, there can be no doubt that the City by its conduct did at least from 1994 know of and tolerate the occupation of land by the occupiers. Not only did it tolerate the occupation, but quite properly in fulfilment of its constitutional obligations, it sought to provide them with basic services. It went beyond this, however. After a devastating fire in November 2000 in which 950 informal dwellings were burnt, the City took significant steps during 2002 to upgrade the settlement through the establishment of a database of residents, the creation of residential blocks bounded by walkways (which also acted as firebreaks),

the improvement of water, sanitation, health and cleansing services and the provision of electricity to dwellings. A key part of the upgrade was to prevent occupants from erecting homes underneath the high tension electricity lines which had caused the fire. Prior to the upgrade, there were only 15 water standpipes in the settlement and only rudimentary cleaning services. The upgrading of the settlement was thus welcomed by the inhabitants. In my view, the process of upgrading that took place in 2002 went way beyond the provision of basic services and made clear that the City was consenting tacitly to the occupation of Joe Slovo.

[279] What is clear, however, is that once the N2 Gateway Housing Project was launched in February 2005, the City intended that the occupiers would move from the land they occupied to enable permanent housing to be erected there. On the applicants' own version, the Mayor informed the occupiers of the N2 Gateway Project at various meetings held with the occupiers, one of which took place after the January 2005 fire. Thereafter, between 2005 and the date on which the eviction application was launched, the City, particularly the Mayor and one of the councillors, Councillor Gophe, held several meetings with the occupiers and took steps to encourage the occupiers to move to make way for the new housing project.

[280] Like Sachs J and Moseneke DCJ, I am willing to accept that on these facts it can be inferred that the City had consented tacitly to the occupation of the land. That consent, however, was neither permanent nor indefinite. At least from the time that the N2 Gateway Housing Project was announced, the consent was clearly limited: the

City consented to the occupation until it would be necessary for the occupiers to move to make way for the new housing project. As mentioned above, the qualified nature of the consent that arose once the N2 Gateway Housing Project was announced was communicated to the occupiers on several occasions.

[281] The next question that arises is whether in these circumstances it was necessary, as the applicants argue, for the City to give reasonable notice to the occupiers of the termination of consent. The applicants base this argument on the common-law rules relating to *precarium*[8] and rely in particular on *Lechoana v Cloete and Others*[9] for the proposition that a precarious tenancy may only be terminated on good cause and with reasonable notice.[10] The common-law rules governing *precarium* are not uncontested. Van den Heever JA in *Theron NO v Joynt*[11] expressed doubts about the correctness of *Lechoana* to the extent that it suggested that a precarious tenancy can only be terminated with good cause.[12]

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[8] *Precarium* is "the legal relationship which exists between parties when one party has the use or occupation of property belonging to the other on sufferance, by the leave and licence of the other. Its essential characteristic is that the permission to use or occupy is revocable at the will of the person granting it." *Malan v Nabygelegen Estates* 1946 AD 562 at 573 per Watermeyer CJ.

[9] 1925 AD 536 at 545.

[10] The applicants rely on the judgment of Kotzé JA who states that:

> "Their occupation under the regulations partakes in substance of the nature of *precarium.* Subject to reasonable notice, and such notice was given in the present case, the appellant must give up his occupation and quit the land, upon good cause shown by the respondents, who are the board of trustees of the Mission Station." (Id at 552.)

[11] 1951 (1) SA 498 (A) at 507E-510D, but see the express reservation in this regard by Hoexter JA with whom Watermeyer CJ concurred. The question was again left open in *Johannesburg City Council v Johannesburg Indian Sports Ground Association* 1964 (1) SA 678 (W) at 684.

[12] See also Cooper *Landlord and Tenant* 2ed (Juta & Co Ltd, Kenwyn 1994) at 9, where the author criticises several cases, including *Lechoana* (above n 9), for concluding that the relationship between the parties constituted a *precarium* when on his view it could not have. He emphasises that the legal nature of a *precarium*

[282] Although the applicants rely on the requirement of good cause, they accept in their argument that this requirement may easily be met. In my view, to the extent that the applicant is correct to state that good cause needs to be shown in this case, a matter I expressly leave open, there can be little doubt that the purpose for which the respondents wish the occupiers to move, which is to make the land available for the building of low-cost housing, would constitute good cause if such is necessary in order to terminate a *precarium*.

[283] Whatever the case may be with good cause, it seems clear, however, that it is widely accepted that a precarious tenancy is subject to termination on reasonable notice.[13] The applicants rely, amongst other cases, on *Adamson v Boshoff and Others*[14] in which the respondents had permitted the applicant, the owner of a neighbouring restaurant, to make use of their toilet facilities without charge. After a dispute arose between the parties on another score, the respondents without any notice to the applicant, locked the gate between the two properties and refused to permit the applicant or his customers to use the toilet facilities. The question that arose is whether the respondents should have given notice to the applicant before terminating the arrangement. Van Winsen JP stated that—

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is, by definition, the occupation of property terminable by the landowner, and points out that "termination at will" is the defining characteristic of a *precarium*.

[13] See *Gemeenskapontwikkelingsraad v Williams and Others* 1977 (3) SA 955 (WLD) and the cases cited therein. In *Williams,* after a useful consideration of the authorities, King AJ (at 968D-E) concludes that:

> "Whilst all the authorities, therefore, lay down that the permission may be withdrawn at will, at the same time they point to the necessity of reasonable notice where the right is of a semi-permanent or permanent nature."

[14] 1975 (3) SA 221 (C).

> "in the light of the South African case law it can be said that the grantor withdrawing the concession to the holder of the *precarium* must give him reasonable notice of his decision to do so. What length of notice is reasonable must be determined in relation to the nature of the concession and the circumstances of the case."[15]

[284] In that case, it should be noted, the parties had not stipulated any time period within which the arrangement would continue to operate, so the applicant had no warning that the respondents would terminate the arrangement. The Court held that the respondents should have given the applicant reasonable notice before termination.

[285] The applicants argue on the basis of *Adamson* that the City was required to give reasonable notice to the occupiers in this case. They assert that because the City had permitted them to reside at Joe Slovo for a long period of time, their permission to reside there could not be withdrawn save after reasonable notice had been given to them. It is clear from the case law that the question whether reasonable notice is required is a matter to be determined by a consideration of all the facts of a particular case.

[286] In my view, the applicants' argument that reasonable notice was required and not given here cannot be sustained for two reasons. First, as a matter of fact, it is clear that whatever may have been the case before, from the moment that the N2 Gateway Project was publicly announced, the City intended the occupiers of Joe Slovo to move to enable the new housing to be built and it held meetings with the occupiers to inform them of this. The occupiers thus knew that their tenure was impermanent and that

[15] Id at 229A-B.

once the housing project got under way they would have to relocate. Indeed the applicants state that thousands of households have already moved from Joe Slovo to Delft in compliance with the request of the City. On these facts, then, it is clear that the occupiers were informed that their occupation would end once the land was needed for the N2 Gateway Project. Whether this information is construed as reasonable notice of termination of their entitlement to occupy, or whether it is seen as the imposition of a condition that their right to occupy will end once the land is needed for the N2 Gateway Project, does not matter. It cannot be said on these facts that the City needed, in addition, to issue some further formal notice to the occupiers of the termination of their occupation.

[287] Secondly, the requirement of reasonable notice is based on the common-law principle that an owner may evict any person from his or her land by simply establishing his or her ownership. This common-law principle might lead to great injustice were a landowner who had consented to the precarious occupation of his or her land by another party to be permitted to withdraw it at will (as had been the situation in the Roman law) with the effect that the occupiers may be evicted immediately upon application by the owner. The Roman Dutch commentators thus inserted an equitable requirement of reasonable notice in appropriate circumstances.[16]

[16] Voet *Commentary on the Pandects* 8.4.18 (see Gane (tr) *The Selective Voet, Being the Commentary on the Pandects* Vol 2 (Butterworth & Co (Africa) Ltd, Durban 1955) at 504-5); and see the full discussion in *Williams* above n 13 at 965E-969A. See also *McIntosh v Corbishley* 1943 TPD 127 at 130.

[288] The need for an equitable principle of this sort, however, has less purchase against the background of the equitable framework established by PIE and the Constitution. PIE fundamentally reorders the ordinary common-law rules relating to eviction.[17] In particular, it ensures that no eviction can take place in terms of section 6 unless it is "just and equitable" for that eviction to take place. The constitutional imperative of procedural fairness, therefore, is protected in PIE by making clear that eviction will only occur in circumstances where it is just and equitable to make an eviction order. The interests of occupiers are therefore protected by this requirement. The equitable considerations, therefore, which impelled an additional equitable requirement of reasonable notice in relation to some precarious possession, have far less force given the equitable protections contained in PIE.

[289] Finally in this regard, I should add that I accept that a relevant consideration in determining whether reasonable notice is required under the rules of *precarium* is the fact that the landowner is an organ of state that bears obligations to take reasonable steps to provide access to adequate housing. The relationship between the landowner and the occupants, therefore, is different to the relationship between a private landowner and occupiers of his or her land. The conduct of an organ of state is constrained by a range of procedural and substantive obligations arising from public law that do not ordinarily constrain the conduct of a private landowner. However, there should ordinarily be synchrony between the obligations of reasonable notice that may arise at private law and the public law obligations of procedural fairness. Both

[17] See, for example, *Port Elizabeth Municipality v Various Occupiers* [2004] ZACC 7; 2005 (1) SA 217 (CC); 2004 (12) BCLR 1268 (CC).

will be based on similar equitable considerations. I do not agree with Sachs J,[18] therefore, when he states that the common-law rules relating to ownership are not at the "core" of the arguments in this case. In my view, they are important and need to be considered.

[290] I conclude that although the occupiers had the consent of the City to occupy the Joe Slovo informal settlement, that consent was not indefinite. From 2005 onwards, it was quite clear to the occupiers that they would have to move to make way for the Gateway N2 Housing Project. This limitation on their lawful tenure meant that it was not necessary for the City to give formal notice to the occupiers. Once the project got underway, the consent of the City was terminated, the occupiers knew that this was so because of the consultation that had taken place, and the occupiers therefore constituted "unlawful occupiers" within the meaning of PIE.

[291] It is unfortunate, perhaps, that PIE speaks of "unlawful occupiers", particularly given our painful history in which black South Africans were, as a result of the policies of colonialism and apartheid, rendered unwelcome and homeless in their own land. To speak of people residing on state land, who have no other homes and nowhere else to go, as "unlawful occupiers" jars with the aspirations of our new constitutional framework. But the fact that the drafters may have used an unfortunate label to describe those who are at risk of eviction should not blind us to the real protections that PIE affords to those very people. PIE strikes a balance between

[18] See [343] below.

landowners, government agencies and homeless people and ensures that the interests of homeless people are seriously considered by any court asked to make an eviction order.

Did the respondents act reasonably in seeking the eviction of the occupiers?

[292] The applicants did not specifically address this question. Like the other members of this Court, however, I have no doubt that unless it is found that the respondents acted reasonably in seeking the eviction, they are not entitled to an eviction order. In this regard, the obligations on organs of state seeking an eviction order are more onerous than the obligations borne by private landowners.

[293] Before turning to the question of reasonableness itself, it is important to observe here that the occupiers who are before this Court are not the only communities who have a deep interest in the N2 Gateway Project. The applicants themselves admit that more than 3 000 households have already moved to Delft from Joe Slovo at the request of the City, on the understanding that they will be potential beneficiaries of the development.[19] There are hundreds of backyard dwellers in Langa too who have also been identified as potential beneficiaries of the development. At the media launch of the N2 Gateway Project, the respondents estimated that 15 504 households currently living in informal settlements and 6 141 backyard households would be housed as a result of the development. In assessing reasonableness, we must take care not to

[19] According to the expert report of Mr Gerald Adlard, a former town planner with the City, lodged by the applicants and not disputed in this regard by the respondents, there are approximately 3 432 households formerly from Joe Slovo now occupying temporary relocation units in Delft. According to his report as well, there were approximately 4 500 households occupying Joe Slovo at the time of his report.

overlook the interests of those people who are not before the Court, but nevertheless who have rights to reasonable conduct by the respondents.

[294] There are two important aspects to reasonableness: the first is whether the N2 Gateway Housing Project is reasonable within the meaning of section 26; and the second is whether the processes to implement the plan have been reasonable. In its second aspect, the requirement of reasonableness overlaps with the requirement stipulated in PIE that an eviction may not be ordered unless it is "just and equitable to do so".

[295] Little more needs to be said on the plan. The test of reasonableness does not require us to be satisfied that it is perfect, or that there is no better plan. The applicants are dismayed by the fact that the plan does not provide for *in situ* upgrading, but although *in situ* upgrading may often be desirable, it cannot be said that in not providing for it the plan is unreasonable. What is clear on the record is that the density levels of the settlement at present are not compatible with adequate housing. In this regard, there is also a suggestion on the record that the plan may not be able to house as many people as it has promised. Again, even if this is so, it does not seem to follow that the plan is necessarily unreasonable. I agree with Sachs J that the details of the plan should, by and large, be left to government.[20] Courts should be slow to interfere in the legitimate policy choices made by government in determining the plan.

[20] See [366] below.

[296] The second aspect that arises is whether the processes to implement the plan have been reasonable. A preliminary issue, raised by the applicants on the papers, is the question whether the City should have followed the procedures set out in section 4 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) when it terminated its consent to the occupiers. Given that the City is not a party to these proceedings, the applicants accept that it cannot be validly and fairly raised and nothing more need be said on this issue, save perhaps to observe that the obligations of fair process imposed upon organs of state must be approached with a clear eye on the purpose for which we insist on process. That purpose is to give affected parties an opportunity to be heard on a decision before it is finally made. Fair process improves the quality of decisions and establishes their legitimacy. However, it should not result in unnecessary and prolix requirements that may strangle government action.[21]

[297] The key question then is whether there has been meaningful engagement[22] between the respondents and the applicants in relation to the implementation of the plan. Here, the argument of the amici was of particular value, it seemed to me, in recognising that the obligation to engage meaningfully imposed by section 26(2) of the Constitution should be understood together with the obligation to act fairly imposed by section 33 of the Constitution, as spelt out in PAJA.

[21] See *Premier, Mpumalanga* above n 2 at para 41: "In determining what constitutes procedural fairness in a given case, a court should be slow to impose obligations upon government which will inhibit its ability to make and implement policy effectively". See also *Minister of Public Works and Others v Kyalami Ridge Environmental Association and Another (Mukhwevho intervening)* [2001] ZACC 19; 2001 (3) SA 1151 (CC); 2001 (7) BCLR 652 (CC) at para 102.

[298] The particular difficulties in a case like this arise from the fact that the initiation of the N2 Gateway Project involves a range of decisions at different levels of government: the adoption of the N2 Gateway plan by provincial and possibly national government; the decision by the City to support the plan and accordingly to require the occupiers to move so that the plan can be implemented; the decision relating to alternative accommodation to be furnished to the occupiers pending providing them with permanent accommodation back at Joe Slovo or elsewhere; and the minutely detailed arrangements for the relocation.

[299] If, as the amici appeared to suggest, each of these decisions constitutes "administrative action" such that a fair hearing needed to be given to the occupiers each time, the result would be unduly burdensome. What fairness required, at the very least, was for the respondents to ensure that the occupiers were aware of the N2 Gateway Project and were given some opportunity to comment on it; and then to the extent that the plan required them to move, the occupiers needed to be given a reasonable opportunity to engage with the appropriate organ of state to ensure that the relocation process was reasonable and fair.

[300] The amici argued that the respondents should have held a public inquiry as contemplated by section 4 of PAJA so as to afford the occupiers and other interested people an opportunity to be heard on the broad parameters of the plan. I am not persuaded that the amici are correct that the respondents could be compelled to do so.

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[22] See *Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg v City of Johannesburg and Others* [2008] ZACC 1; 2008 (3) SA 208 (CC); 2008 (5) BCLR 475 (CC) at paras 13-21.

The definition of "administrative action" in PAJA expressly excludes a decision taken, or a failure to take a decision, in terms of section 4.[23] Moreover, I am not persuaded that the failure to hold a public inquiry could be said to be unreasonable within the meaning of section 26(2). Be that as it may, this difficult issue was not one raised on the papers and we need not decide it here.

[301] The respondents admit candidly in their argument that there was not a coherent or adequate process of consultation with the occupiers and others affected by the development of the N2 Gateway Project. The absence of such a strategy is to be deplored. What is clear on the record, though, is that there was engagement between the affected communities and the respondents. On the applicants' own version there were several public meetings held at the Sports Complex in Joe Slovo (and also at least one at the Resource Centre or IEC Hall in Joe Slovo) to discuss the N2 Gateway Project. There were also meetings between Thubelisha and the committees representing the community. The applicants argue that they had a legitimate expectation arising from this engagement that 70% of the houses built would be allocated to members of the Joe Slovo community. This averment itself, as the respondents rightly point out, indicates that there was engagement between the applicants and the respondents. Nevertheless it cannot be denied that much of the heat that has been generated in this case has been generated because the respondents did

[23] See section 1(a)(ii) of PAJA for the definition of "administrative action". See also the discussion of that exclusion in Hoexter *Administrative Law in South Africa* (Juta & Co Ltd, Cape Town 2007) at 215-6. See also the reasoning of Chaskalson CJ in *Minister of Health and Another NO v New Clicks (Pty) Ltd and Others (Treatment Action Campaign as Amici Curiae)* [2005] ZACC 14; 2006 (2) SA 311 (CC); 2006 (1) BCLR 1 (CC) at para 132 where he states that the administrator's decision in relation to section 4(1) "is final". See also the judgment of Ngcobo J in *New Clicks* at para 468.

not engage fully and meaningfully with the applicants and the other communities who have an interest in the housing project.

[302] The question we have to ask in this case is whether the failure to have a coherent and meaningful strategy of engagement renders the implementation of the plan unreasonable to the extent that the respondents have failed to establish a right to evict the occupiers. On balance I think not. First, we cannot ignore that this is one of the first attempts at a housing development in terms of the new housing policy. Given the huge numbers of people living in inadequate or makeshift housing in Cape Town (and indeed many of our municipalities), and given the fact that this is a pilot project, it is not surprising that it has not been implemented without controversy. Secondly, it is clear that the respondents have engaged in some consultation with the applicants, although they admit that it has not been coherent or comprehensive and that at times it has been misleading (for example, in relation to the allocation of housing in phase 1).

[303] Thirdly, a consideration that to my mind weighs heavily in the balance is that it is not only the occupiers who are affected by the plan. Thousands of other households have already co-operated with the respondents in the hope that their co-operation will hasten the building of the housing project and result in their receiving permanent housing. Refusing an order of eviction in this case might give some temporary relief to the applicants, but it would be against the interests of those waiting anxiously in Delft and in backyards in Langa for the houses to be built. Finally, the order of eviction that is made can seek to remedy, at least to some extent, the failure of

government to engage meaningfully in consultation with the applicants up to this stage.

[304] I conclude, then, that despite the criticisms that can legitimately be directed at the respondents in this regard, I am not persuaded that the conduct of the respondents in seeking to implement the N2 Gateway Project has been unreasonable in all the circumstances, such that the respondents are not entitled to seek an eviction order in this case.

Legitimate expectation

[305] The applicants argue that the eviction may not take place because to do so would be to permit the respondents to evict the occupiers in breach of a legitimate expectation of the occupiers that 70% of the housing to be built on the site of Joe Slovo would be allocated to current and former occupiers of Joe Slovo. It is not clear on what legal basis the applicants assert this, and even if they were to establish a legitimate expectation, on what basis this would constitute a defence to an eviction action.

[306] In our law, where an applicant can show that government has acted in a manner inconsistent with the existence of a legitimate expectation (whether the expectation is an expectation of a fair process or a substantive benefit) without giving the applicant an opportunity to be heard, the applicant may launch review proceedings to set aside

the government conduct.[24] Our courts have expressly refrained from determining the question whether a legitimate expectation might give rise to a substantive benefit,[25] although the English courts have developed a doctrine of substantive legitimate expectation.[26]

[307] It is clear from the record that on several occasions after the launch of the N2 Gateway Project, members of government (including the Mayor) suggested to members of the Joe Slovo community that the housing to be built in the N2 Gateway Project would be built on the basis that 70% would be allocated to residents of the community and 30% to residents of backyard dwellings. It is also clear that when the first phase of the N2 Gateway Project was built, this did not happen. Indeed very few residents of Joe Slovo took up occupation in phase 1 because, by and large, the rentals charged were beyond their means.

[308] Phase 2 is currently being planned. On the record before us, a deponent on behalf of the respondents has indicated that only 35 houses will be built in phase 2 and that they will all be "credit-linked" housing (that is housing, generally, where the rentals would be beyond the means of the community). This number has been reduced. Furthermore, all the housing to be built during phase 3 of the project is to be

[24] *Administrator, Transvaal, and Others v Traub and Others* 1989 (4) SA 731 (A) at 758D-F. See also *Premier, Mpumalanga* above n 2 at paras 33-7; *Bel Porto School Governing Body v Premier, Western Cape* [2002] ZACC 2; 2002 (3) SA 265 (CC); 2002 (9) BCLR 891 (CC) at para 96.

[25] See *Premier, Mpumalanga* above n 2 at para 36; *Bel Porto School Governing Body* above n 24 at para 96; *Meyer v Iscor Pension Fund* 2003 (2) SA 715 (SCA) at para 29; *South African Veterinary Council v Szymanski* 2003 (4) SA 42 (SCA) at para 15; cf the minority judgments of Madala J and Mokgoro and Sachs JJ in *Bel Porto School Governing Body* above n 24.

BNG housing according to the deponent for the government. In their explanatory memorandum lodged with the Court on 3 September 2008 after the hearing in this matter, the respondents informed the Court that no fewer than 1 500 *Breaking New Ground* permanent houses would be built at Joe Slovo.

[309] As mentioned above, I am not persuaded that even were the Court to conclude that the applicants had established a legitimate expectation in this case, such an expectation would give rise to a defence against an eviction order. However, it is not necessary finally to decide that question, because as will appear below, government has agreed to an order in terms of which it undertakes that 70% of the remaining *BNG* housing to be built on the Joe Slovo site will be allocated to current and former residents of the Joe Slovo informal settlement.

[310] Given that the respondents have in their latest memorandum indicated that no fewer than 1 500 low-cost houses will be built at Joe Slovo, and given the misunderstandings that have arisen between the parties before, it is in the interests of transparency and fairness that the order made by the Court should require the respondents to inform the applicants within 14 days of this order if the number of houses to be built at Joe Slovo will be fewer than 1 500.

[311] In the circumstances, it is not necessary to consider and determine further the arguments relating to legitimate expectation made by the applicants.

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[26] See *R v North and East Devon Health Authority, ex parte Coughlan (Secretary for Health and another intervening)* [2000] 3 All ER 850 (CA).

Is it just and equitable to make an eviction order?

[312] Section 6(3) of PIE stipulates:

> "In deciding whether it is just and equitable to grant an order for eviction, the court must have regard to—
>
> *(a)* the circumstances under which the unlawful occupier occupied the land and erected the building or structure;
>
> *(b)* the period the unlawful occupier and his or her family have resided on the land in question; and
>
> *(c)* the availability to the unlawful occupier of suitable alternative accommodation or land."

[313] I have concluded above, after a careful examination of the relevant factors, that it was reasonable for the respondents to seek the eviction of the applicants. That, however, is not the end of the matter. The question remains whether it is just and equitable to issue an eviction order. The remaining questions that arise depend on the terms of the eviction order to be made. An eviction order that does not make provision for alternative accommodation but simply orders an eviction will be far less likely to be just and equitable than one which does make careful provision for alternative accommodation.

[314] The terms of the High Court eviction order are set out in paragraph 13 of the judgment of Yacoob J and need not be repeated here. That order is relatively straightforward. It simply identifies each block and house in the Joe Slovo informal settlement and establishes a date upon which the occupants of the identified block and house should move out of Joe Slovo to temporary accommodation to be furnished in

Delft. It does not describe the minimum conditions of the temporary accommodation, nor does it expressly state that no occupier may be required to move unless alternative accommodation is, in fact, available at Delft. Moreover, the High Court's order does not stipulate that there should be any engagement between the occupiers and the respondents relating either to the arrangements for the move or any other matter.

[315] In my view, the applicants are correct in stating that it was not just and equitable for the order to be made in those terms. As they have been successful in this regard, the application for leave to appeal by the applicants must be granted and the appeal will succeed in part.

[316] The order made by this Court which appears in the judgment of this Court seeks to remedy the deficiencies in the order made by the Western Cape High Court. As is described in paragraphs 119 to 122 of the judgment of Yacoob J, the order is in large part based on the order submitted by the respondents after the hearing. The applicants did not consent to the order, as they persisted with their argument that the eviction order could not stand because they are not "unlawful occupiers", but they did furnish some commentary on it which the Court has taken into consideration.

[317] The occupiers are ordered to move to Delft over a period of time, as set out in a timetable annexed to the order. In terms of that timetable, the first move will take place on 17 August 2009 and the last in June 2010. However, the order requires the parties to engage meaningfully before 30 June 2009 in relation to the date upon which

the relocation will commence, the identification of the families to be relocated, the dates upon which they will be relocated, as well as on any other matter the parties may agree to discuss. If alternative arrangements are agreed between the parties, they may approach the Court on dates stipulated in the order for their agreement to be made an order of Court.

[318] The order makes clear that no occupier may be required to move unless temporary accommodation is made available for him or her by the respondents. To the extent, therefore, that a situation arises during the course of the eviction process to the effect that there are no longer sufficient temporary residential units available to house the occupiers who are scheduled to be moved (an issue that was disputed on the papers), the eviction process must be halted until sufficient alternative accommodation is available.

[319] The order stipulates the quality of accommodation that is to be made available. Although the current plan is that the accommodation will be provided at Delft, it need not be provided there as long as the occupiers agree to the alternative location. In any event, the standard of the alternative accommodation must comply with the terms of this Court's order. In particular, the accommodation must be equipped with basic services, including tarred roads, electricity (by prepaid meter), fresh water and reasonable provision for toilet facilities.

[320] The applicants complain that the temporary housing to be provided at Delft is not suitable alternative accommodation within the meaning of section 26(3) of the Constitution. Again there was a dispute on the papers as to whether the Delft units were constructed of asbestos. The order made makes plain that the units must be constructed of Nutec, the fire-resistant substance the respondents have used at Delft, and may not be constructed of asbestos. This dispute thus need not detain us further.

[321] I have no doubt that the occupants would prefer to stay at Joe Slovo because it is convenient and constitutes a community where they feel at home. This view is worthy of respect but it is indisputable that the situation at Joe Slovo is undesirable and unacceptable and cannot be a long-term solution. The alternative accommodation which must be provided to those who must move from Joe Slovo must meet basic standards, as stipulated in the order. Moreover, the respondents are asked to engage meaningfully with the applicants concerning issues relating to transport between Delft, and the occupiers' places of work and education, as well as clinics. The solution may be far from ideal, but in the circumstances I have not been persuaded that it is not just or equitable.

[322] The first respondent is ordered to assist occupiers to move their possessions to the alternative accommodation "insofar as it is reasonably practicable". Further, the respondents are directed to engage meaningfully with the applicants prior to each relocation to ascertain the names, details and circumstances of those affected by the relocation; the time and manner in which the relocation will take place; the precise

units to which each relocated household is to be moved; the need for transport for the people and possessions to be moved; the provision of transport from the temporary accommodation to schools, clinics and place of work; and the allocation of permanent housing in due course.

[323] The respondents also tendered that an order be made directing them to allocate 70% of the government subsidised homes to be built at the site of the Joe Slovo informal settlement to current and former residents of the Joe Slovo settlement who apply for and qualify for that housing. I have dealt with this issue above. The order is duly made on the basis of the respondents' tender. I should add however that the tender in this regard is important, as in some measure, it meets the applicants' complaint that the respondents had reneged on a promise that 70% of the housing opportunities created at Joe Slovo would be made available to those who had occupied the Joe Slovo informal settlement. It is true that it is not possible now to undo the unfairness which flowed from the respondents' failure to honour this undertaking, to the extent that it was made, in respect of phase 1 of the development.

[324] I should add that, as appears from what I have said above, the respondents averred that all of the housing to be built under phases 2 and 3 of the project, bar 35 houses, would be *BNG* housing and that at least 1 500 such houses would be constructed at Joe Slovo. The Court has made an order recording this, and requiring the respondents to disclose to the applicants within 14 days of this Court's order if fewer than 1 500 *BNG* houses are to be built at Joe Slovo.

[325] Finally the order allows for the substitution of the first respondent by another on the basis that the new development company undertakes the obligations imposed upon the first respondent by the Court's order.

[326] It is my view that the order made by the Court is just and equitable within the meaning of section 6(1) of PIE. For the reasons given in this judgment I concur in that order.

SACHS J:

Introduction

[327] Some years back, the government embarked on an ambitious programme to upgrade the conditions of 18 000 to 20 000 people living in informal habitations in an area known as Joe Slovo.[1] The settlement abutted on the N2 highway as it approached Cape Town, and the programme, designated the N2 Gateway Project (the Project), was undertaken to serve as a pilot scheme for the progressive ending of all informal settlements in the country. In the beginning, the members of the community embraced the project with enthusiasm. Yet before it could get into full swing, relations between the residents and the government broke down. Dissatisfied with the

[1] Named after Joe Slovo, a lawyer and activist in the anti-apartheid struggle, who was appointed Minister for Housing after the first democratic elections in South Africa in 1994.

manner in which they felt the upgrading of the area was being conducted, the residents marched to Parliament to hand over a petition, and some of them later blockaded the highway with burning tyres. As they saw it, their dream had turned into a nightmare. From the government's point of view, on the other hand, a project filled with high hopes and involving considerable investment was facing collapse. The government approached the Western Cape High Court, Cape Town,[2] seeking an order to compel the residents to leave the area so that permanent houses could be built in Joe Slovo to enable insubstantial and fire-prone shelters to be replaced with adequate housing.

[328] There were three applicants. The first was Thubelisha Homes, a company established by the government to undertake various of its housing functions, and which had been required to see the Project through.[3] The second was the national Minister for Housing[4] and the third was the MEC for Local Government and Housing, Western Cape.[5] The respondents were referred to as Various Occupants.[6] The Community Law Centre and the Centre on Housing Rights and Evictions were jointly admitted as amici curiae.[7]

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[2] Previously referred to as the Cape High Court, the Court's name was changed to the Western Cape High Court, Cape Town under the Renaming of High Courts Act 30 of 2008 which came into operation on 1 March 2009.

[3] It is the first respondent in this application for leave to appeal.

[4] The second respondent in this application for leave to appeal.

[5] The third respondent in this application for leave to appeal.

[6] In this application for leave to appeal they were separately represented by two groups, namely the Penze Committee and the Task Team.

[7] In this application for leave to appeal they were allowed to continue as amici curiae. The arguments they submitted were most helpful.

[329] The High Court upheld the application, noting that temporary alternative accommodation was being provided for the residents about 15 kms away in an area called Delft. The residents have now applied directly to this Court for leave to appeal against this decision. As the judgment of the Court indicates, all the members of the Court who heard the matter are agreed on the outcome and the order to be made. There are differences, however, in relation to certain aspects of the reasoning. In particular there is disagreement on the question of whether the occupation of the land was ever lawful. Thus, after elegantly setting out the facts of the case in a manner that managed to be both comprehensive and synoptic, Yacoob J comes to the conclusion that the residents had never at any stage been in lawful occupation. Moseneke DCJ, Ngcobo J, O'Regan J and I come to a different conclusion. In our view the community lawfully occupied the land with the knowledge, acquiescence and support of the Council, but on the understanding that their occupation would be of a temporary nature pending the provision by the state of adequate housing. The differences do not affect the outcome because we all accept that the occupation was unlawful when eviction proceedings commenced. Nevertheless, important jurisprudential issues are raised that affect the status, and in my view, the dignity, of a vast number of people throughout the country living in informal settlements.[8] My reasons follow.[9]

[8] The "Breaking New Ground" National Housing Policy (*BNG*) states that—

> "[t]he number of households living in informal settlements and backyards increased from 1.45 million in 1996 to 1.84 million in 2001, an increase of 26%, which is far greater than the 11% increase in population over the same period."

[9] The reader will see that I concur in the judgments of Moseneke DCJ and Ngcobo J, concur in some of the reasoning of Yacoob J and the order that he crafted but differ in respect of his approach to the lawfulness of the occupation. With regard to questions raised by O'Regan J concerning the relation between private and public law, I feel that whatever differences there appears to be in our two judgments is more apparent than real, depending on starting-point rather than substance. I endorse her judgment's approach to reasonableness; and associate myself fully with the manner in which she fills certain gaps in my judgment.

Preliminary observations

[330] I start with two preliminary and inter-linked observations. The first concerns the general manner in which I believe courts are called upon to approach a case like this. The second deals with how this particular matter should be located within the trajectory of this Court's evolving jurisprudence on the constitutional right of access to adequate housing.

[331] This is not a matter in which formal legal logic alone can solve the conundrum of how to do justice to the one side without imposing a measure of injustice on the other. Thus, in the present matter, if the application for leave to appeal is upheld and the appeal succeeds, the Project goes back to square one, time is lost, costs escalate and people who have already moved to temporary accommodation are left in limbo. If, on the other hand, the eviction order of the High Court is upheld, then desperately poor families, whose lives have been spent in systematised insecurity on the fringes of organised society, would feel that they are being further marginalised. Once more they must pick up their belongings and move, this time to a distant place without firm guarantees of being able to return.

[332] It is necessary, then, not to seek an unattainable solution that is "correct", but to aim for an outcome that, in keeping with the objectives and spirit of the Constitution and relevant statutory provisions, seeks to reconcile the competing considerations and

to minimise as far as is reasonably possible any resultant injustice or disadvantage to either party.[10]

[333] The fact is that in a constitutionally-based, pluralistic society such as ours, the court's function will often move from simply determining the frontiers between "right" and "wrong", to holding the ring between "right" and "right". In many circumstances, instead of seeking to find a totally "right" or "correct" solution, the judiciary will be obliged to accept the intellectually more modest role of managing tensions between competing legitimate claims, in as balanced, fair and principled a manner as possible.

[334] Moreover, in seeking to reconcile the competing interests the courts must give due weight to the overlap between the substantive and the procedural dimensions of the matter. As this Court said in *Port Elizabeth Municipality* in eviction proceedings against the homeless[11] and the landless:

> "The court is thus called upon to go beyond its normal functions, and to engage in active judicial management according to equitable principles of an ongoing, stressful and law-governed social process. This has major implications for the manner in which it must deal with the issues before it, how it should approach the question of

[10] *Port Elizabeth Municipality v Various Occupiers* [2004] ZACC 7; 2004 (12) BCLR 1268 (CC); 2005 (1) SA 217 (CC) at paras 33 and 38.

[11] The word "homeless" as used in this judgment is not limited to people who because of fire, flood or eviction have no shelter at all. It includes the millions of people living in informal settlements and other forms of grossly inadequate habitation. Historically speaking, the term "landless" has had a more specific meaning relating to those who have been deprived of any title to occupy land in the country.

evidence, the procedures it may adopt, the way in which it exercises its powers and the orders it might make."[12] (Footnote omitted.)

[335] The second preliminary observation is that it is necessary to locate this case within the jurisprudence developed by this Court on the enforcement of housing rights and responsibilities under section 26 of the Constitution. This section states that:

> "(1) Everyone has the right to have access to adequate housing.
> (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.
> (3) No one maybe evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions."

[336] The foundations of how this provision should be interpreted and applied were laid in the landmark decision of *Grootboom*.[13] That matter dealt with the claims of about a thousand people who, after being evicted and having their shelters destroyed, found themselves on a dusty sports field with no shelter whatsoever and no land on which to erect new shelters. The judgment focused on the responsibility of government to take reasonable steps, within its available resources, progressively to realise the right of access to adequate housing. The emphasis on the reasonableness of the government's programme, both in its conception and in its implementation,[14] has provided the bedrock of this Court's jurisprudence on the enforcement of social and

[12] Above n 10 at para 36.

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

[14] Thus, impressive though the national housing programme was in enabling millions of homeless people to have access to formal housing, the programme was unreasonable to the extent that it made no systematic provision for accommodating desperate families in crisis situations with no shelter at all.

economic rights. In my view, it should constitute the analytical basis for dealing with the present matter.

[337] In *Port Elizabeth Municipality*, a local authority acting at the behest of private landowners brought proceedings under the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act[15] (PIE) to evict 68 people, including 23 children living in shelters on the landowners' property.[16] The problem was to reconcile the legitimate rights of the landowners not to be arbitrarily deprived of their property,[17] with the equally legitimate rights of everyone to have access to adequate housing.[18] The Court emphasised the new responsibilities of the judiciary when managing a process made particularly stressful by historically-created and racially-based distortions in relation to access to land. It went on to hold that ordinarily an eviction order would not be just and equitable if an attempt at mediation between the parties had not been made. The judgment accordingly highlighted the overlap between substance and procedure in achieving as just and equitable an outcome as possible.

[338] *Olivia Road*[19] took the interconnectedness of procedure and substance a step forward. In that case the municipality was acting in response to a request by developers to secure vacant possession of certain properties. The properties were over-crowded, unhygienic and unsafe apartment blocks in or near central

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[15] 19 of 1998.

[16] Above n 10 at para 1.

[17] Id at para 33.

[18] Id at para 19.

Johannesburg, and the owners wished to have the buildings cleared for development purposes. Holding that the provisions of PIE were applicable, this Court introduced the concept of "meaningful engagement" between the occupiers and the City as a major pre-condition for determining whether an eviction order would be just and equitable. In this way the conundrum of how to balance competing claims is partly resolved by getting the parties themselves to find functional solutions according to their respective needs and interests, with the court establishing the parameters of what is just and equitable.

[339] The present matter involves an application by organs of government to secure an eviction in terms of PIE. This Court's jurisprudence, as referred to above, requires that certain fundamental principles must govern the manner in which applications for eviction orders should be approached. The first is to apply the over-arching principle that the governmental conduct be reasonable. The second is to give due weight to the obligation on the parties to engage as far as possible with each other. Within this matrix, the present case adds three distinctive elements. In the first place, the governmental authorities are not acting on behalf of private landowners seeking vacant possession of land they own or are about to acquire. The authorities are acting on their own behalf as owners of the land, and are attempting to secure governmental and not private interests. Secondly, the community is a relatively settled one, numbering between ten and twenty thousand people who over a period of 15 years have settled on the land, with the Cape Town City Council's knowledge, and, they

[19] *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg and Others* [2008] ZACC 1; 2008 (5) BCLR 475 (CC); 2008 (3) SA 208 (CC).

aver, with its consent. Thirdly, the eviction is being sought not with a view to securing vacant possession to enable the owners to do with the land what they please,[20] nor to open the way to private entrepreneurial activity.[21] On the contrary, the objective is to secure the improvement of the housing conditions of most, if not all, of the occupiers themselves, and not to have them permanently expelled.

[340] With these observations in mind I turn to a question which dominated much of the argument at the hearing, namely, whether the residents of Joe Slovo were "unlawful occupiers" of the Council's land and therefore liable to eviction in terms of PIE.

Lawfulness of the occupation

[341] The foundation of the debate on the lawfulness of occupation lay in the definition of "unlawful occupier" in PIE. Section 1 provides that "unlawful occupier" means "a person who occupies land without the express or tacit consent of the owner or person in charge, or without any other right in law to occupy such land."[22] A large part of this case was accordingly taken up with the question of whether the Council had given tacit consent to the residents to live in the area, thereby rendering the occupation lawful. The Council contended that it had never given consent to the residents to live in the area. As far as its furnishing of electricity and water to the

[20] Above n 10.

[21] Above n 19.

[22] Above n 15 at section 1(xi).

residents was concerned, the Council claimed that nothing more was involved than rendering humanitarian assistance. Yacoob J agrees. I see the matter differently.

[342] Relying essentially on common law principles relating to land rights, Yacoob J sets out in some detail the factual and jurisprudential basis for his conclusion that the residents of Joe Slovo were never lawful occupiers. In his view, the fact that the Council provided water and electricity represented no more than the furnishing of humanitarian assistance in keeping with its civic responsibilities, and fell far short of proving consent to occupation.

[343] In my opinion, the question of the lawfulness of the occupation of council land by homeless families must be located not in the framework of the common law rights of landowners, but in the context of the special cluster of legal relationships between the council and the occupants established by the Constitution and the Housing Act.[23] The common law might have a role to play as an element of these relationships, but would not be at their core. The very manner in which these relationships are established and extinguished will be different from the manner in which these relationships might be created by the common law, for example, through contract, succession or prescription. They flow instead from an articulation of public responsibilities in relation to the achievement of guaranteed social and economic rights.[24] Furthermore, unlike legal relationships between owners and occupiers

[23] 107 of 1997.

[24] The position would of course be different in a case where private owners of property seek eviction of occupiers from their land. In this context traditional private law criteria for establishing the existence of tacit consent could well be operative.

established by the common law, the relationships between a local authority and homeless people on its land will have multiple dimensions, involve clusters of reciprocal rights and duties and possess an ongoing, organic and dynamic character that evolves over time. As this Court said in *Port Elizabeth Municipality*, quoting *FNB*:[25]

> "When considering the purpose and content of the property clause it is necessary, as *Van der Walt* (1997) puts it,
>
> > '. . . to move away from a static, typically private-law conceptualist view of the Constitution as a guarantee of the *status quo* to a dynamic, typically public-law view of the Constitution as an instrument for social change and transformation under the auspices [and I would add 'and control'] of entrenched constitutional values'."

The Court went on to observe that the transformative public law view of the Constitution referred to by Van der Walt was further underlined by section 26.

[344] A transformative view of section 26 makes it clear that in the present matter the Council was not just another landowner entitled to do what it pleased with the land, subject only to normal regulatory controls and, in relation to eviction, to the provisions of PIE. On the contrary, the Council was a landowner of a special type, obliged to use the land for purposes designated by the Constitution and the Housing Act. It owed a duty to the homeless who could not be treated simply as strangers waiting at the gate for charitable assistance. They had rights to adequate housing, and the state was obliged to take reasonable measures to enable them to realise these

[25] Above n 10 at para 16. See also *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* [2002] ZACC

rights. It follows that in dealing with the rights of the homeless within its boundaries, the Council was called upon to act in a manner that in constitutional terms would be regarded as reasonable.

The right to adequate housing

[345] The Constitution requires us to view the provisions of section 26 as constituting a comprehensive set of entitlements and obligations which govern the conduct of the Council right from the very beginning of its relationship with the residents. It is necessary, then, to anchor the analysis in an understanding of the affirmative housing rights granted to the homeless by section 26(1) and 26(2). Both chronologically and conceptually the defensive rights concerning eviction contained in section 26(3), and given statutory form by PIE, enter the picture not as the point of departure for the analysis, but as its end-point. The consequence is that the question of the lawfulness of the occupation of the land must be located within the complex, ongoing, mutable and two-way relationship established essentially by public law between the Council and the residents.

[346] There is no reason, of course, that the Council as owner of the land in question should not have the same rights as any other owner.[26] Yet any rights the Council possessed had to be asserted within the framework of the Constitution and the

5; 2002 (7) BCLR 702 (CC); 2002 (4) SA 768 (CC).

[26] *Minister of Public Works and Others v Kyalami Ridge Environmental Association and Others (Mukhwevho intervening)* [2001] ZACC 19; 2001 (7) BCLR 652 (CC); 2001 (3) SA 1151 (CC) at para 40.

restrictions of relevant legislation.[27] More specifically, the government had to function in a manner compatible with duties prescribed for it by section 26 of the Constitution, and the Housing Act. Any inferences to be drawn from the conduct of the Council should accordingly be based on the assumption that at all times it was aware of, and seeking to comply with, its constitutional and statutory obligations to the community.

[347] Our Constitution is far from silent on how municipalities may use their land. It does not assume that we live in the best of all possible worlds in which all have equal opportunities to improve their lot. On the contrary, the Constitution acknowledges that we still inhabit a deeply-divided society that is heavily marked by the systemic inequalities of the past, and requires active forms of redress.[28] Thus, the Constitution does not, as some constitutions do, simply prescribe limits on the way government exercises its authority. It imposes duties on government to play a proactive role in bringing about social transformation and facilitating enjoyment of human rights by all.[29]

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[27] Id.

[28] Thus the Preamble to the Constitution affirms the objective of healing the divisions of the past and establishing a society based on social justice, improving the quality of life of all citizens and building a united South Africa. The founding values of the Constitution include human dignity and the achievement of equality and the advancement of human rights. Taken together, the use of the verbs 'heal', 'establish', 'improve' and 'build', followed by employment of the nouns 'achievement' and 'advancement' connote an unmistakable vision of an imperfect society that greatly needs to be perfected.

[29] The cornerstone of our democracy, the Bill of Rights, which the state is obliged to respect, protect, promote and fulfil (section 7(2) of the Constitution), includes socio-economic rights (sections 26 to 29 of the Constitution). Similarly, when interpreting any legislation and when developing the common law, the courts are required to promote the spirit, purport and objects of the Bill of Rights (section 39(2) of the Constitution).

[348] The Constitution deals expressly with the duties of councils towards the 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"[30] and "promot[ing] social and economic development",[31] 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".[32]

[349] The Constitution is even more specific in relation to housing. As set out above, section 26 provides that "[e]veryone has the right to have access to adequate housing"; "[t]he state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right"; and "[n]o one may be evicted from their home . . . without an order of court made after considering all the relevant circumstances".

[350] The Housing Act, enacted pursuant to section 26, takes the responsibilities of the Council several steps forward. It lays down in great detail the approach the state must adopt when dealing with the claims of the homeless. Thus, section 2(1) requires all spheres of government to "give priority to the needs of the poor in respect of

[30] Section 152(1)(b) of the Constitution.

[31] Section 152(1)(c) of the Constitution.

[32] Section 153(a) of the Constitution.

housing development".[33] Municipalities are then given the following specific functions:

> "Every municipality must, as part of the municipality's process of integrated development planning, take all reasonable and necessary steps within the framework of national and provincial housing legislation and policy to—
>
> *(a)* ensure that—
>
> (i) the inhabitants of its area of jurisdiction have access to adequate housing on a progressive basis;
>
> (ii) conditions not conducive to the health and safety of the inhabitants of its area of jurisdiction are prevented or removed;
>
> (iii) services in respect of water, sanitation, electricity, roads, stormwater drainage and transport are provided in a manner which is economically efficient;
>
> *(b)* set housing delivery goals in respect of its area of jurisdiction;
>
> *(c)* identify and designate land for housing development;
>
> *(d)* create and maintain a public environment conducive to housing development which is financially and socially viable;
>
> *(e)* promote the resolution of conflicts arising in the housing development process;
>
> *(f)* initiate, plan, co-ordinate, facilitate, promote and enable appropriate housing development in its area of jurisdiction".[34]

[33] Above n 27 at section 2(1)(a). Section (1)(vi) of the Act states that "housing development"—

> "means the establishment and maintenance of habitable, stable and sustainable public and private residential environments to ensure viable households and communities in areas allowing convenient access to economic opportunities, and to health, educational and social amenities in which all citizens and permanent residents of the Republic will on a progressive basis have access to—
>
> *(a)* permanent residential structures with secure tenure, ensuring internal and external privacy and providing adequate protection against the elements; and
>
> *(b)* potable water, adequate sanitary facilities and domestic energy supply".

[34] Id at section 9(1).

[351] In my view it is against this constitutional and statutory background, and not according to the precepts of private law, that the lawfulness of the occupation by the Joe Slovo community of public land must be determined.

[352] As Yacoob J aptly put it in *Olivia Road*, every homeless person is in need of housing and this means that every step taken in relation to a homeless person must be reasonable.[35] This observation followed on what he had said in *Grootboom* about the duties of all levels of government in the light of all the provisions of the Constitution:

> "All implementation mechanisms and all State action in relation to housing falls to be assessed against the requirements of s 26 of the Constitution. Every step at every level of government must be consistent with the constitutional obligation to take reasonable measures to provide adequate housing."[36]

He went on to state that the Constitution would be worth infinitely less than its paper if the reasonableness of state action concerned with housing was determined without regard to the fundamental constitutional value of human dignity, adding that:

> "Section 26, read in the context of the Bill of Rights as a whole, must mean that the respondents have a right to reasonable action by the State in all circumstances and with particular regard to human dignity. In short, I emphasise that human beings are required to be treated as human beings. This is the backdrop against which the conduct of the [Council] towards the [occupiers] must be seen."[37]

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[35] Above n 19 at paras 17-8.

[36] Above n 13 at para 82.

[37] Id at para 83.

[353] These are the injunctions that, in the light of the Constitution, this Court has established and which, I believe, should govern the processes under investigation in the present matter. "Every step at every level" does not start with eviction proceedings. It begins with the initial tolerance of settlement on the land, proceeds to the devising of the Project, follows with the programme of actual implementation, and only concludes with the ultimate decision to institute eviction proceedings. The question to be asked in relation to each of these steps is: does the conduct of the Council measure up to the test of reasonableness as required by the Constitution?

[354] The first step taken by the Council in relation to its obligations to promote the right of the homeless to have access to adequate housing was to enable homeless families to occupy vacant land which it owned at the side of the N2 highway. To have refused the families the right to erect their temporary shelters on that land would have been manifestly unreasonable. For people in desperate quest of some place on earth to lay their heads, the erection of rudimentary structures on land from which they would not be expelled represented more than just establishing a shelter from the elements. Their simple habitations on council land gave them a zone of personal intimacy and family security, and established relatively inviolable spaces of privacy and tranquillity in a turbulent and hostile world.[38] Moreover, individuals who would otherwise have lived in insecure isolation became part of a community, with all the social interaction and organised facilities that living within a settled neighbourhood provides. They

[38] Above n 19 at para 17. It should be mentioned, too, that permitting the homeless to occupy demarcated areas of land under the Council's control would foster urban peace by reducing the risk of desperate families putting up their shelters on privately-owned land or in public gardens or on common land.

escaped the status of pariahs who had been historically converted by colonial domination and racist laws into eternal wanderers in the land of their birth.[39]

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[39] The spiritual dimension of eviction and homelessness was captured with rare eloquence by Sol Plaatje in his famous book *Native Life in South Africa* (PS King & Son, Ltd. London 1916), recently re-published by Pan Macmillan South Africa, 2007. Referring to the effects of dispossession and homelessness created by the Native Land Act, 1913, he writes:

> "Awakening on Friday morning, June 20, 1913, the South African native found himself, not actually a slave, but a pariah in the land of his birth." (At 21.)

> "Mrs Kgobadi carried a sick baby when the eviction took place, and she had to transfer her darling from the cottage to the jolting ox-wagon in which they left the farm. Two days out the little one began to sink as the result of privation and exposure on the road, and the night before we met them its little soul was released from its earthly bonds. The death of the child added a fresh perplexity to the stricken parents. They had no right or title to the farmlands through which they trekked: they must keep to the public roads – the only places in the country open to the outcasts if they are possessed of travelling permit. The deceased child had to be buried, but where, when and how? This young wandering family decided to dig a grave under cover of the darkness of that night, when no-one was looking and in that crude manner the dead child was interred – and interred amid fear and trembling, as well as the throbs of a torturing anguish, in a stolen grave, lest the proprietor of the spot, or any of his servants, should surprise them in the act. Even criminals dropping straight from the gallows have an undisputed claim to six feet of ground on which to rest their criminal remains, but under the cruel operation of the Natives' Land Act little children, whose only crime is that God did not make them white, are sometimes denied that right in their ancestral home." (At 73-4.)

> "[W]e had returned in thought to the July funeral of the veld and its horrid characteristics; and a pleasant reaction set in when we recalled a verse of Matthew which says: 'The foxes have holes, and the bird of the air have nests, but the Son of Man hath not where to lay His head'. How very Christlike was that funeral of the veld. It resembled the Messiah's in that it had no carriages, no horses, no ordained ministers, nor a trained choir singing the remains into their final resting place. The veld funeral party, like the funeral party of the Son of Man, was in mortal fear of representatives of the law; it, like that party, had not the light of the sun, nor the light of a candle, which charitable friends in our day would usually provide for the poorest of the poor under ordinary circumstances. Still, it was not cold at Golgotha, or should not be today as it was on the first Good Friday; but even the Madonna and the disciples must have had some house in which to gather to discuss the situation." (At 126.)

> "[E]victions have always taken place, since the first human couple was sent out of the Garden of Eden, yet . . . until the Union parliament passed the Natives' Land Act there never was a law saying to the native population of South Africa, 'You must not settle anywhere, under a penalty of £100, unless you are a servant.'. . . no slavery could be worse than to be outlawed in your own homes." (At 154.)

> "We remember how African women have at times shed tears under similar injustices; and how when they have been made to leave their fields with their hoes on their shoulders, their tears on evaporation have drawn fire and brimstones from the skies. But such blind retribution has a way of punishing the innocent alike with the guilty, and it is in the interests of both that we plead for some outside intervention to assist South Africa in recovering her lost senses." (At 365.)

Eight decades after these words were written, intervention came, not from outside, but in the form of our Constitution. It declares in its Preamble that South Africa belongs to all who live in it. This case is as much about access to full moral citizenship as it is about access to adequate housing.

[355] Thus, in allowing the families to find a place of rest and a fixed spot from which to conduct their lives, the Council was making a crucial intervention of double significance: it was responding to the immediate human needs of homeless families, and it was establishing a relatively secure staging-point for the later development of programmes for the ultimate access of these families to adequate housing. In keeping with these objectives, and unlike its predecessors who had taken sporadic steps to drive homeless people off parts of the land now known as Joe Slovo, the new democratically elected Council did not seek to expel the residents. As far as I am aware, the record does not indicate any past attempt to wall off the area or evict the families. On the contrary, in the period 1994 to 2006 the Council not only offered no opposition to the establishment of a burgeoning community, it laid on access to potable water and installed a dense overhead grid of electrification cables for the benefit of the residents. In doing this, it was not acting as a non-governmental organisation providing forms of emergency relief or charitable assistance for people in desperate need. It was functioning as government itself, fulfilling its specific constitutional and statutory responsibilities in the sphere of local government.

[356] Had this case been brought by private landowners it might have been possible to contend that the evidence fell short of showing anything more than conduct of a good Samaritan animated by a spirit of good-neighbourliness. Yet even in relation to a private landowner, I believe that the prolonged character of the occupation, coupled with the creation of infrastructure to provide water and electricity, would have indicated to any objective observer that there was actual consent to the occupation.

This was simply not a case of illicit, surreptitious or defiant adverse user against the will of the Council. Nor was the Council a mere passive bystander either uninterested or condemned to put up with a situation over which it had little control. On the contrary, the Council accepted the presence of the residents on the land, negotiated with community leaders over the provision of services and made the land available for being upgraded by other organs of state. The occupation could not be consensual and non-consensual at the same time; the consent was there, and the occupation was lawful.

[357] This was the approach adopted, rightly in my view, in *Rademeyer*.[40] In that matter the High Court had to decide whether homeless families residing on municipal land could be classified as unlawful occupiers liable to eviction at the behest of more affluent private neighbours who regarded them as a nuisance. The Court held that the families were occupying the municipality's property with the knowledge and acquiescence of the Council. It went on to state that the conduct of the municipality in permitting the occupiers to remain on its property and in resolving to provide them with water and sanitation constituted at the very least tacit consent to the occupiers to reside on the property.

[358] I believe that the conduct of the Council in this case constituted at the very least tacit consent for the residents of Joe Slovo to stay there. Indeed, I would go further. The only inference that can reasonably be drawn from all the objective circumstances

[40] *Rademeyer and Others v Western Districts Council and Others* 1998 (3) SA 1011 (SECLD); [1998] 2 All SA 547 (SE).

is that the Council actually consented to the occupation. It follows that from 1994 to 2006 the residents were lawful occupiers. In this respect, I fully agree with the eloquent judgments of Moseneke DCJ and Ngcobo J.

Conditional nature of the occupation

[359] The consent given to homeless people to remain on the Council's property was, however, neither unqualified nor irrevocable. Built into it and foundational to its existence, was an acknowledgement of its temporary character. The very purpose of permitting the informal settlement to burgeon in that area was to establish a point of stability which could pave the way for the next step in a programme of realisation of the right of access to adequate housing. The right to enjoy relatively undisturbed occupancy of the Joe Slovo area, then, was conditional on the land not being needed for other legitimate council purposes, such as future development of formal housing. It was neither a real right as understood by common law principles of land law, nor a contractual right as created in terms of the common law. Rather it was an authorisation specific to its context, granted in terms of public law considerations enabling the residents to reside lawfully on the land for an indeterminate but terminable period. In this respect, the Council was not purporting simultaneously to permit and disallow occupation. It was permitting occupation, subject always to built-in conditions which could bring the permission to an end.

[360] In this context, the fear expressed in argument that the authorities would be reluctant to provide any form of assistance to residents of land if this were to be seen

as giving the residents permanent rights to stay on the land would be misplaced. The right to occupy the land will be dependent on the purpose for which, and the conditions under which, the occupation has been permitted. Thus, in the present matter occupation was permitted subject to the land one day being upgraded, and to reasonable measures being used to deal with the adverse consequences for the residents of the transformative process involved. Thus, while I fully accept Yacoob J's observation that occupation cannot be both lawful and unlawful at the same time,[41] I see no reason why occupation that is lawful at one moment cannot at a later stage become unlawful.

[361] The fact that no rent was paid to the Council is entirely consistent with the special legal regime that operated between the Council and the residents. The Council was fulfilling its responsibilities to enable desperately poor people to occupy land which the Council owned, pending eventual access on a subsidised basis to formal housing. Then, once the formal housing had been established, a new legal relationship based on individualised contracts for those gaining access could be created. It was logical that the interim relationship between the Council and the residents during the period when formal housing opportunities were still being created would have to be governed by these considerations. And the fact that older residents expected tribute from newer arrivals had no bearing on the general consent of the Council, which was for the homeless families to take up abode on the land, to enjoy a certain degree of communal self-management, and to sort out allocations themselves.

[41] See [52] above.

[362] To sum up: the Council first informally demarcated areas where the landless and the homeless could erect their shelters while they awaited formal housing. It then went a step further – it provided electricity and water, and a degree of waste collection, and entered into ongoing relationships with leaders of the new communities being established. This could not be characterised simply as the provision of humanitarian assistance to those in need. The term "humanitarian assistance" lends itself more to the granting of ad hoc support for occasional victims of war, persecution, or natural disasters, than to the fulfilment of constitutional and statutory obligations to furnish succour and redress to the long-standing casualties of history. What the Council was doing was providing focused civic action to help people achieve their constitutional right to enjoy dignified habitation. At the same time, however, the entitlement of the homeless to be in continuing occupation of the land was conditional on and subject to the exigencies of any reasonable programme for formal housing to be developed on that land.

Reasonableness of the upgrading programme

[363] As I have mentioned, the nature of the relationship between the Council and the residents was on going and dynamic. The next step in the process of fulfilling the Council's responsibilities towards the homeless was to devise a programme for upgrading the area. The objective was to transform a sector of informal housing with minimal amenities, into a sustainable community graced with adequate formal housing. The fact is that the shelters erected by the homeless suffered from great

material inadequacies. They were highly susceptible to devastating fires, and access for fire engines (and ambulances) was difficult. The need for radical improvement in housing conditions for all the residents, and especially for the children whose developmental horizons were being severely restricted by the harshness of the circumstances in which they were growing up, was self-evident. The question was how this should be done, and what should happen to the residents while it was being done.

[364] In September 2004 Cabinet approved the "Breaking New Ground" National Housing Policy (*BNG*) with the express intention of eliminating informal settlements throughout the country. The document projected a forceful and optimistic vision for the progressive eradication of informal settlements: informal settlements were urgently to be integrated into the broader urban fabric to overcome spatial, social and economic exclusion. The Department would introduce a new informal settlement upgrading instrument to support the focused eradication of informal settlements. The new human settlements plan would adopt a phased in situ upgrading approach to informal settlements, in line with international best practice. The plan would support the eradication of informal settlements through in situ upgrading in desired locations, coupled with the relocation of households where such development was not possible or desirable. Upgrading policies would be implemented by municipalities and would commence with nine pilot projects, one in each province, building up to full implementation status by 2007/8. The document added that a joint programme by the National Housing Department, Western Cape Provincial Government and Cape

Metropolitan Council, had already initiated the N2 upgrading from the Cape Town International Airport to Cape Town, as a lead pilot project. Thereafter a further eight projects were to be identified.

[365] I have already held that the initial occupation of the area by the residents occurred with the permission of the responsible authorities, and was accordingly lawful. At the same time, however, the consent given was based on the understanding that the accommodation in self-constructed shelters would be of a temporary nature, and that residence in the area was to be seen as constituting a holding operation pending access to formal housing. Implicit in this was the fact that the Council would be entitled to undertake reasonable measures to progressively realise the promise of access to adequate formal housing. In this regard, the Council would be able to employ a wide range of strategies, subject only to the requirement that they fell within the range of options that were reasonable.[42]

[366] A court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent. The question would be whether the measures that have been adopted are reasonable. It is necessary to recognise that a wide range of possible measures could be adopted by the state to meet its obligations. Many of these would

[42] Above n 13 at para 41.

meet the requirement of reasonableness. Once it is shown that the measure adopted falls within the range of reasonableness, this requirement is met.[43]

[367] On the papers, it cannot be said that the Project as originally conceived did not fall within this range. It might well be that other methods could have been used to secure the same objectives. In particular, *BNG* puts considerable emphasis on in situ upgrading, which minimises the amount of time people are away from their homes and encourages them to stay at or near the sites as they are being improved. This choice, however, was one which appropriately lay with the governmental authorities and their agents. The only limitation on the exercise of the discretion of the responsible authorities was that it should fall within the range of reasonable alternatives. Indeed, at its commencement and in the early months of its existence, the programme was enthusiastically welcomed by the Joe Slovo residents themselves. As a result, many of the occupiers voluntarily relocated to Delft. The programme was accordingly not suddenly sprung on the occupiers. Nor were they unaware that the upgrading programme would require them to relocate.

[368] Accordingly, I hold that the programme constituted a reasonable measure undertaken with the view to fulfilling the governmental authorities' responsibilities to enable the residents to have access to adequate housing.

Reasonableness of implementation

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[43] Id.

[369] The formulation of a programme, however, represents only the first step in meeting the state's obligations. The programme must also be reasonable in its implementation. An otherwise reasonable programme that is not implemented reasonably will not constitute compliance with the state's obligations.[44] The main disputes that arose between the parties in fact stemmed from disagreement over the manner in which the Project was being implemented.

[370] Many of the facts surrounding the implementation of *BNG* and the development of the Project are contested. The following facts, however, are common cause:

- In January 2005 a devastating fire struck the Joe Slovo area and destroyed the homes of 996 families. The fire victims were informed that they could not rebuild their homes, but would be catered for in terms of the Project.
- The public launch of the Project took place a month later. Joe Slovo was amongst the areas alongside the N2 that the Project covered. The state's overall objective was to provide a total of approximately 22 000 housing opportunities for beneficiary communities adjacent to the highway. It was targeted at the poorest people, with a view to engineering modes of urban development and informal settlement upgrading.
- In its early stages the Joe Slovo community and its leaders enthusiastically embraced the Project.
- The building of flats began at the Cape Town end of the settlement in what later came to be known as phase 1 of the Project.

[44] Id at para 42.

- The area was again struck by a devastating fire in the early part of 2006, and most of the victims were transported 15 kms away to the suburb of Delft, where temporary accommodation was provided.
- In February 2006 Thubelisha Homes, the company established by the government to undertake its various housing functions, became involved in the Project. I will refer collectively to Thubelisha Homes, the national Minister for Housing and the MEC for Local Government and Housing, Western Cape as "the governmental authorities".[45] The authorities strongly encouraged the residents of Joe Slovo to move and a considerable number voluntarily relocated to temporary relocation areas in Delft.

[371] It is also agreed by all the parties that by the second half of 2006 the initial widespread enthusiasm of the residents for the Project had given way to disenchantment and a breakdown of cooperation between the residents and the authorities. Though the causes of and responsibility for the rupture are disputed, it is clear from the record that a strong precipitating factor was the announcement that instead of rentals in the flats being set to range from R150 per month for single units to R300 per month for double units, they would be R600 per month for single units and R1 050 per month for double units.

[45] It should be noted that the Metropolitan Council of Cape Town was not a party to the proceedings either in the High Court or this Court. Its role as owner of the land features strongly in relation to the lawfulness of the occupation by the residents. The upgrading programme, however, was not conducted by it, although the former Mayor and other officials played a role in communicating the plans of the government.

[372] The papers suggest two reasons for this increase. The one is that the building costs had been higher than anticipated. The other is that *BNG* expressly sought to support the functioning of "a single residential property market to reduce duality within the [housing sector] by breaking the barriers between the first economy residential property boom and the second economy slump".[46] The result was that eminently reasonable objectives of the authorities at the macro level, appeared to come into conflict with what the residents had taken to be eminently reasonable and very specific commitments in their favour at the micro level.[47]

[373] The residents had envisaged that they would enjoy a right to return to upgraded versions of single dwellings on single plots. *BNG*, on the other hand, sought to avoid a perpetuation of the division of the city into areas of what are commonly known as "RDP houses" outside of the residential property market, and better-appointed homes supported by mortgages and located within the residential property market. It accordingly emphasised that the upgrading process should not be prescriptive, but

[46] The document pointed out that:

> "[T]he current housing mandate restricted subsidies to households earning less than R3 500 per month. This was premised upon the assumption that end-user finance would be accessed for the construction of houses by income groups above R3 500 per month. This had not in fact occurred and there was a growing disjuncture between subsidised and non-subsidised residential accommodation. This impacted negatively on the operation of the residential property market. In order to address this problem, a subsidy mechanism was to be introduced to facilitate the availability and accessibility of affordable housing finance products/instruments to medium income households (earning R3 500 to R7 000 per month) by providing a mechanism to overcome the down-payment barrier. This mechanism would be linked to household savings and loans from financial institutions."

Put more simply, access to more desirable homes would be financed by mortgage payments.

[47] In the first years after democracy was installed in 1994 the government launched a programme called the Reconstruction and Development Programme (RDP). One of the major components of this programme was the provision of completely subsidised housing for very low income people living in shelters. The abbreviation RDP continued to be used after the programme was replaced. Many of the informal settlements established after 1994 were named after persons who had been prominent in the struggle against apartheid. Joe Slovo, who had been responsible for developing the RDP programme for upgraded housing, was one of them.

rather support a range of tenure options and housing typologies. Where informal settlements were to be upgraded on well-located land,[48] mechanisms were to be introduced to optimise the locational value, and preference would generally be given to medium-density social housing solutions.

[374] This clash of perspectives and expectations appeared to be the genesis of what turned out to be a major bone of contention between the parties, namely, the decision by the authorities to promote access to a substantial number of bonded homes in Joe Slovo for families earning more than R3 500 per month. The residents claimed that less than 20% of the Joe Slovo households fell into that category, and that the scheme would shatter the expectation of the majority of the residents of being able to return to homes that would be more modest but more affordable.

[375] A further cause for discontent was a decision by the authorities to allocate 30% of homes in the Joe Slovo area to "backyard dwellers" in the nearby Langa township. There were also strong complaints about the manner in which decisions were being communicated (or not communicated) to the residents. Above all, the residents were extremely disconcerted by what they saw as the transformation of a firm undertaking that all, or nearly all, of the residents who went into temporary accommodation in Delft, would be able to return to formal accommodation in Joe Slovo, into a more diffuse and open-ended commitment to apply "objective criteria" that would merely take their claims into account.

[48] In spatial terms Joe Slovo is well located, half way between the Cape Town International Airport and the central business district.

[376] As a result of their dissatisfaction, in August 2006 the residents marched to Parliament and handed over a petition containing a list of their grievances to a representative of the Minister for Housing. The residents also established a Task Team to represent them, but in the end the attempts to find commonly-acceptable solutions failed. In August 2007 there was a further march to Parliament, and this time the protestors handed a memorandum directly to the Minister. Dissatisfied with what they regarded as a lack of response, on 10 September 2007 a number of residents blocked the N2 highway and burnt tyres to prevent traffic from coming through.

[377] Nine days later the authorities launched proceedings in the Western Cape High Court, Cape Town, seeking eviction of the residents of Joe Slovo. They claimed that the residents were in unlawful occupation and by refusing to move were impeding the realisation of a housing project designed to extend formal housing to thousands of homeless families, many of them included.

[378] The unfortunate breakdown in what had once been an enthusiastic partnership, had now culminated in eviction proceedings. The result was the collapse of one of the key elements of *BNG*, which was to accomplish a shift "towards a reinvigorated contract with the people and partner organisations for the achievement of sustainable human settlements." There can be no doubt that there were major failures of communication on the part of the authorities. The evidence suggests the frequent employment of a top-down approach where the purpose of reporting back to the

community was seen as being to pass on information about decisions already taken rather than to involve the residents as partners in the process of decision-making itself.[49] As this Court has made clear, meaningful engagement between the authorities and those who may become homeless as a result of government activity, is vital to the reasonableness of the government activity.[50]

[379] Yet despite these inadequacies in the modes of consultation, it cannot be said that no meaningful engagement at all took place. If anything, there was a surplus rather than a deficit of acts of engagement. There were simply too many rather than too few protagonists on the side of the authorities. At different stages the occupants had to engage with national and then with provincial and finally with local entities. To complicate matters even further, Thubelisha, which had been created at national level to function at provincial and local levels, became forcefully involved as a protagonist. The difficulty of establishing an authoritative counterpart was aggravated by what appears to have been an incompatibility of objectives in relation to whether, and the extent to which, bonded housing for the somewhat better-off should be made available at Joe Slovo. The residents saw this as drastically cutting down on the accommodation to be made available to the great majority of the families, namely those whose incomes were below R3 500 per month.

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[49] *BNG* contains contradictory statements in this regard. Much of it emphasises the importance of ensuring that housing "citizenship" is cemented by means of inclusion "in human settlement development decision-making." A particular section, however, headed: "Mobilizing communities", puts the emphasis on a comprehensive mobilisation and communication strategy to clarify the intentions of policy and raise awareness on the implications of policy. Civic participation and community mobilisation are not necessarily mutually incompatible, but an emphasis on mobilisation risks treating the communities as recipients of state largesse to be informed of the benefits they are about to receive, rather then as active partners engaged with the authorities in developing programmes and finding solutions to the problems that emerge.

[50] Above n 19 at paras 17, 18 and 20.

[380] In testing the reasonableness of the implementation, the failure to maintain dependable and meaningful lines of communication would, however, not be the only factor to be considered. Extensive negotiations had in fact taken place over a long period of time. The inadequacies of the engagement towards the end appear to have been serious, but would not necessarily have been fatal to the whole process. What mattered was the overall adequacy of the scheme as it unfolded. Evaluation of the details of the scheme as it worked out in practice has to take account, amongst other things, of the benefits that the programme would bestow; the degree of disruption to the lives of the residents; the kind of alternative accommodation made available during temporary relocation; the opportunities that would exist for at least a substantial number of the residents ultimately to achieve access to adequate housing in the Joe Slovo area; the kind of accommodation that would await those who would not be able to return; the criteria that would be used for deciding who would be able to return and who not; and finally, the need to make fair provision for any other homeless people in the vicinity who might also be desperate for access to adequate housing.

[381] In essence, these are largely operational matters in relation to which the state should ordinarily have a large discretion. Courts would not normally intervene to decide how well or badly programmes are being managed.[51] In terms of examining

[51] For example, this Court intervened in *Grootboom* (above n 13) because it felt that although the state had embarked on a massive housing programme, it had acted unreasonably in not putting in place a measure to deal with homeless families in situations of extreme desperation brought about by crisis or emergency. Similarly, in *Minister of Health and Others v Treatment Action Campaign and Others (No 2)* [2002] ZACC 15; 2002 (10)

the reasonableness of the implementation, courts will be particularly cautious about allowing the best to become the enemy of the good. In the present matter, if errors were made by the governmental authorities, they were of the kind that could crop up in any project and were committed with a view to pursuing legitimate civic and national objectives. In my view, the means used were not so disproportionately out of kilter with the goals of the meritorious Project as to require a court to declare them to be beyond the pale of reasonableness.

[382] It is also important to bear in mind that a back-stop existed to prevent any defects there might be in implementation from leading to unjust and irreversible consequences for the residents. This safety net was provided by section 26(3) of the Constitution, and PIE. Ultimately, no resident could be compelled to leave Joe Slovo except in terms of a court order, which could only be granted after the court had taken account of all the circumstances and decided that it would be just and equitable for an eviction to take place.

[383] In considering the reasonableness of the implementation scheme, all the different aspects have to be considered in conjunction. Was the overall implementation conducted in a reasonable manner? In particular, were the deficiencies in the process of such a degree as to vitiate the reasonableness of the whole Project?

BCLR 1033 (CC); 2002 (5) SA 721 (CC), it stepped in to declare that it was unreasonable to restrict the supply of anti-retroviral drugs for mothers about to give birth, to only two test sites in each province. In both cases it was defects in the conception of the programme rather than faults in their administration that produced the unconstitutionality.

[384] There may well have been serious faults in the mode of engaging with the residents. Indeed unilateral decision-making on important questions concerning who would in fact be able to return to the newly-built homes, appears to have caused a great deal of uncertainty. Yet, manifestly meritorious plans were well on track. Temporary accommodation was being provided in Delft. In one way or another, all of those who were entitled to a subsidy would end up with a home. The delay would not be too great. Relocation by its very nature presupposed a measure of inconvenience. The inconvenience resulting from restarting the whole process from square one, however, would be far greater. An eviction order made in terms of PIE could be constructed in such a way as to iron out many of the problems. In all the circumstances I cannot hold that the implementation as a whole was so tainted by inconsistency and unfairness as to fail the test of reasonableness.

[385] This brings me to examine the reasonableness of the last step of the process of providing access to adequate housing, namely, the institution of proceedings for eviction under PIE to enable the upgrading programme to be completed. Wrapped up in this process was the question of whether the manner in which eviction was sought was procedurally fair.

Eviction proceedings under PIE

[386] The manner and timing of the termination of the Council's consent to occupation of Joe Slovo cannot be separated from the way in which the overall

relationship between governmental authorities and the residents had been initiated and had evolved over time. Implicit in this relationship from the outset was the understanding that occupation would be temporary, pending eventual access to formal housing. Once the residents had embraced the Project, they implicitly undertook the obligation to allow it to work. This meant that the plan for temporary relocation on a staggered basis and the phased clearing of Joe Slovo for formal housing became dependent on voluntary relocation by the existing residents, at least on a temporary basis. This was fully comprehended by all the residents and, indeed, on this understanding many left of their own accord.

[387] As this judgment has stressed, the lawfulness of the occupation was conditional on uses to which the Council and its partners in government could legitimately put the land. A reasonable upgrading programme had been established. For all its possible faults, it was being implemented in a manner that fell within the parameters of reasonableness. By its nature, the programme imposed a duty on the residents to cooperate. Their situation was not equivalent to that of families in the days of apartheid seeking to resist forced removal from ancestral land. They had been accommodated on Council property precisely with a view to overcoming the patterns of segregation and marginalisation to which they had been subjected. The objective was to enable them one day, in a planned fashion, to overcome their spatial, economic, social and spiritual isolation from the mainstream of society. Acquiring a dignified house of their own would represent more than getting a secure roof over their heads and access to water and electricity. It would mark an end to their life as permanent

itinerants with a sword of eviction perpetually hanging over their heads. It would symbolise a degree, hitherto denied to them, of being accepted as members of organised civic society. However humble the home, it would be their own. The moral quality of their citizenship in terms of public acknowledgement and self-esteem, would be notably enhanced.[52]

[388] It was now incumbent upon the residents to cooperate in the achievement of these objectives. They were not being thrown back on to the street to fend for themselves. Alternative arrangements were being made to provide temporary shelter for each and every family. The process would inevitably be inconvenient, but the details would be open to amelioration through negotiation, and if that failed, by recourse to the courts. In these circumstances, a blanket refusal to move served to frustrate the further development of the Project, causing a great deal of inconvenience and expense to a large number of people, and delaying the implementation of a programme from which the majority, if not all, of the residents themselves stood to benefit.

[389] The refusal of the residents to cooperate was in conflict with the conditions under which consent to occupy had been given to them. As such, their failure to abide

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[52] As the National Housing Programme dealing with upgrading of informal settlements forcefully puts it 13.2.1:

> "The Programme aims to enhance the concept of citizenship, incorporating both rights and obligations, by recognising and formalising the tenure rights of residents within informal settlements wherever feasible. This process seeks to vest access and usage of physical land assets in the hands of the urban poor, reducing their vulnerability and enhancing their economic citizenship and capability. Tenure security is also intended to normalise the relationship between the state and the residents of informal settlements."

See also the reference to the citizenship status of the person at para 13.3.4.7.

by the unwritten bargain between themselves and the Council served automatically to annul the consent originally given by the Council. They were in fact repudiating the conditions that were foundational to their stay. It could be said that it would have been more courteous and in keeping with the spirit of engagement for the authorities to have given them advance notice that they were planning to invoke the procedures of PIE to ensure that the upgrading process for Joe Slovo could proceed.[53] I do not, however, see that it was necessary for formal notice of termination of consent to have been delivered prior to the institution of proceedings. The permission to occupy was given by conduct rather than formally. Similarly, the breach of the implicit undertaking made by the residents, was effected by conduct.

[390] In this respect, it is instructive to look at what this Court said in *Kyalami*[54] in connection with procedural fairness in relation to administrative action. The circumstances in that matter were by no means identical, but the approach adopted by the Court is helpful in the present matter. The state had a plan to accommodate victims of floods in Alexandra on public land adjacent to a prison and the issue was whether specific notice with an opportunity to object should have been given to all parties who had an interest. In responding to complaints by residents of an affluent suburb that neighboured on the prison that they had not been given a fair opportunity to object, this Court stated:

[53] And, it should be added, the invocation of the fast-track emergency procedures of section 5 of PIE manifested subjective impatience rather than objective urgency, and was legally quite inappropriate.

[54] Above n 26.

> "Where, as in the present case, conflicting interests have to be reconciled and choices made, proportionality, which is inherent in the Bill of Rights, is relevant to determining what fairness requires. Ultimately, procedural fairness depends in each case upon the balancing of various relevant factors including the nature of the decision, the 'rights' affected by it, the circumstances in which it is made and the consequences resulting from it."[55] (Footnote omitted.)

[391] After considering the facts of the case the judgment went on to conclude:

> "[P]rocedural fairness does not require the government to do more in the circumstances of this case than it has undertaken to do. That was to consult with the Kyalami residents in an endeavour to meet any legitimate concerns they might have as to the manner in which the development will take place. To require more, would in effect inhibit the government from taking a decision that had to be taken urgently . . . . It may have been better and more consistent with salutary principles of good government if the government had found an appropriate method to inform the neighbouring residents of its intentions before contractors went onto the site, and if it had engaged them in discussion and the planning at an early stage of the project. However . . . the absence of such consultation and the engagement did not invalidate the decision."[56]

The emphasis on context and proportionality, rather than on abstract, mechanical rules, is relevant to the present matter.

[392] In this case there was a need for the stalled upgrading process to be resumed. Costs were piling up, and construction was at a standstill. People who had voluntarily moved to Delft in the expectation of a swift return to dignified homes, were left stranded. Many other parties stood to be affected. And of special significance was

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[55] Id at para 101.

[56] Id at paras 109-10.

the fact that no irreversible damage to the residents' interests would have been caused by the mere issuing of notices in terms of PIE.

[393] PIE itself laid down notice procedures,[57] and provided the residents with full opportunity to be heard on the one critical issue at stake, namely, whether it would be just and equitable to compel them to move. The procedures in PIE would ensure that the court would traverse all relevant circumstances and decide whether the provision of accommodation was just and equitable. Before coming to its conclusion, the court would be required to consider all relevant circumstances, and give a full hearing to the occupiers. In this way, an administrative decision based on the discretion of the officials concerned would be converted into a judicial decision. The court would not be acting as a judicial body reviewing an administrative decision. It would be hearing the matter *de novo* (from scratch), and making up its own mind whether the justice and equity requirements of PIE had been met.

[394] The invocation of PIE procedures following on the public breakdown of the process, served in itself as a final statement that the occupation had been rendered unlawful. Invoking PIE in these circumstances was not unreasonable, nor was the notice unfair. On the contrary, the PIE procedures guaranteed that the matter would be looked at with utmost fairness in a judicial setting. And given that the residents knew all along that they were required to move somewhere to enable the upgrading process to continue, and that the Council was determined to go ahead, the issuing of a

[57] Above n 15 at section 4.

formal notice that consent no longer existed, would have been an exercise in pure formalism. Indeed, it would have been a costly bureaucratic exercise with no meaningful practical significance.[58]

[395] In other circumstances it might be inappropriate for the owner of land simply to say: "See you in court, you may have your say there". But PIE is a unique piece of legislation with procedures that are specifically designed to prevent unjust removals. It expressly provides for an opportunity to make full representations. Moreover, it insists that even if the occupation is no longer lawful because consent has manifestly ceased to exist, no eviction shall be ordered unless in all the circumstances it would be just and equitable to issue it.

[396] I now turn to the question of whether the issuing of an order authorising eviction was just and equitable.

The justness and equity of the eviction

[397] The overall upgrading process must be seen as one that was manifestly beneficial in its objectives and that had already gone a considerable way in its implementation. To start again from scratch would not have furthered any of the constitutional interests at stake. One zone of Joe Slovo had already been developed. The accommodation was palpably superior to that available in the remainder of the

[58] While keeping an open mind on certain aspects of its treatment of the question of the lawfulness of the initial occupation, I would endorse the clearly articulated approach in the judgment of O'Regan J with regard to the reasonableness of the steps taken up to and including the application for eviction. See [292]-[304] above.

area, and has been actively enjoyed for some time without the fire and flood hazards that characterise the rest of the zones. There are people at Delft waiting to get back to their promised homes in Joe Slovo, and others in Langa who have to endure backyard shelter because the building of their new homes has been put on hold. These considerations are highly relevant both to the reasonableness of insisting that the programme be allowed to resume, and to the justness and equity of requiring residents who are stalling development to accept temporary relocation.

[398] The applicants' main challenge in this application for leave to appeal is directed at the order of eviction. To reinforce the challenge, they referred to many aspects of the High Court order which, they claimed, would lead to consequences that were manifestly unjust and inequitable. One critical feature, they contended, was that there was no guarantee that once the residents left Joe Slovo to take up temporary accommodation 15 kms away, they would in fact be able to return to the area. They also stated that no specific arrangements had been made to ensure sufficient quantity and appropriate quality for the temporary accommodation in Delft. They submitted that engagement between the authorities and the residents had been wholly inadequate, and that no provision had been made to ensure that there would be appropriate individualised treatment for the people due to be removed.

[399] As has been mentioned above,[59] one of the functions of the Court in a case like the present, is to do what it can to manage an inevitably stressful process. In keeping

[59] See [333]-[334] above.

with this consideration, after extensive argument at the hearing, the Court invited the parties to attempt to reach an agreed solution. As a starting point, the authorities were requested to furnish a proposed draft order which would go beyond the order granted by the High Court, in particular by ensuring individualisation of the relocation process, thereby respecting the dignity of those affected. As a result, the authorities produced a memorandum setting out detailed undertakings with regard to what they would do immediately to meet the Court's request, coupled with more general commitments in terms of how they would proceed as further information became available. They attached to the memorandum a draft order agreed to by all three respondents.

[400] The terms of this draft order have, with small modifications, been incorporated into the order made by this Court. They include the following new provisions:

- that the authorities allocate 70% of the subsidised houses to be built at Joe Slovo to current and former residents who apply for and qualify for such housing;
- that the authorities engage with the affected residents in respect of each relocation prior to requesting the Sheriff to act. This engagement would include finalising precise details of the relocation and the transport needs before and after the relocation, and would cover transport facilities to schools, health facilities and places of work. The authorities would also provide specific information to inform the residents about where they stood in relation to the allocation of permanent housing; and

- that the authorities provide detailed specifications concerning the temporary accommodation being made available in Delft.

[401] Three weeks after the draft order was lodged with the Court, the residents submitted an affidavit in response. It stated that they agreed that Joe Slovo should be upgraded and developed for poor people, and that a necessary consequence was that it would not be possible for them to remain where they were in their present structures. They also accepted that it would not be possible for all of the broader Joe Slovo community to be accommodated permanently at Joe Slovo. However, they did not accept that a legally valid case for eviction had been made out; that it was not possible for people to move to another part of Joe Slovo while development was taking place; that Delft was the only suitable location for temporary or permanent accommodation; or that it could be just and equitable for them to be evicted on the basis of vague promises where important information continued to remain uncertain. They accordingly urged the Court not to order eviction, but instead to require further engagement between the parties.

[402] The concerns advanced by the residents merit serious consideration. In essence they boil down to asking the Court to replace the eviction order with an order requiring engagement between the parties with a view to finding mutually agreed mechanisms for resolving the impasse. The authorities accepted the need for engagement, but in a far more limited sense than that asked for by the residents. Assuming that eviction would be ordered, the order proposed by the authorities

requires individualised engagement for the purposes of ensuring appropriate attention to individual needs when eviction takes place. The residents, on the other hand, state that engagement can only be meaningful if the parties meet as equals without the eviction order hanging over them. Engagement on substantive questions, they say, could well avoid the necessity for having an eviction order at all.

[403] The authorities responsible for housing must have a wide discretion in respect of how they should best manage programmes that are eminently reasonable in their objectives. At the same time, they must deal with the people most affected in a fair manner that invites their participation and respects their dignity. The revised order in fact substantially fills in the gaps left by the High Court order, and deals in a balanced way with the intricacies of reconciling the competing considerations at stake.

[404] No doubt, the process could be accomplished in other and possibly even better ways. But this Court is not called upon to decide whether the best means have been found to enable the upgrading programme to go ahead. The test is whether the mechanisms used to accomplish the objectives of the programme are reasonable overall; whether the procedures used have been fair; and whether an eviction order would be just and equitable in relation to residents who are refusing to take up the temporary alternative accommodation available.

[405] It is important to note that the order of this Court requires meaningful engagement in relation to the stage the process has now reached. This does not

envisage re-opening the basic modalities of the upgrading and relocation scheme. But it does bring the community directly into helping to achieve maximum fairness in relation to potentially divisive features of the implementation.

[406] That the Council and the residents need to engage in a two-way process must be emphasised. In *Port Elizabeth Municipality* and *Grootboom* this Court underlined the need for municipalities to attend to their duties with insight and a sense of humanity, adding that their duties extended beyond the development of housing schemes to treating those within their jurisdiction with respect.[60] Officials seeking eviction should be encouraged not to rely on concepts of faceless and anonymous squatters automatically to be regarded as obstinate and obnoxious social nuisances. Justice and equity require that everyone be treated as an individual bearer of rights entitled to respect for his or her dignity.[61]

[407] At the same time, this Court has emphasised that those who have been compelled by poverty and landlessness to live in shelters, should be discouraged from regarding themselves as helpless victims, lacking the possibilities of personal moral agency. The tenacity and ingenuity they have shown in making homes out of discarded material, in finding work and sending their children to school, serves as a tribute to their capacity for survival and adaptation. The achievement of a just and equitable outcome required an appropriate contribution not only from the municipal authorities but from the residents themselves. They had a duty to show the same

[60] Above n 10 at para 56. See also above n 13 at para 83.

resourcefulness in seeking a solution as they did in managing to survive in the most challenging circumstances.[62] In the same vein, when underlining the fact that the process of engagement would work only if both sides acted reasonably and in good faith, this Court in *Olivia Road* stated that people subject to eviction must—

> "not content themselves with an intransigent attitude or nullify the engagement process by making non-negotiable, unreasonable demands. People in need of housing are not, and must not be regarded as a disempowered mass. They must be encouraged to be pro-active and not purely defensive. Civil society organisations that support the people's claims should preferably facilitate the engagement process in every possible way."[63]

[408] This case compels us to deal in a realistic and principled way with what it means to be a South African living in a new constitutional democracy. It concerns the responsibilities of government to secure the ample benefits of citizenship promised for all by the Constitution. It expands the concept of citizenship beyond traditional notions of electoral rights and claims for diplomatic protection, to include the full substantive benefits and entitlements envisaged by the Constitution for all the people who live in the country and to whom it belongs. At the same time it focuses on the reciprocal duty of citizens to be active, participatory and responsible and to make their own individual and collective contributions towards the realisation of the benefits and entitlements they claim for themselves, not to speak of the well-being of the community as a whole. When all is said and done, and the process has run its course, the authorities and the families will still be connected in ongoing constitutional

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[61] Above n 10 at para 41.

[62] Id.

relationships. It is to everyone's advantage that they be encouraged to get beyond the present impasse and work together once more.

[409] Not without some hesitation, I have come to the conclusion that, given the history of the matter and the negative consequences for all concerned from further delays to the housing programme, considerations of equity and justice require that the order for eviction, now suitably amplified to make it a great deal fairer, should be supported.

Moseneke DCJ and Mokgoro J concur in the judgment of Sachs J.

[63] Above n 19 at para 20.

For the Applicants represented by the Penze Committee:	Advocate P Hathorn instructed by Chennels Albertyn.
For the Applicants represented by the Task Team:	Advocate G Budlender and Advocate L Kubukeli instructed by the Legal Resources Centre.
For the First and Third Respondents:	Advocate SC Kirk-Cohen SC, Advocate DB Ntsebeza SC (only on behalf of the First Respondent), Advocate H Rabkin-Naicker and Advocate T Mashuku instructed by Nongogo Nuku Inc.
For the Second Respondent:	Advocate M Donen SC and Advocate K Pillay instructed by the State Attorney.
For the Amici Curiae:	Advocate H Barnes and Advocate N Jele instructed by Wits Law Clinic.