IN THE HIGH COURT OF SOUTH AFRICA

(WITWATERSRAND LOCAL DIVISION)

Date delivered: 29 February 2008

CASE NUMBER: 05/29099

R Du Plessis, AJ:

In the matter between:

JOHN MICHAEL GROBLER	Applicant
and	
BEN MSIMANGA	First Respondent
THE OCCUPIERS OF THE IMMOVABLE PROPERTY KNOWN AS PORTION 74 OF THE FARM ELANDSVLEI 249 IQ RANDFONTEIN	Second Respondent
RANDFONTEIN LOCAL MUNICIPALITY	Third Respondent

JUDGMENT

R Du Plessis, AJ:

Background:

[1] This application was brought by the applicant for the eviction of first and second respondents from Portion 74 of the farm Elandsvlei 249 IQ Randfontein, ("the property"), which property is situated within the municipal area of the third respondent.

[2] The application was brought in terms of a Part A and a Part B, in terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 19 of 1998, ("PIE").

[3] The order in terms of Part A of the application was granted on 13 December 2005 before Goldblatt j, in terms of which it was ordered that the notice of motion, (Part B), and the founding affidavit must be served on the first respondent in terms of the uniform rules of court by affixing a copy of the notice of motion, (Part B), and founding affidavit to the main entrance gate to the property.

[4] It was also ordered that the notice of motion, (Part B), and founding affidavit must be served on one occupier of each shack and caravan as far as circumstances permit, and should there not be an occupier of a shack and/or caravan, by serving a copy of the notice of motion, (Part B), and founding affidavit on one occupier of a room and one occupier of the house on the property in terms of the uniform rules of court.

[5] Service of the application was effected by the sheriff on 3 February 2006 and 6 February 2006.

[6] The application was issued on 8 December 2006 by the Registrar of the court.

[7] There was therefore compliance with the provisions of section 4(2) of PIE, in that at least fourteen days before the hearing of the proceedings, written and effective notice of the proceedings was given to the alleged unlawful occupiers and

the municipality having jurisdiction, namely the third respondent.

[8] The application was set down for hearing on 28 February 2006, but by that date, the respondents had not delivered any answering affidavits.

[9] It must be mentioned here that the first respondent is the chairman of the committee of occupiers on the property, and the second respondent constitutes the various adult males and females permanently residing on the property. The third respondent is the local authority that has jurisdiction over the property.

[10] A site plan indicating all the shacks, caravans and other structures on the property was annexed to the founding affidavit.

[11] It appears clearly on the returns of service filed by the sheriff, that the sheriff took the necessary steps to serve the application upon all the occupiers concerned. No real dispute was raised pertaining to service, and there is no evidence that any person who should have received service and notice of the application did not receive notice and service thereof.

[12] There were no answering affidavits filed by the 28th of February 2006 and in order to assist the respondents, the court postponed the application to 25 April 2006 and ordered the first and second respondents to deliver their answering affidavits by 21 March 2006.

[13] The respondents failed to deliver any answering affidavits by 21 March 2006.

[14] On 20 April 2006, some fifty-four court days after service of the application, the third respondent delivered an answering affidavit. The affidavit was delivered out of time without the leave of the court, and without any explanation therein why it was delivered out of time. It was also filed without any application for condonation for the late filing thereof, or any application wherein the leave of the court was sought to file the affidavit. In fact, the third respondent did not bring an application for condonation at any stage in the proceedings.

[15] The application was set down for hearing on 25 April 2006, by which date the first and second respondents had still not delivered any answering affidavits.

[16] Another court order was then granted in terms of which the first and second respondents would deliver their answering affidavits by 12 May 2006. This order was also not complied with.

[17] On 19 May 2006 third respondent filed a supplementary answering affidavit, which affidavit was also delivered out of time, without any condonation being sought.

[18] On 22 May 2006, applicant filed a replying affidavit to the third respondent's original answering affidavit.

[19] Applicant also, on 12 April 2007, as a contingency measure, filed a provisional supplementary replying affidavit to third respondent's supplementary answering affidavit.

[20] The application was then set down for hearing on 31 July 2007 by which time the first and second respondents had still not delivered any answering affidavits.

[21] At the hearing, counsel for the first and second respondents informed the legal representatives of the applicant that they were not ready to proceed with the application, and that they would apply to court to have a postponement. An affidavit by their attorney, a certain Mr Tseladinitloa, was handed up to the court wherein the reasons for the postponement were set out.

[22] The application was thereafter enrolled for 1 August 2007, when it transpired that the court had not had an opportunity to read the application because the court file was empty. The matter was again postponed to 11 September 2007, and respondents were ordered to deliver such applications for condonation, and any other applications which they deemed necessary, by 16:00 on 21 August 2007. The court also ordered that costs be reserved for determination by the court on 11 September 2007.

[23] At the hearing on 1 August 2007, a bundle of documents was handed to applicant, which purported to be copies of affidavits of the occupants of the property, which had allegedly been deposed to by first and second respondents on 9 and 10 May 2006. On these affidavits the registrar's stamp shows the date of 12 May 2006. An affidavit attempting to explain the late filing of the affidavits of the occupants was also handed to the

applicant, which affidavit had been deposed to by first respondent on 29 May 2006.

[24] On 22 August 2007, first and second respondents filed an application for condonation for the late filing of their answering affidavits and for leave to oppose the application.

[25] It appears from the aforegoing that the first and second respondents filed their answering affidavits approximately eighteen months after the application was originally served on them, and only filed their application for condonation on 22 August 2007. This was done notwithstanding previous court orders laying down time periods within which their affidavits had to be filed.

[26] The third respondent delivered an answering affidavit fifty-four court days after service of the application, and a supplementary answering affidavit seventy-five court days after service of the application. No application for condonation was filed to have these affidavits allowed. The applicant never agreed to accept the late filing, and requested this court to refuse to accept the affidavits and to refuse the application for condonation.

The application for condonation:

[27] It is trite law that the overriding consideration in respect of an application for condonation is that the matter rests in the judicial discretion of the court, which discretion is to be exercised by having regard to all the circumstances of the case. It must be exercised judicially upon a consideration of all

the facts, and it is in essence a question of fairness to both sides.

[28] Relevant considerations may include the degree of non-compliance with the rules, the explanations therefor, prospects of success, the importance of the case, finality of the judgment, convenience of the court, and the avoidance of unnecessary delay in the administration of justice.[1]

[29] There must be good cause shown why condonation should be granted, and secondly, a respondent must show that he or she has a *bona fide* defence.[2]

[30] Condonation for the non-observance of the rules is by no means a mere formality. There must be an acceptable explanation for the default, and an explanation on oath by the defaulting party, if a respondent or defendant, that he or she has a *bona fide* defence.[3]

[31] The affidavit of Mr Tseladinitloa explains that he took up employment with the Legal Aid Board (Criminal Section) of Krugersdorp on 1 July 2007. Before him a certain Mr Seforo, an attorney, headed the civil section at the Legal Aid Board, Krugersdorp.

[32] The latter was suspended due to alleged irregularities. In the affidavit he gives a long explanation of the inertia of Mr Seforo,

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[1] *United Plant Hire (Pty) Ltd v Hills & Others*, 1976 (1) SA 717 (A); *Torwood Properties (Pty) Ltd v South African Reserve Bank*, 1996 (1) SA 215 (WLD)

[2] *Ford v Groenewald*, 1977 (4) SA 224 (T); *Oostelike Transvaalse Koöperasie Bpk v Aurora Boerdery*, 1979 (1) SA 521 (T); *UL&B Marcow Caterers (Pty) Ltd v Greatermans SA Ltd*, 1981 (4) SA 108 (C); *Du Plooy v Anwes Motors (Edms) Bpk*, 1983 (4) SA 213 (O); *Standard General Insurance Co Ltd v Eversafe (Pty) Ltd*, 2000 (3) SA 87 (W);

[3] *Dalhouzie v Bruwer*, 1970 (4) SA 566 (C); *Creative Car Sounds & Another v Auto Mobile Radio Dealers Ass 1989 (Pty) Ltd*, 2007 (4) SA 546 (D)

but he points out that all the respondents attended court on 28 February 2006 and 25 April 2006, and that they clearly indicated their intention to oppose the application during those occasions.

[33] He also points out that the respondents are lay persons, and that they eventually approached the South African Police Services to assist them with drafting affidavits, which were the affidavits that were filed on 12 May 2006.

[34] He indicates that the respondents have a valid defence in law although he did not elaborate upon that at all.

[35] He furthermore gave the following information pertaining to the occupiers on the property, according to him:

1. There were at least one hundred and thirty three shacks, forty four permanent structures and two caravans.
2. There are two hundred and sixty one dwellings on the property.
3. There are approximately two thousand people living on the property of which approximately nine hundred are female.
4. There are seventeen old age pensioners living on the property, thirty seven residents that receive medical pension, and approximately three hundred and fifty children attending school, and a further one hundred and fifty children attending crèche and pre-school.

[36] He did indicate that, according to him, the applicant followed the wrong procedure, as the applicant should allegedly have acted in terms of the Extension of Security of Tenure Act, 62 of

1997, ("ESTA"). He gave no reasons for this argument. That was eventually the main thrust of the defence of the first and second respondents.

[37] The applicant argued that this affidavit shows certain inconsistencies.

[38] The allegation that the first and second respondents immediately contacted the Legal Aid Board after the application was postponed on 28 February 2006 is contradicted by the fact that the second respondent only instructed the Legal Aid Board during October 2006, eight months later. The question arises why the respondents did not contact the Legal Aid Board immediately after 25 April 2006, and why they waited until October 2006.

[39] The reference to two consultations which had been arranged between first respondent and Mr Seforo, indicates that such consultations must have been arranged between March 2006 and 2 July 2007 when Mr Seforo was suspended. Nothing was done when the consultations were cancelled. There is no explanation of why the court orders in respect of filing of the answering affidavits had not been complied with.

[40] The applicant argues that there is a limit beyond which a litigant cannot escape the result of his attorney's lack of diligence, or an insufficiency of the explanation tendered.

[41] The applicant relies for this contention on *Saloojee & Another NNO v Minister of Community Development*, 1965 (2) SA 135

(A) and *Regal v African Superslate (Pty) Ltd*, 1962 (3) SA 18 (AD).

[42] The applicant also argued that the answering affidavits of the first and second respondents, which had been filed, do not comply with the requirements of the rules of this court and that the affidavits should therefore, for that reason also not be accepted. Applicant relies for this on *Swissborough Diamond Mines (Pty) Ltd & Others v Government of The Republic Of South Africa & Others*, 1999 (2) SA 279 (T).

[43] The applicant also brought an application for striking out of certain averments in the answering affidavits of the first, second and third respondents on the basis of hearsay evidence contained therein.

[44] The approach of the respondents to this court pertaining to filing of answering affidavits, and in particular the fact that court orders ordering the respondents to file affidavits before certain time periods, have been ignored, has placed this court in a very difficult position. On the one hand, the court must apply the rules and principles laid down by courts in South Africa over a long period of time which dealt with condonation, late filing of affidavits and procedures in respect thereof, which have in all instances not been complied with in this matter. In fact, not one affidavit, nor the application for condonation filed by first and second respondents, was filed in time and in terms of the rules of this court. On the other hand the nature of the matter must be considered.

[45] I have a wide discretion to consider if condonation should be granted in respect of the first and second respondents. In respect of the third respondent, the decision becomes more difficult as no application for condonation for the late filing of the third respondent's answering affidavit was filed.

[46] However, it must be borne in mind that third respondent was cited as an interested party in the matter, and no relief is sought in the notice of motion against the third respondent. The relief is in essence sought against the first and second respondents being eviction from the property and costs, as referred to in Part B of the notice of motion.

[47] Therefore, the third respondent was, in any event, obliged to have placed relevant facts before this court pertaining to the application, and in particular pertaining to alternative accommodation and land available to the occupiers. It was also in any event obliged to have become a party to the proceedings.

[48] I therefore find that it was not necessary for the third respondent to have filed a condonation application, and the third respondent's affidavit is therefore allowed.

[49] I am furthermore of the view that the first and second respondents' answering affidavits should be allowed simply in the light of the nature of the case, with reference to the effect the court order will have on the occupants of the property, and in particular on the women, children and the elderly.

[50] Although the application for condonation does not necessarily comply with all the requirements, which should ideally have been dealt with in a proper application for condonation, there was an attempt to explain the late filing, and also an attempt to deal with a defence.

[51] I therefore have come to the conclusion that even though there was a long delay and non-compliance with the rules of this court, the issues in this case, and in particular the effect that the court order may have on a number of citizens, warrants the granting of condonation.

ESTA or PIE:

[52] One of the main arguments of the respondents was that the applicant should have brought the application in terms of ESTA and not PIE.

[53] PIE is applicable to an unlawful occupier which is 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 ESTA.

[54] ESTA is applicable to an occupier, who is a person residing on land which belongs to another person, and who has on 4 February 1997, or thereafter, had consent, or any other right in law, to do so, but excluding a person who has an income in excess of the prescribed amount, or a person who is, or is intending, to use the land in question mainly for industrial, mining, commercial or commercial farming purposes. Consent

in ESTA is defined as express 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, including the express or tacit consent of such holder.

[55] The respondents in this matter argued that they had consent to live on the property and to occupy the property. That argument was based upon submissions that some of the respondents made in their affidavits, including the first respondent, that they occupied the property over a period of time.

[56] However, the first respondent did not state in his affidavit that he occupied the property with any consent whatsoever.

[57] Furthermore, the third respondent, in its answering affidavit, indicated that the property was first occupied by the respondents in November 2005. Some of the other respondents also stated under oath that they had occupied the property for a long period of time, but none of those occupants stated in any way whatsoever that they had received any consent to occupy the property from any previous owner.

[58] The first respondent also filed an affidavit dealing with the specific averments of the applicant. Nowhere in that affidavit reference is made to which owner granted consent to whom to stay on the property. Only a bald allegation that "We have occupied the said property for a period of thirty five years with the consent of the owner" is made. There were, however, over the

period different owners. No details are provided in respect of consent obtained from them at all.

[59] The applicant explained that the property was owned previously by Patelsons Investments (Pty) Limited, which company purchased the property from Mr Banji Laher, who occupied the property in terms of a 99 year leasehold awarded to him during 1994. His son deposed to an affidavit stating clearly that no consent or permission was given by Mr Laher to any of the respondents to occupy the property, and the same evidence was presented by the applicant himself. The applicant himself confirmed this, as well as Mr Patel, the shareholder and director of Patelsons.

[60] Furthermore, the first respondent's answering affidavit, wherein he states that he occupied the property for thirty five years with consent of the owner, is in direct conflict with the third respondent's supplementary answering affidavit wherein it is stated that the property was first occupied by the respondents in November 2005.

[61] In the light of the aforegoing, I have no hesitation to come to the conclusion that the respondents have not presented evidence of any acceptable nature in terms of which I can find that any of the respondents obtained permission or consent from any of the previous owners, or from the current owner, namely the applicant, to occupy the property or to reside upon the property. On the other hand, conclusive evidence was

presented by the applicant and his predecessors pertaining to the issue of consent.

[62] I am of the view that the bald statements, and the contradictory nature thereof, which were made by the respondents in their affidavits, do not give rise to *bona fide* disputes of fact. No positive evidence to the contrary of the applicant's evidence was presented.

[63] I therefore have no hesitation to apply a robust common sense approach to this issue, and to find that the respondents have not presented evidence of any consent of any nature whatsoever to occupy the property or to reside upon the property.[4]

[64] In the light of the aforegoing, I therefore come to the conclusion that on the evidence before me, the first and second respondents are unlawful occupiers occupying the property without the express or tacit consent of the owner or person in charge, and without any other right in law to occupy such land.

[65] Therefore, I am of the view that the applicant has brought the application correctly in terms of the provisions of PIE.

Compliance with formal issues:

[66] In terms of sections 4(1), 4(2), 4(3), 4(4) and 4(5) of PIE, certain formal requirements have to be complied with before the court will consider granting an order. This division has

[4] *Room Hire Company (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd*, 1949 (3) SA 115 (T); *Soffiantini v Mould*, 1956 (4) SA 150 (E) and 154 (F); *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*, 1984 (3) SA 623 (A) at 634 (I) to 635 (A); *Khumalo v Director-General of Co-Operation & Development*, 1991 (1) SA 158 (A) at 167 (G); *South African Veterinary Council v Szymanski*, 2003 (4) SA 42 (SCA) at 51 A to C

also, after the hearing of this matter, brought out a practice directive pertaining to service of such an application and giving of notice in terms of section 4(5). That practice directive is not directly applicable to this matter as the application commenced long before the practice directive came into force.

[67] In *Cape Killarney Property Investments (Pty) Ltd v Mahamba*, 2001 (4) SA 1222 (SCA), the Supreme Court of Appeal discussed sections 4(1), 4(2), 4(3), 4(4) and 4(5).

[68] Brandt AJA, as he then was, clearly indicated that a common sense approach to obtain the court's directions regarding the section 4(2) notice, would be that the applicant can approach the court for such directions by way of an *ex parte* application.

[69] An order on the merits by way of a *rule nisi*, for instance, cannot be obtained. An applicant should approach the court on an *ex parte* basis to obtain a ruling pertaining to service of the section 4(2) notice.

[70] In this matter, Part B of the notice of motion, dealing with the relief sought on the merits, was served together with the founding affidavit, and in the notice of motion the information, referred to in section 4(5), was included. Therefore, service in this matter occurred in accordance with the *Cape Killarney* judgment.

[71] Selikowitz J in *City of Cape Town v Rudolph & Others*, 2004 (5) SA 39 (CPD) interpreted the *Cape Killarney* decision as requiring two notices, namely a notice of motion, as prescribed by rule 6 of the rules of court, to be served in accordance with

rule 4, and in addition a separate notice in terms of section 4(2) of PIE.

[72] It is correct that the court in *Cape Killarney* came to the conclusion that a section 4(2) notice is required to be served in addition to the notice of motion.[5] The court stated that only after all the papers have been served, the section 4(2) notice should be authorized and directed by the court.

[73] In the current matter, it is clear that a separate section 4(2) notice was not served shortly before the matter was heard. However, the matter was postponed previously on various occasions because of the non-compliance of respondents. It is inconceivable that it would be required of an applicant, in such circumstances, to serve a section 4(2) notice every time when a matter is postponed to a different date.

[74] It is also important to take into account the fact that the respondents have filed an affidavit under oath wherein the attorney of the first and second respondents, Mr Tseladinitloa, stated the following:

> "*It must be noted that all the respondents attended court on both occasions and clearly indicated their intention to oppose this application.*"

[75] The two instances referred to are the hearings of 28 February 2006 and 25 April 2006.

[76] The question therefore arises if there was substantial compliance with the provisions of section 4 of PIE for purposes

[5] Page 1227 I to 1228 D

of proper notice to the occupiers of the property of the matter. The attorney, in his affidavit referred to above, clearly indicated that all the respondents attended court on both occasions. There can therefore be no doubt that all the respondents knew of the application and that they attended the first two hearings.

[77] There is also no doubt that the first and second respondents were legally represented when this matter was eventually heard, and as I have already stated, it could never have been the intention of the legislature to require applicant to give a section 4(2) notice every time the matter is postponed to a different date in respect of each and every court date.

[78] The question which therefore arises is if non-compliance with the requirement that a separate section 4(2) notice had to be served, affects the procedure to such an extent that the matter should start fresh.

[79] I am of the view that the procedure followed in this matter achieved the desired result as meant in the legislation. The provisions of sections 4(1), 4(2), 4(3), 4(4) and 4(5) of PIE were formulated with the express purpose that occupiers of land must be properly informed of court proceedings, to evict them from the land.

[80] The purpose of the section 4(2) notice is to afford the respondents in an application under PIE an additional opportunity, apart from the serving of the notice of motion, to

put all the circumstances they allege to be relevant before the court.[6]

[81] In this matter it is clear that, apart from the fact that the respondents attended the first two court hearings, and therefore knew exactly what the application was about, they also had more than ample opportunity to file papers in respect of any information they wanted to place before the court. In fact, they did not comply with two court orders forcing them to file papers within specified periods of time.

[82] The procedure followed in this matter obviously and clearly attained the legislature's goal, and achieved its purpose.

[83] I am therefore of the view that there was substantial compliance with the provisions of sections 4(1), 4(2), 4(3), 4(4) and 4(5) of PIE in this matter, and in this regard I am supported by the approach of the Supreme Court of Appeal in *Unlawful Occupiers, School Site v City of Johannesburg*, 2005 (4) SA 199 (SCA) where Brandt JA, in respect of a mistake in a section 4(2) notice, dealt with the matter as follows on page 209 F to 210 B:

> "[22] As to the first and second objections pertaining to the contents of the notice, it is clear that the reference to s 4(1) of PIE was a mistake. To that extent the notice was therefore defective. I am also in agreement with the contention that the grounds for the application stated in the notice were too sparse to meet the requirements of

[6] *Unlawful Occupiers, School Site v City of Johannesburg*, 2005 (4) SA 199 (SCA) at 209 I to J

s 4(5)(*c*). The respondents should at least have been told that their eviction was alleged to be in the public interest. As the appellants also correctly pointed out, it was held in *Cape Killarney Property* (at 1227E-F) that the requirements of s 4(2) must be regarded as peremptory. Nevertheless, it is clear from the authorities that even where the formalities required by statute are peremptory it is not every deviation from the literal prescription that is fatal. Even in that event, the question remains whether, in spite of the defects, the object to the statutory provision had been achieved (see eg *Nkisimane and Others v Santam Insurance Co Ltd* 1978 (2) SA 430 (A) at 433H-434B; *Weenen Transitional Local Council v Van Dyk* 2002 (4) SA 653 (SCA) in para [13]).

[23] The purpose of s 4(2) is to afford the respondents in an application under PIE an additional opportunity, apart from the opportunity they have already had under the Rules of Court, to put all the circumstances they allege to be relevant before the court (see *Cape Killarney Property Investments* at 1229E-F). The two subsections of s 4(5) that had not been complied with were (*a*) and (*c*). The object of these two subsections is, in my view, to inform the respondents of the basis upon which the eviction order is sought so as to enable them to meet that case. The question is therefore whether, despite its defects, the s 4(2) notice had, in all the circumstances, achieved that purpose. With reference to the appellants who all opposed

> the application and who were at all times represented by counsel and attorneys, the s 4(2) notice had obviously attained the Legislature's goal. However, there were also respondents who did not oppose and who might not have had the benefit of legal representation."[7]

[84] Hopefully the difficult question surrounding these issues will be avoided if the practice directive of the WLD is, from now on, adhered to in this division.

Sections 4(7), 4(8), 4(9), 4(10), 4(11) and 4(12) of PIE:

[85] Once the procedural requirements have been complied with, the Act provides as follows in sections 4(7), 4(8), 4(9), 4(10), 4(11) and 4(12):

> "4(7) If an unlawful occupier has occupied the land in question for more than six months at the time when the proceedings are initiated, a court may grant an order for eviction if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances, including, except where the land is sold in a sale of execution pursuant to a mortgage, whether land has been made available or can reasonably be made available by a municipality or other organ of state or another land owner for the relocation of the unlawful occupier, and including the rights and needs of the elderly, children, disabled persons and households headed by women.

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[7] See also *Nkisimane & Others v Santam Insurance Co Ltd*, 1978 (2) SA 430 (A) at 433 H to 434 B; *Weenen Transitional Local Council v Van Dyk*, 2002 (4) SA 653 (SCA)

4(8) If the court is satisfied that all the requirements of this section have been complied with and that no valid defence has been raised by the unlawful occupier, it must grant an order for the eviction of the unlawful occupier, and determine-

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

(b) the date on which an eviction order may be carried out if the unlawful occupier has not vacated the land on the date contemplated in paragraph (*a*).

4(9) In determining a just and equitable date contemplated in subsection (8), the court must have regard to all relevant factors, including the period the unlawful occupier and his or her family have resided on the land in question.

4(10) The court which orders the eviction of any person in terms of this section may make an order for the demolition and removal of the buildings or structures that were occupied by such person on the land in question.

4(11) A court may, at the request of the sheriff, authorise any person to assist the sheriff to carry out an order for eviction, demolition or removal subject to conditions determined by the court: Provided that the sheriff must at all times be present during such eviction, demolition or removal.

> 4(12) Any order for the eviction of an unlawful occupier or for the demolition or removal of buildings or structures in terms of this section is subject to the conditions deemed reasonable by the court, and the court may, on good cause shown, vary any condition for an eviction order."

[86] There is no dispute that most, if not all, of the respondents have occupied the land for more than six months. They all therefore approached this application as if the applicant has to prove its case in terms of section 4(7) of PIE as opposed to section 4(6).

[87] Section 4(7) indicates that the court has a discretion which must be exercised in respect of the granting of an order. In this regard, Harms JA in *Ndlovu v Ngcobo; Bekker & Another v Jika*, 2003 (1) SA 113 (SCA) said the following on page 124 B to D:

> "[18] The court, in determining whether or not to grant an order or in determining the date on which the property has to be vacated (s 4(8)), has to exercise a discretion based upon what is just and equitable. The discretion is one in the wide and not the narrow sense (cf *Media Workers Association of South Africa and Others v Press Corporation of South Africa Ltd ('Perskor')* 1992 (4) SA 348 (A) at 360G-362G). A court of first instance, consequently, does not have a free hand to do whatever it wishes to do and a Court of appeal is not hamstrung by the traditional grounds of whether the court exercised its discretion

> capriciously or upon a wrong principle, or that it did not bring its unbiased judgment to bear on the question, or that it acted without substantial reasons (*Ex parte Neethling and Others* 1951 (4) SA 331 (A) at 335E, *Administrators, Estate Richards v Nichol and Another* 1999 (1) SA 551 (SCA) at 561C-F)."

[88] In exercising its discretion, the court must find what is just and equitable, with reference to all the relevant circumstances. Two of those circumstances are mentioned in section 4(7), namely where the land has been made available, or can reasonably be made available by a municipality, or other organ of state, or another land owner for the relocation of the unlawful occupier, and secondly the rights and needs of the elderly, children, disabled persons and households headed by women.

[89] This discretion must be exercised after there has been compliance with the procedural requirements set out in sections 4(1), 4(2), 4(3), 4(4) and 4(5) of PIE.

[90] Section 4(8) then provides that if the court is satisfied that all the requirements of section 4 have been complied with, and that no valid defence has been raised by the unlawful occupier, it must grant an order for the eviction of the unlawful occupant. The use of the word "*must*" in section 4(8), which is a clear contradistinction to the use of the word "*may*" in section 4(7), creates a dilemma. On the one hand section 4(7) seems to provide for a discretion to be exercised. However, once the discretion is exercised, with reference to the requirements in

section 4(7), an order must be granted. A court therefore does not have an overriding discretion in terms of section 4(7) not to order eviction.

[91] The legislature clearly had in mind that a court in formulating the order should consider what type of order will be just and equitable, when and how land could be made available, if land is available, and consideration should be given to the rights and needs of the elderly, children, disabled persons and households headed by women.

[92] Could it ever have been the intention of the legislature to provide that, under circumstances of an unlawful action, and an unlawful deed having been perpetrated, namely unlawful occupation of another person's property, such a property owner can be stripped of all his property rights, with no compensation whatsoever? It is, in my view, inconceivable that the legislature would have intended a court to allow unlawful occupation of property to result in the eventual *de facto* expropriation of that property, and the deprivation of existing property rights of the lawful landowner without compensation. The inescapable conclusion is that the legislature intended that a court must consider an order that is just and equitable under the circumstances, by giving consideration to alternative land being available, or which could reasonably be made available, and the other requirements referred to in section 4(7), including all the relevant circumstances.

[93] If the legislature wanted to provide a court with a discretion to take away property rights of a land owner it would have used the word "*may*" in section 4(8) instead of "*must*".

[94] The difficulties in interpreting these provisions arise under circumstances where a court considers exercising its discretion against the granting of an eviction order. The question under such circumstances that arises is if that will have the effect of expropriation of the landowner.

[95] Harms JA said the following in this regard in *Ndlovu v Ngcobo; Bekker & Another v Jika*, *supra*, at 122 J to 124 H:

> "[15] Schwartzman J raised another point. He found it difficult to accept that PIE could be interpreted as turning common-law principles on their head, for instance, by granting a tenant a 'right' of holding over. He postulated the example of the affluent tenant who rents a luxury home for a limited period. Such a person should not be entitled to the protection of PIE. Mr *Trengove*, on the other hand, postulated other cases: the tenant of a shack in a township who loses his work or falls ill and cannot afford to pay rent or the tenant in a township whose tenancy is terminated by virtue of some township regulation and has nowhere else to go. He asked rhetorically why these persons should be in a worse position than those whose initial occupancy was illegal.
>
> [16] There is clearly a substantial class of persons whose vulnerability may well have been a concern of Parliament,

especially if the intention was to invert PISA. It would appear that Schwartzman J overlooked the poor, who will always be with us, and that he failed to remind himself of the fact that the Constitution enjoins courts, when interpreting any legislation, to promote the spirit, purport and objects of the Bill of Rights, in this case s 26(3). The Bill of Rights and social or remedial legislation often confer benefits on persons for whom they are not primarily intended. The law of unintended consequences sometimes takes its toll. There seems to be no reason in the general social and historical context of this country why the Legislature would have wished not to afford this vulnerable class the protection of PIE. Some may deem it unfortunate that the Legislature, somewhat imperceptibly and indirectly, disposed of common-law rights in promoting social rights. Others will point out that social rights do tend to impinge or impact upon common-law rights, sometimes dramatically.

[17] The landlord's problem with the affluent tenant is not as oppressive as it seems at first. The latter will obviously be entitled to the somewhat cumbersome procedural advantages of PIE to the annoyance of the landlord. If the landlord with due haste proceeds to apply for eviction the provisions of s 4(6) would apply:

> 'If an unlawful occupier has occupied the land in question for less than six months at

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

If the landlord is a bit slower, s 4(7) would apply, but one may safely assume that the imagined affluent person would not wish to be relocated to vacant land possessed by a local authority and that this added consideration would not be apposite. The period of the occupation is calculated from the date the occupation becomes unlawful. The prescribed circumstances, namely the rights and needs of the elderly, children, disabled persons and households headed by women, will not arise. What relevant circumstances would there otherwise be save that the applicant is the owner, that the lease has come to an end and that the tenant is holding over? The effect of PIE is not to expropriate the landowner and PIE cannot be used to expropriate someone indirectly and the landowner retains the protection of s 25 of the Bill of Rights. What PIE does is to delay or suspend the exercise of the landowner's full proprietary rights until a determination has been made whether it is just and equitable to evict the unlawful occupier and under what conditions. Simply put,

that is what the procedural safeguards provided for in s 4 envisage.

[18] The court, in determining whether or not to grant an order or in determining the date on which the property has to be vacated (s 4(8)), has to exercise a discretion based upon what is just and equitable. The discretion is one in the wide and not the narrow sense (cf *Media Workers Association of South Africa and Others v Press Corporation of South Africa Ltd ('Perskor')* 1992 (4) SA 348 (A) at 360G-362G). A court of first instance, consequently, does not have a free hand to do whatever it wishes to do and a Court of appeal is not hamstrung by the traditional grounds of whether the court exercise its discretion capriciously or upon a wrong principle, or that it did not bring its unbiased judgment to bear on the question, or that it acted without substantial reasons (*Ex parte Neethling and Others* 1951 (4) SA 331 (A) at 335E, *Administrators, Estate Richards v Nichol and Another* 1999 (1) SA 551 (SCA) at 561C-F)."

(My underlining)

[96] Rabie J in *Groengras Eiendomme (Pty) Ltd & Others v Elandsfontein Unlawful Occupants & Others*, 2002 (1) SA 125 (TPD) explained his interpretation of PIE as follows on page 138 H to 139 G:

"In my view, the Act should be viewed as an attempt by the Legislature to do exactly what it stated in the preamble to the Act

that it intended to do. That is to prevent *unlawful* eviction and to provide for *procedures* for the eviction of unlawful occupiers. For this purpose the Act provides, first, that an unlawful occupier may be evicted only by order of a court of law. Secondly, a procedure is prescribed which an applicant should follow and a procedure by way of which the court hearing the matter should approach the application. I do not interpret the obligation on the court first to consider whether it would be just and equitable to order the eviction after considering all the relevant circumstances of the particular case in front of it as prohibiting an eviction of an unlawful occupier. What the court must ensure is that an eviction should be effected in such a manner that fairness and human dignity prevail.

In *Port Elizabeth Municipality v Peoples Dialogue on Land and Shelter and Others* (*supra* at 1080H-1081A) the following is stated:

> 'At first glance the Act seems to encroach on the fundamental principles of ownership and to impinge upon the rights of owners of land to evict people who had moved onto their property illegally. However, what the Act does not do is to abolish the common-law right of an owner to the exclusive enjoyment of his property and the owner's inherent right to the legal protection of his property. The Act sets out to control in an orderly fashion those situations where it had become necessary to evict

> persons who had occupied land belonging to another unlawfully (*ABSA Bank Ltd v Amod*) (*supra* at 4-8*d*)).'

And at 1083D-E:

> 'Preferably the Act should be seen as an instrument for the protection of human rights and the orderly removal of informal settlements. What must, however, be prevented is an abuse of that protection by the selfsame people whom the Act sets out to protect. A premeditated invasion of another's property is, by its very nature, counter-productive.'

It is true that the procedures prescribed by the Act which have to precede removals have made inroads into the rights of property owners to protect their property against unlawful occupation. I also agree with Horn AJ (as he then was) that the Act could very well give rise to serious abuse by homeless persons who deliberately invade an owner's land under the guise of the protection afforded by the Act. Once a group of people of the class referred to as homeless has identified a piece of land and decided to move onto the land, they would, in effect, set in motion a complex set of rules and often frustrating procedures which would have to be complied with by the landowner before he could evict them form his property. I agree also with his statement that the provisions of the Act, particularly the negative implications they hold for rights of freehold in this country, are indeed

worrisome in that the deliberate invasion of an owner's land by people who would usually be those desperately in need of accommodation could ultimately involve the landowner in a protracted legal battle which he could never have anticipated. I may add that the legislator also probably never anticipated that blatant large-scale land grabs, as the one under discussion, would occur. This does not, however, in my view, mean that unlawful land-grabbing, should, in principle, be tolerated. Should this be the interpretation to be afforded to the Act, the constitutionality thereof should, in my view, be considered."

(My underlining.)

[97] The Constitutional Court in *Port Elizabeth Municipality v Various Occupiers*, 2005 (1) SA 217 (CC), by way of Sachs J, explained the approach as follows on page 228 F to 229 B:

"[20] … Thus, 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 the arbitrary seizure of land, whether by the State or by landless people. The rights involved in s 26(3) are defensive rather than affirmative. The land-owner cannot simply say: This is my land, I can do with it what I want, and then send in the bulldozers or sledgehammers.

[21] A second major feature of this cluster of constitutional provisions is that, through s 26(3), they expressly acknowledge that eviction of people living in informal

> settlements may take place, even if it results in loss of a home."

[98] This is a clear indication that PIE was not intended to effect transfer of title by constitutional fiat, and that it is not meant to sanction arbitrary seizure of land, and therefore to result in the obtaining of rights to land through unlawful action.

[99] As mentioned by Sachs J, in the abovementioned decision, PIE expressly requires the court to infuse elements of grace and compassion into the formal structures of the law. It is called upon to balance competing interests in a principled way, and to promote the constitutional vision of a caring society based on good neighbourliness and shared concern. The intention is therefore clearly to provide for the despair of people in dire need of adequate accommodation, and to protect such people against arbitrary evictions causing hardship to poor, landless and destitute persons. Therefore, the legislature, by virtue of the provisions in PIE, set about implementing a procedure which envisages the ordinary and controlled removal of informal settlements.[8]

[100] In *Port Elizabeth Municipality v Peoples' Dialogue on Land & Shelter & Others*, 2000 (2) SA 1074 (SE) at 1079, Horn AJ pointed out that each case must be decided on its own facts, and that it is essential that removals be done in a fair and ordinary manner, and preferably with a specific plan of resettlement in mind. That approach was endorsed and

[8] *Port Elizabeth Municipality v Various Occupiers*, 2005 (1) SA 217 (CC) at 236 E

referred to with approval by various courts thereafter, including the Constitutional Court, through the words of Sachs J describing Horn AJ's judgment as:

> "both judicially and academically sensitive and balanced."

[101] A reading of the judgments, referred to above, clearly gives an indication that none of those courts thought that circumstances may arise where it would be just and equitable that a land owner may be stripped of all his property and ownership rights under circumstances where the property was occupied unlawfully without the landowner's consent.

[102] It appears that the courts, in interpreting the provision "just and equitable" in section 4(7), apply that requirement usually to the kind of order that should be granted under the circumstances, so as to avoid any hardship and unfairness towards destitute, landless and homeless persons. That is why the court must consider whether other land has been made available, or can be made available, and must consider the rights and needs of the elderly, children, disabled persons and households headed by women.

[103] Furthermore, the emphasis in section 4(8) of PIE is on the determination of a just and equitable date on which an unlawful occupier must vacate the land, and the date on which an eviction order may be carried out if there are unlawful occupiers who have not vacated the land on that date.

[104] Sections 4(9), 4(10), 4(11) and 4(12) are all intended to assist the court in formulating and granting an order that is just and

equitable under the circumstances, especially towards unlawful occupiers, and therefore these sections are intended to assist destitute, landless and homeless people who are unlawful occupiers of land.

[105] In my view, the intention of the legislature could never have been to provide a court with a discretion in the sense that a court could decide to *de facto* expropriate a landowner through unlawful occupation of such land by homeless and destitute persons.

[106] It could never have been the intention because expropriation is provided for in the Expropriation Act, 63 of 1975. Expropriation of a certain nature can also occur in terms of the Restitution of Land Rights Act, 22 of 1994, where a land claim succeeds in terms of that Act. Deprivation of certain parts or elements of ownership may be authorized by way of legislation. This issue is canvassed more fully hereunder.

[107] The legislature could never have intended for PIE to provide for a different form of expropriation of property rights and land rights through unlawful actions by unlawful occupiers.

[108] The focus of PIE is rather upon the protection of such homeless, landless and destitute persons, by enjoining the courts to grant orders which take into account the interests of all the parties concerned, and not only the rights of the landowner. Originally, only the rights of the landowner would be applicable if an unlawful occupier has no defence in the form of any right to occupy the land. Now, PIE provides for

various circumstances, facts and considerations to be taken into account to protect occupiers, and to provide for just and equitable procedures in the case of an eviction order.

[109] It has also been decided, previously, that the reference to available land, and the rights and needs of elderly, children, disabled persons and households headed by women, are only factors which the court must consider. The apparent lack of availability of alternative land for the resettlement of unlawful occupiers is not an absolute bar to the granting of an eviction order.[9] These issues were considered by Alkema AJ in *Transnet Ltd v Nyawuza & Others*, 2006 (5) SA 100 (D&CLD).

[110] The court, in that matter, disagreed with the views expressed by Rabie J in *Groengras Eiendomme*, and by Horn AJ, as he then was, in *Port Elizabeth Municipality v Peoples Dialogue on Land & Shelter & Others*, referred to above.

[111] Alkema AJ found that both sections 4(6) and 4(7) of PIE obliged the court, as a matter of substantive law, to exercise its discretion only in relation to the grant or refusal of an eviction order. Once the discretion is exercised in favour of the applicant, the court must grant an order for the eviction of the unlawful occupier under section 4(8). However, he does not explain why the word "*must*" was used in section 4(8). He also does not consider or discuss the dichotomy between the use of the word "*may*" in section 4(7) and the use of the word "*must*"

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[9] *Port Elizabeth Municipality v Peoples Dialogue on Land & Shelter*, 2001 (4) SA 759 (ECD) at 771 E to F; *Groengras Eiendomme (Pty) Ltd v Elandsfontein Unlawful Occupants*, 2002 (1) SA 125 (TPD) at 143 A to C; *Ndlovu v Ngcobo; Bekker & Another v Juka*, 2003 (1) SA 113 (SCA) at 124 E to F

in section 4(8). If it was the intention of the legislature to provide the court with such a wide and overriding discretion to effect *de facto* expropriation of land by refusing an eviction order under circumstances where an unlawful occupier has no defence, the word "*must*" in section 4(8) would never have been used.

[112] Support for the decision by Alkema AJ is to be found in a minority judgment in *Ndlovu v Ngcobo; Bekker & Another v Juka*, referred to above. In his minority judgment, Olivier JA found that an owner no longer has an absolute right to evict an unwanted and unlawful occupier, and that a court is given a discretion to evict, or to allow the occupier to remain in occupation. This was not the view of the majority in that matter.

[113] Alkema AJ then finds that the fact that the exercise of a discretion against granting an order of eviction would amount to an unlawful expropriation of the owner's property rights is not a relevant consideration. I disagree with this approach. It is in fact a very relevant consideration because of the fact that <u>all</u> the relevant circumstances should be taken in to account when the court exercises its discretion, (if such a discretion exists).

[114] Furthermore, it is a matter of interpretation. I disagree with the interpretation of Alkema AJ of the provisions of sections 4(7) and 4(8) of PIE. Strangely, while he states on page 106 D of the reported judgment that expropriation of the owner's

property is not a relevant consideration, he takes that into account in exercising his discretion on page 113 B, by stating that unless an eviction order is granted, the applicant will, for all practical purposes, be permanently deprived of all its rights and ownership to its property.

[115] I am of the view that it is a wrong approach to interpret the provisions of PIE as having intended to provide for possible expropriation of land through the exercise of a discretion by a court, faced with unlawful occupiers acting unlawfully, and occupying unlawfully, the property of a person who owns that property and who does not act unlawfully. It could never have been the intention of the legislature to sanction unlawful behaviour to such an extent that it can give rise to property rights in land and deprivation of the owner of such land, of his property rights, without even compensating him therefor.

[116] I am therefore of the view that the provisions of sections 4(7), 4(8), 4(9), 4(10), 4(11) and 4(12) all relate to the fair, reasonable, just and equitable treatment of destitute, landless persons who must be evicted from land. The circumstances, facts and issues which must be taken into account by a court are stipulated, but all other relevant circumstances must also be taken into account. A court will therefore not, where PIE is applicable, simply grant an eviction order without building into the order safeguards and mechanisms to ensure just, equitable and fair treatment to the poorest of the poor and to destitute, landless people.

[117] I am fortified in this approach by the judgment of Gildenhuys J, in the Land Claims Court of South Africa, in the matter of *Kungwini Local Municipality v Puntlyf 520 Investments (Pty) Ltd & Others*, which judgment was handed down on 17 September 2007, under case number LCC86/2007, and which judgment is currently unreported.

[118] In that matter an order of court was made by Meer J on 24 March 2006, evicting all persons occupying through, or under them, from the Rietvlei and Puntlyf farms in the magisterial district of Kungwini. The Metsweding District Municipality assisted the occupiers financially to obtain legal representation for opposing the eviction application.

[119] The municipality averred that the eviction of occupiers from land within its jurisdiction was of public interest because it imposes a burden on the municipality to provide suitable alternative accommodation.

[120] After the eviction order was granted, the occupiers applied to court to set aside the warrant of eviction. This application was funded by the Kungwini Municipality. It was dismissed with costs.

[121] Thereafter, the Kungwini Municipality lodged an application requesting the warrant of eviction to be suspended, pending finalization of an intended expropriation of the Puntlyf farm by the municipality.

[122] The municipality assisted the unlawful occupiers of the land to remain on the land and even went as far as deciding to

expropriate the land in favour of the occupiers and to assist them through expropriation.

[123] The court considered the purpose of the intended expropriation and provisions authorizing local authorities to expropriate land, for instance, for housing purposes.

[124] The court came to the conclusion that it had not been established that the municipality intended to expropriate the Puntlyf farm for the provision of housing. Rather the intention thereof was to protect the residents against eviction. The purpose of any expropriation was described by the court as an authorized purpose by law, and it must be the chief purpose. The power to expropriate can only be used for a particular purpose. The court found that the expropriation was not for a public purpose and not in the public interest, and that the municipality had no power to expropriate the land for the purpose of assisting the unlawful occupiers. Therefore, the application to stay the warrant of execution was refused.

[125] The abovementioned decision clearly indicates that land reform, and in particular expropriation, must take place in accordance with legislative measures which provide therefor. Expropriating land for a purpose not intended should not be enforced. This is a clear indication that the legislature would not simply have incorporated a further procedure for *de facto* expropriation of property into legislation by way of the provisions of PIE. Expropriation of land to assist unlawful occupiers is therefore not in accordance with the law.

[126] The traditional method of statutory interpretation is to ascertain the intention which the legislature meant to express from the words which it used. In the Constitutional era purposive interpretation has been used in statutory interpretation, especially in the interpretation of the Constitution, but also in other circumstances. In *Julies v Speaker of the National Assembly*, 2006 (4) SA 13 (CPD) Fourie J explained these principles as follows on page 19 C to G:

> "[10] The traditional method of statutory interpretation is to ascertain the intention which the Legislature meant to express from the words which it used. Those words, if they are clear and unambiguous, are to be given their ordinary, literal, grammatical meaning. A court may depart from the ordinary meaning of the words used only where not to do so would lead to absurdity so glaring that it could never have been contemplated by the Legislature, or where it would lead to a result contrary to the intention of the Legislature, as shown by the context or by such other considerations as the court is justified in taking into account. See *R v Venter* 1907 TS 910; and *Randburg Town Council v Kersey Investments (Pty) Ltd* 1998 (1) SA 98 (SCA) at 107B-G.
>
> [11] In our new constitutional era the technique of purposive interpretation is often used in statutory interpretation, especially in the interpretation of the Constitution. In *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1)

SA 765 (CC) (1997 (12) BCLR 1696) in para [17], Chaskalson P said:

> 'The purposive approach will often be one which calls for a generous interpretation to be given to a right to ensure that individuals secure the full protection of the Bill of Rights, but this is not always the case, and the context may indicate that in order to give effect to the purpose of a particular provision "a narrower or specific meaning" should be given to it.'

See also *Stopforth v Minister of Justice and Others; Veenendal v Minister of Justice and Others* 2000 (1) SA 113 (SCA) in para [21], where the Supreme Court of Appeal gave a purposive interpretation to the provisions of the Promotion of National Unity and Reconciliation Act 34 of 1995.

[127] If a purposive interpretation is applied in this matter, and taking into account that the court may depart from the ordinary meaning of the words used, and to deviate therefrom with a view to counter absurdity, the conclusion must be that it could never have been contemplated by the legislature to achieve a result contrary to the intention of the legislature as shown above, and also dealt with hereunder. I can therefore deviate from the words in section 4(7) where it provides that a court may grant an order for eviction if it is of the opinion that it is just

and equitable to do so. In my view, the intention of the legislature was that an order for eviction must be granted in a way that it is just and equitable. Such an interpretation accords with the intention of section 4(8).

[128] I am further fortified in this conclusion by a reading of PIE in its totality. The explanation, at the commencement thereof, before the pre-amble reads as follows:

> "To provide for the prohibition of unlawful eviction; to provide for procedures for eviction of unlawful occupiers; and to repeal the Prevention of Illegal Squatting Act, 1958, and other obsolete laws; and to provide for matters incidental thereto."

[129] There is no indication that a balancing act should be exercised by a court pertaining to eviction. The emphasis is on illegal eviction in a situation of unlawful occupation. It is therefore intended to provide for legal procedures and a just and equitable procedure to effect eviction as a result of unlawful occupation of land.

[130] The pre-amble is a further justification of this conclusion, especially where it provides that it is desirable that the law should regulate the eviction of unlawful occupiers from land in a fair manner, while recognizing the right of land owners to apply to a court for an eviction order in appropriate circumstances.

[131] The pre-amble, in the first sentence, also repeats the wording of section 25(1) of the Constitution which reads as follows:

> "No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property."

[132] It is clear from the aforegoing that the Act did not intend, in any way whatsoever, to permanently deprive a landowner from ownership of property or the enjoyment of property. It also does not appear to intend to provide a court with a wide discretion to grant eviction or to refuse it.

[133] Sections 4(9) to 4(12) furthermore deal with the circumstances, facts and considerations which should be taken into account by a court in the eviction process and in formulating an eviction order. The focus is clearly on the order itself and the fairness thereof.

[134] I am supported in the abovementioned view by the comments of Rabie J in *Groengras Eiendomme (Pty) Ltd v Elandsfontein Unlawful Occupants*, 2002 (1) SA 125 (TPD) at 138 G to H where the following is stated:

> "[26] In my view, the Act should be viewed as an attempt by the Legislature to do exactly what it stated in the preamble to the Act that it intended to do. That is to prevent *unlawful* eviction and to provide for *procedures* for the eviction of unlawful occupiers…"

[135] The Act must also be interpreted, with reference to the constitutional and statutory context, and in particular a

historical context.[10] This context and the history which gave rise to the promulgation of PIE was thoroughly and clearly explained and discussed by Sachs J in *Port Elizabeth Municipality v Various Occupiers*, 2005 (1) SA 217 (CC) at 222 to 231. The history shows the unfairness of eviction orders without protection for the occupiers built into such orders.

[136] Furthermore, there is a presumption that an Act does not alter the common law more than is necessary. A decision, such as the decision of Alkema AJ in *Transnet v Ngyanga*, as referred to above, in my view alters the common law principles of eviction more than is necessary.

[137] As I have already stated, the purpose of the Act is to regulate eviction, to make it just and equitable, and to take into account the relevant circumstances, and in particular the human dignity, and rights of unlawful occupiers as human beings who are landless, destitute and more than often extremely poor.

[138] An enactment must not achieve an unjust and inequitable result. Eviction orders without the safeguards in PIE previously resulted in unjust and inequitable treatment of people. However, the deprivation of ownership of a landowner which constitutes in fact *de facto* expropriation will similarly be inequitable.[11]

[139] Enactments are not aimed at achieving unjust and inequitable results. I have taken this presumption into account in giving

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[10] *DVB Behuising (Pty) Ltd v Northwest Provincial Government & Another*, 2001 (1) SA 500 (CC)

[11]; *Casserley v Stubbs*, 1916 TPD 310 at 312; *Gordon v Standard Merchant Bank Ltd*, 1983 (3) SA 638 (A) at 94

consideration to the rights of a lawful landowner as opposed to the rights of an unlawful occupier of property, and in my interpretation of sections 4(7) and 4(8) of PIE.[12]

[140] I also take into account that absurdities must be avoided. Any interpretation therefore, which leads to an absurdity, must as a matter of course be avoided.[13] It must be so glaring that it could never have been contemplated by the legislature.[14] I find that *de facto* expropriation of property through the exercise of a court's discretion with no compensation leads to an absurdity which was never intended.

[141] In my view it could never have been the intention of the legislature to make provision for the exercising of a discretion which results in the *de facto* expropriation of property. This issue will be elaborated upon further hereunder.

[142] As I have pointed out above, the effect of the legislation must also be considered.[15] If I should not grant an eviction order in the current matter, the question arises what the effect of such an order would be.

[143] It is clear from the evidence in the papers before me that the applicant does not have any use of the property whatsoever. Therefore, the applicant will be deprived of the use and enjoyment of this property to such an extent that he would have no use and enjoyment of the property at all, and the value

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[12] *Dadoo Ltd v Krugersdorp Municipal Council*, 1920 AD 530 at 552
[13] *Spinnaker Investments (Pty) Ltd v Tongaat Group Ltd*, 1982 (1) SA 65 (A) at 76
[14] *Shenker v The Master*, 1936 AD 136 at 143; *Hatch v Koopoomal*, 1936 AD 190 at 212
[15] Victoria Bronstein in *Constitutional Law of South Africa*, second edition, volume 1, at 50-12, refers to the fact that the effect of legislation may also be relevant. She refers to *Texada Mines v AGBC*, (1960) SCR 713, a decision of the Canadian Supreme Court.

of the property would most probably be diminished in totality, and there will be no profitability for him in respect of the property.

[144] As I have pointed out above, section 25(1) of the Constitution provides that no one may be deprived of property, except in terms of law of general application, and no law may permit arbitrary deprivation of property.

[145] Section 25(2) of the Constitution provides as follows:

> "(2) Property may be expropriated only in terms of law of general application-
>
> (a) for a public purpose or in the public interest; and
>
> (b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court."

[146] Should an eviction order be refused because of the exercise of a discretion, the question then arises if the effect thereof is a deprivation of property which is an arbitrary deprivation as referred to in section 25(1) of the Constitution, and secondly, if such a deprivation could be regarded as expropriation in terms of section 25(2) of the Constitution. I accept that PIE is a law of general application, and I do not deal further with the meaning of a "law of general application".

[147] The question pertaining to arbitrariness was considered in detail by the Constitutional Court in *First National Bank of SA v Commissioner of SARS*, 2002 (4) SA 768 (CC), where

Ackermann J considered deprivation of property, in the context of section 25(1) of the Constitution, with reference to section 114 of the Customs and Excise Act, 91 of 1964.

[148] Ackermann J said the following regarding the meaning of "*arbitrary*" as meant in section 25(1) on page 798 G to J:

> "[65] In its context 'arbitrary', as used in s 25, is not limited to non-rational deprivations, in the sense of there being no rational connection between means and ends. It refers to a wider concept and a broader controlling principle that is more demanding than an enquiry into mere rationality. At the same time it is a narrower and less intrusive concept than that of the proportionality evaluation required by the limitation provisions of s 36. This is so because the standard set in s 36 is 'reasonableness' and 'justifiability', whilst the standard set in s 25 is 'arbitrariness'. This distinction must be kept in mind when interpreting and applying the two sections.
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> [66] It is important in every case in which s 25(1) is in issue to have regard to the legislative context *to which* the prohibition against 'arbitrary' deprivation has to be applied; and also to the nature and extent of the deprivation. In certain circumstances the legislative deprivation might be such that no more than a rational connection between means and ends would be required, while in others the ends would have to be more compelling to prevent the deprivation from being arbitrary."

[149] In summary, he laid down a test for arbitrariness as follows on page 810 H to 811 F:

> "[100] Having regard to what has gone before, it is concluded that a deprivation of property is 'arbitrary' as meant by s 25 when the 'law' referred to in s 25(1) does not provide sufficient reason for the particular deprivation in question or is procedurally unfair. Sufficient reason is to be established as follows:
>
> (a) It is to be determined by evaluating the relationship between means employed, namely the deprivation in question and ends sought to be achieved, namely the purpose of the law in question.
>
> (b) A complexity of relationships has to be considered.
>
> (c) In evaluating the deprivation in question, regard must be had to the relationship between the purpose for the deprivation and the person whose property is affected.
>
> (d) In addition, regard must be had to the relationship between the purpose of the deprivation and the nature of the property as well as the extent of the deprivation in respect of such property.
>
> (e) Generally speaking, where the property in question is ownership of land or a corporeal moveable, a more compelling purpose will have to be established in order for the depriving law to constitute sufficient reason for the deprivation than

in the case when the property is something different and the property right something less extensive. This judgment is not concerned at all with incorporeal property.

(f) Generally speaking, when the deprivation in question embraces all the incidents of ownership, the purpose for the deprivation will have to be more compelling than when the deprivation embraces only some incidents of ownership and those incidents only partially.

(g) Depending on such interplay between variable means and ends, the nature of the property in question and the extent of its deprivation, there may be circumstances when sufficient reason is established by, in effect, no more than a mere rational relationship between means and ends; in others this might only be established by a proportionality evaluation closer to that required by s 36(1) of the Constitution.

(h) Whether there is sufficient reason to warrant the deprivation is a matter to be decided on all the relevant facts of each particular case, always bearing in mind that the enquiry is concerned with 'arbitrary' in relation to the deprivation of property under s 25."

[150] It is important to point out that regard must be had to the relationship between the purpose of the deprivation, and the nature of the property, as well as the extent of the deprivation of that property. In the case of ownership of land, a more compelling purpose will have to be established for deprivation. When deprivation embraces all the incidents of ownership, as in the current case, the purpose for the deprivation will have to be more compelling. There must therefore be an interplay between means and ends.

[151] If these principles are applied, one cannot but come to the conclusion that temporary deprivation in the circumstances of the current matter before me will not be arbitrary. There is a relationship between the purpose of the deprivation and the property, as well as a relationship between the purpose for the deprivation and the person whose property is affected. Permanent deprivation of property might be a different story.

[152] In fact, PIE allows deprivation of property if regard is had to the factors and circumstances which the court must take into account when formulating the eviction order. An eviction order will be justified and lawful even if it has the consequence of temporary deprivation of property for purposes of the eviction order. However, if an eviction order is refused, and the deprivation of property embraces all the incidents of ownership, and has a final effect, the question arises if that does not constitute expropriation in a specific form.

[153] There is a clear distinction drawn in the Constitution between deprivation and expropriation. In *Steinberg v South Peninsula Municipality*, 2001 (4) SA 1243 (SCA), Cloete AJA, (as he then was), described it as follows on page 1246 B to F:

> "[4] A fundamental distinction is drawn in s 25 between two kinds of taking: a deprivation and an expropriation. It is only in the case of an expropriation that there is a constitutional requirement for compensation to be paid. The purpose of the distinction is to enable the State to regulate the use of property for the public good, without the fear of incurring liability to owners of rights affected in the course of such regulation. The essence of the distinction, and the fact that it is well established in our law, appears from the following passage in *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC) (1997 (11) BCLR 1489) at 315G-316C:
>
> '[33] The distinction between expropriation (or compulsory acquisition as it is called in some other foreign jurisdictions) which involves acquisition of rights in property by a public authority for a public purpose and the deprivation of rights in property which fall short of compulsory acquisition has long been recognised in our law. In *Beckenstrater v Sand River Irrigation Board* Trollip J said:
>
> "(T)he ordinary meaning of 'expropriate' is 'to dispossess of

ownership, to deprive of property' (see eg *Minister of Defence v Commercial Properties Ltd and Others* 1955 (3) SA 324 (N) at 327G); but in statutory provisions, like ss 60 and 94 of the Water Act, it is generally used in a wider sense as meaning not only dispossession or deprivation but also appropriation by the expropriator of the particular right, and abatement of extinction, as the case may be, of any other existing right held by another which is inconsistent with the appropriated right. That is the effect of cases like *Stellenbosch Divisional Council v Shapiro* 1953 (3) SA 418 (C) at 422-3, 424; *SAR & H v Registrar of Deeds* 1919 NPD 66; *Kent NO v SAR & H* 1946 AD 398 at 405-6; and *Minister van Waterwese v Mostert and Others* 1964 (2) SA 656 (A) at 666-7."""

And also at page 1246 G to 1247A:

"[6] The principle of constructive expropriation creates a middle ground, and blurs the distinction, between deprivation and expropriation. According to that principle a deprivation will

> in certain circumstances attract an obligation to pay compensation even although no right vests in the body effecting the deprivation. It is the determination of those circumstances which can give rise to problems."

[154] Van Der Walt, in Constitutional Property Law, explains the meaning of "*arbitrariness*" as follows on page 145:

> "According to a 'thicker' interpretation of section 25(1) the non-arbitrariness requirement means that deprivation should not impose an unacceptably heavy burden upon or demand an exceptional sacrifice from one individual or a small group of individuals for the sake of the public at large. This interpretation, which finds some support in foreign case law, means that any law that authorizes deprivation of property must establish sufficient reason for the deprivation in the sense that it is not only rationally linked to a legitimate government purpose but also justified in the sense of establishing a proper balance between ends and means. Consequently, a law that authorizes an excessive burden being placed unfairly on one individual or a small group of individuals could be invalid for being arbitrary. According to this interpretation a non-expropriatory, regulatory deprivation of property would be arbitrary unless it establishes a proportionate balance between the public benefit is serves and the private harm it causes."

[155] The decision in *Mkontwana v Nelson Mandela Metropolitan Municipality; Bissett & Others v Buffalo City Municipality; Transfer Rights Action Campaign & Others v Member of the*

Executive Council for Local Government & Housing, Gauteng & Others, 2005 (1) SA 530 (CC), has not changed the test to be applied as set out in the *FNB*-case, referred to above, to any extent that would impact upon my findings.

[156] Van Der Walt argues, on page 161 of his book, that deprivation of property caused by anti-eviction legislation imposes a limitation upon such ownership rights, and such a limitation is legitimate and a valid deprivation of property because of the service of the legitimate regulatory purpose and is not arbitrary. It is capable of explanation and justification in terms of section 25(1). He deals with this issue as follows on pages 161 and 162:

> "In giving effect to these reform-oriented constitutional and statutory limitations of landownership the Court emphasized that the apparent conflict between the rights of landowners and the interests of unlawful occupiers had to be solved by way of an individualized, context-sensitive balancing process that takes both sets of rights and interests into account. The importance of this balancing process is particularly clear from the *Modderklip*-case, where the right of the landowner to evict unlawful occupiers was limited by the anti-eviction measure in section 26(3) and the landowner therefore had to wait until the occupiers could be removed to alternative accommodation, but at the same time the state was ordered to pay compensation to the landowner for the loss suffered during the period of unlawful occupation. The landowner's right is therefore not simply ignored or diminished; it

> was properly recognized and protected in terms of section 25. In this instance, the Constitutional Court argued that the state was obliged, in terms of section 34 of the Constitution, to ensure that the landowner had access to court – including access to suitable and effective enforcement procedures and institutions – to enforce protection of his right. It was therefore not acceptable for the state to stand by and allow the owner to deal with the problem and therefore, because no effective enforcement measure was made available to him, the state had to pay compensation for the loss that the owner suffered as a result of the unlawful invasion and the protracted unlawful occupation of his land."

[157] He did not consider, however, the legal effect of a refusal of an eviction order, with reference to deprivation of property and expropriation of property.

[158] When Van Der Walt deals with expropriation as part of deprivation, as described in the *FNB*-decision, he states the following on page 183:

> "It is true, though, that deprivation that affects just one or a small group of owners and places an unfair burden on them for the sake of society at large will mostly be either invalid or treated as constructive expropriation." (My underlining)

[159] Theunis Roux[16] argues that the *FNB*-case illustrates that a law that totally deprives the claimant of its property, without providing for compensation, is unlikely to survive even a court's test for arbitrariness.

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[16] In Constitutional Law of South Africa, second edition, volume 2, at 46-29

[160] However, as I have pointed out above, I am of the view that the principles reflected in PIE, and in particular the circumstances and facts to be taken into account when an eviction order is to be granted, warrants and justifies temporary deprivation of property in accordance with a court order.

[161] However, the question arises if the exercise of such a discretion can, in fact, lead to a conclusion that the deprivation of property rights, which are permanent in nature, and constitute constructive expropriation.

[162] Cloete AJA, (as he then was), in *Steinberg v South Peninsula Municipality*, 2001 (4) SA 1243 (SCA), argues that it may be undesirable to recognize a general doctrine of constructive expropriation for the practical reason that it could introduce confusion into the law, and the theoretical reason that emphasis on compensation for the owner of a right which is limited by executive action, could, for instance, adversely affect the constitutional imperative of land reformation. The SCA in that judgment left open the possibility of recognition of constructive expropriation.

[163] If the core principles of expropriation are considered, it is clear that it always involves a loss of property, usually total and permanent, and that the property is usually required by or on behalf of the State. The compulsory loss of the property, and acquisition of the property, is brought about for a public

purpose, or in a public interest, and it is usually accompanied by compensation.[17]

[164] Constructive expropriation becomes applicable where some state actions result in loss to an affected property owner, which should justify the conclusion that compensation is required, even though the State did not intend to acquire the property for itself.

[165] Van Der Walt states that the idea of constructive expropriation is usually associated with a claim for compensation for excessive regulation, and is also applicable in the case where the implementation of state regulation effectively destroys the private property right or interest, without the State acquiring the property, under circumstances where the losses are justified. Van Der Walt states the following on pages 211 to 212 of his book:

> "To accept that excessive or unfair regulatory deprivation could amount to and be treated as constructive expropriation does not mean that a property owner will necessarily succeed with a claim for compensation simply because of the excessive or unfair results of the regulatory action. If regulatory excess is reviewed within the framework of constructive expropriation the process will have to involve a balancing of the interests of the affected owner and the public interest in the regulatory limitation, with due regard for all the relevant circumstances. In principle the excessive

[17] Van Der Walt, *supra*, at 189; *Harksen v Lane NO*, 1998 (1) SA 300 (CC); *First National Bank of SA Ltd t/a Wesbank v Commissioner of South Africa Revenue Service; First National Bank of SA Ltd t/a Wesbank v Commissioner of Finance*, 2002 (4) SA 768 (CC)

> results of the limitation could be justifiable and the deprivation would then be valid without compensation."

[166] In a situation where the State does not acquire the property, but does acquire the advantage of not having the obligation to provide for alternative land, in the event of refusal of an eviction order, and where the State is not obliged in terms of any statute to pay compensation, it constitutes, in my view, constructive expropriation. This is particularly so because of the fact that the exercise of a discretion by a court would lead to constructive expropriation, which in my view, is not authorized or intended by PIE.

[167] The consequences thereof may be that the legitimacy of the decision not to grant eviction may be attacked as invalid on a constitutional basis, because it constitutes constructive expropriation with no compensation, or it may be subject to argument that because of the fact that it constitutes constructive expropriation, under such circumstances, a duty to compensate the property owner arises. This was never the intention of PIE.

[168] Van Der Walt argues that in more difficult cases, for instance where seizure and forfeiture of property are apparently authorized by law, but where the matter is complicated because the property belongs to an innocent third party, or because the State benefits from the use or sale of a seized and forfeited property, the theory of constructive expropriation could assist the courts to distinguish between different

situations in order to reach a context – sensitive and justifiable outcome.

[169] Van Der Walt also argues, where a scheme is part of a legitimate and important public purpose, the court would be unwilling to strike down legislation or invalidate any deprivation. In such a situation, constructive expropriation could be used not to frustrate land reform for instance, but to facilitate land reform by saving a legitimate and important but harsh regulatory measure from being struck down, in return for paying compensation.[18] Creating such a situation was clearly never intended by PIE.

[170] Perhaps the discussion of Gildenhuys J in his book, Onteieningsreg, second edition, at 137 to 149, is the most lucid and clear explanation of constructive expropriation.

[171] He refers, *inter alia*, to the *Attorney-General v De Keyser's Royal Hotel Ltd*, (1920) AC 508, where the House of Lords concluded that the recognized rule for the construction of statutes is that, unless the words in the statute clearly so demand, the statute is not to be construed so as to take away the property of a subject without compensation. The obligation to compensate is therefore read into the statute in a particular case.

[172] He also refers to various Canadian authorities to the effect that the taking of property must be more than a mere restriction on use, except if the restriction is of sufficient severity to remove

[18] Page 236

virtually all attributes associated with the property holder's interest. In such a case, a claim of *de facto* expropriation may be supported.

[173] Even though Goldstone J in *Harksen v Lane*[19] states that expropriation involves the acquisition of rights in property by a public authority, it is not limited to an action of a public authority, but also where an individual has to give up his property for a public purpose and in the public benefit. In such a case, constructive expropriation arises and the question of compensation arises.

[174] Gildenhuys J quotes a decision in Bermuda, namely *Grape Bay Ltd v Attorney General*, (2000) 1 LRC 167 (ENG/JER) wherein the following was said:

> "The principles which underline the right of the individual not to be deprived of his property without compensation are, first, that some public interest is necessary to justify the taking of the public property for the benefit of the state and, secondly, that when the public interest does so require, the loss should not fall on the individual whose property has been taken but should be borne by the public as a whole. But these principles do not require the payment of compensation to anyone whose private rights are restricted by legislation of general application which is enacted for the public benefit. This is so even if, as will inevitably be the case, the legislation in general terms affects some people more than others."

[19] 1998 (1) SA 300 (CC) at 315 G to H

[175] There exists authority for a court to read into legislation a tacit obligation to pay compensation where a statute authorizes expropriation and payment for compensation is not provided for specifically. Gildenhuys J relies for authority in respect hereof on *Sandton Town Council v Erf 89 Sandown Extention 2 (Pty) Ltd*, 1988 (3) SA 122 (A) at 132 B to E and *Pretoria City Council v Blom & Another*, 1966 (2) SA 139 (T) at 144 A.

[176] It is not necessary, for purposes of this judgment, to decide if any refusal of an application for eviction of unlawful occupants would constitute arbitrary deprivation of property, or if it would constitute expropriation, or if it warrants payment of compensation in the case of constructive expropriation, or to recognize the principle of constructive expropriation.

[177] The effect of the abovementioned consideration of the principles of arbitrary deprivation of property, expropriation and constructive expropriation is that it illustrates and supports the conclusion I have come to namely that it could never have been the intention of the legislature to have authorized a court to refuse an eviction order, leading to a permanent deprivation of ownership of property, to the effect that it could constitute expropriation or constructive expropriation, which would in turn lead to the State becoming liable for compensation.

[178] Such a conclusion would open the door for illegal occupants to simply illegally occupy property, and to argue that an eviction order should not be granted, but rather that it will be just and equitable that a court should exercise its discretion in refusing

an application for eviction, which would lead to expropriation or constructive expropriation, and a concomitant obligation on the State to pay compensation to the land owner. The effect thereof would be astronomical and one that could not have been intended by the legislature.

[179] The absurd end result would be that unlawful occupiers would eventually be in a position to decide which land could and should be expropriated, should a court come to their assistance in not granting an eviction order on just and equitable grounds.

[180] I am therefore of the view that it could never have been the intention of the legislature to provide a discretion to a court to refuse an eviction order if a property owner is entitled to such an order, and therefore that the intention of the legislature was never to vary the common law in this regard. The intention of the legislature was simply to provide for principles and procedures according to which the courts should grant eviction orders, and in particular, to emphasize circumstances and facts which should be taken into account by the courts in formulating eviction orders.

[181] In this regard, I am of the view that a court should express the necessary compassion by granting an order which is just and equitable, in particular towards the land occupiers.

[182] I therefore find that I am enjoined in this matter to consider the issues referred to in sections 4(7), 4(8), 4(9), 4(10), 4(11) and 4(12) of PIE, but in the absence of any defence raised by the

respondents indicating that they have any right of any nature to remain on the property, I am obliged, in terms of section 4(8) of PIE, to grant an order of eviction. The formulation of the order, and the terms of the order, must be just and equitable and must be formulated with the requirements of sections 4(7), 4(8), 4(9), 4(10), 4(11) and 4(12) of PIE in mind. The discussion of sections 25 and 26 of the Constitution hereunder provide ample further reasons why my conclusion above is correct.

[183] I must also add that even if I was to exercise a discretion, I would still have made the same order on the same grounds and in the same terms.

Sections 25 and 26 of the Constitution, Act 106 of 1998, read together with the provisions of PIE:

[184] Section 25(1) of the Constitution provides as follows:

> "Property
>
> (1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property."

[185] Section 26 of the Constitution provides as follows:

> "Housing
>
> (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."

[186] In terms of section 26, the State is obliged to take reasonable legislative and other measures within its available resources to achieve a progressive realization of the right of access to adequate housing.

[187] In *Government of the RSA & Others v Grootboom & Others*, 2001 (1) SA 46 (CC) the obligation of the State in this regard was explained as follows on pages 67 F to 69 D:

"[37] The State's obligation to provide access to adequate housing depends on context, and may differ from province to province, form city to city, from rural to urban areas and from person to person. Some may need access to land and no more; some may need access to land and building materials; some may need access to finance; some may need access to services such as water, sewage, electricity and roads. What might be appropriate in a rural area where people live together in communities engaging in subsistence farming may not be appropriate in an urban area where people are looking for employment and a place to live.

[38] Subsection (2) speaks to the positive obligation imposed upon the State. It requires the State to devise a comprehensive and workable plan to meet its obligations in

terms of the subsection. However ss (2) also makes it clear that the obligation imposed upon the State is not an absolute or unqualified one. The extent of the State's obligation is defined by three key elements that are considered separately: (*a*) the obligation to 'take reasonable legislative and other measures'; (*b*) 'to achieve the progressive realisation' of the right; and (*c*) 'within available resources'.

Reasonable legislative and other measures

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

[40] Thus, a co-ordinated State housing program must be a comprehensive one determined by all three spheres of government in consultation with each other as contemplated by chap 3 of the Constitution. It may also require framework legislation at national level, a matter we need not consider further in this case as there is national framework legislation in place. Each sphere of government must accept responsibility for the implementation of particular parts of the program but the national sphere of government must assume responsibility for ensuring that laws, policies, programs and strategies are adequate to meet the State's s 26 obligations. In particular, the national framework, if there is one, must be designed so that these obligations can be met. It should be emphasised that national government bears an important responsibility in relation to the allocation of national revenue to the provinces and local government on an equitable basis. Furthermore, national and provincial government must ensure that executive obligations imposed by the housing legislation are met.

[41] 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.

[42] The State is required to take reasonable legislative *and* other measures. Legislative measures by themselves are not likely to constitute constitutional compliance. More legislation is not enough. The State is obliged to act to achieve the intended result, and the legislative measures will invariably have to be supported by the appropriate, well-directed policies and programs implemented by the Executive. These policies and programs must be reasonable both in their conception and their implementation. The formulation of a program is only the

> first stage in meeting the State's obligations. The program must also be reasonably implemented. An otherwise reasonable program that is not implemented reasonably will not constitute compliance with the State's obligations."

[188] Both national and provincial legislation exists concerned with housing. I need not quote all the legislation in this regard, but it is important to refer to, *inter alia*, the Housing Act, 107 of 1997, the Development Facilitation Act, 67 of 1995 and the Housing Consumers Protection Measures Act, 95 of 1998.

[189] The State put a housing policy in place and the budget allocated by National Government appears to be substantial according to the abovementioned decision.

[190] In that case, the court came to the conclusion that even though a nationwide housing program exists, and even though a housing shortage was addressed by the Cape Metro, there was no provision in the nationwide housing program for people in desperate need. It found that the nationwide housing program fell short of the obligations laid down by National Government to the extent that it failed to recognize that the State must provide for relief for those in desperate need. Part of the national housing budget was to be devoted to this issue.

[191] The Constitutional Court came to the conclusion in that matter that the State was not meeting its obligations imposed upon it by section 26(2) of the Constitution, in the case of the Cape Metro. Precaution against the interpretation of the judgment,

and the effect thereof, was expressed as follows on pages 85 J to 86 B:

> "[92] This judgment must not be understood as approving any practice of land invasion for the purpose of coercing a State structure into providing housing on a preferential basis to those who participate in any exercise of this kind. Land invasion is inimical to the systematic provision of adequate housing on a planned basis. It may well be that the decision of a State structure, faced with the difficulty of repeated land invasions, not to provide housing in response to those invasions, would be reasonable. Reasonableness must be determined on the facts of each case."

[192] Three years later, in *City of Cape Town v Rudolph & Others*, 2004 (5) SA 39 (CPD), the Cape Provincial Division had the opportunity to consider the actions which the Cape Metro had taken after the *Grootboom* decision, referred to above, to provide for families in crisis and persons in desperate need for housing.

[193] The Cape Metro devised an Accelerated Managed Land Settlement Program, but the court came to the conclusion that that program had not been implemented or adopted. It therefore came to the conclusion that the City of Cape Town had not complied with the Constitutional Court's findings and directions. The court emphasized the need for emergency provisions of the kind required by the Constitutional Court and

ordered the City of Cape Town to report regarding steps taken to comply with its constitutional and statutory obligations in that regard.

[194] It is therefore clear from the aforegoing that it is incumbent upon the third respondent to make provision for emergency situations and for persons who are in desperate need, to provide emergency housing to achieve the purpose and objectives of the Constitution and the nationwide housing program.

[195] Sachs J, in *Port Elizabeth Municipality v Various Occupiers*, 2005 (1) SA 217 (CC) touched upon this issue as follows on page 234 A to E:

> "[29] The availability of suitable alternative accommodation will vary from municipality to municipality and be affected by the number of people facing eviction in each case. The problem will always be to find something suitable for the unlawful occupiers without prejudicing the claims of lawful occupiers and those in line for formal housing. In this respect, it is important that the actual situation of the persons concerned be taken account of. It is not enough to have a programme that works in theory. The Constitution requires that everyone must be treated with care and concern; if the measures, though statistically successful, fail to respond to the needs of those most desperate, they may not pass the test. In a society founded on human dignity, equality and freedom, it cannot

> be presupposed that the greatest good for the many can be achieved at the cost of intolerable hardship for the few, particularly if, by such a reasonable application of Judicial and administrative statecraft, such human distress could be avoided. Thus it would not be enough for the municipality merely to show that it has in place a programme that is designed to house the maximum number of homeless people over the shortest period of time in the most cost-effective way. The existence of such a programme would go a long way towards establishing a context that would ensure that a proposed eviction would be just and equitable. It falls short, however, from being determinative of whether and under what conditions an actual eviction order should be made in a particular case."

[196] Therefore, for a municipality to simply show that a program is in place to house a maximum number of homeless people, is not enough to provide for a just and equitable eviction. It falls short of what is required.

[197] Section 26 of the Constitution provides clearly that everyone has the right to have access to adequate housing. That provision is no authority for obtaining adequate housing through unlawful occupation of another person's property.

[198] The obligation is placed, in terms of section 26(2) of the Constitution, on the State to take reasonable legislative and other measures within its available recourses to achieve the realisation of the right. The State has done so, but the

Constitutional Court has indicated that it is incumbent upon State institutions, including local authorities, to make provision for emergency situations, and to take the necessary steps to provide for destitute persons in a designated area. The argument that that would lead to queue jumping by persons who are not on a list to obtain State Fund housing, does not affect this issue. The issue is emergency measures which must be in place and which must be provided for.

[199] The court in *Grootboom*, on page 75 D to E, expressly referred to the fact that the legislative provisions, in particular the National Housing Act, did not provide for the facilitation of access to temporary relief for people who have no access to land, no roof over their heads, and people who are living in intolerable conditions, and for people who are in crisis because of natural disaster, such as floods and fires, or because peoples' homes are under threat of demolition, or if they are under threat of eviction. Such people are people in desperate need, and their immediate need, should be met by relief which fulfils the requisite standards of durability, habitability and stability as meant by the definition of "*house*" and "*development*" in the Act.

[200] Sachs J, in *Port Elizabeth Municipality v Various Occupiers*, 2005 (1) SA 217 (CC) states on page 233 G to H:

> "[28] Although section 6(3) states that the availability of a suitable alternative place to go to is something to which regard must be had, it is not an inflexible requirement.

> There is therefore no unqualified constitutional duty on local authorities to ensure that under no circumstances should a home be destroyed unless alternative accommodation or land is made available. In general terms, however, 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 programme."

[201] A court therefore should consider carefully an eviction order against relatively settled occupiers unless it is satisfied that a reasonable alternative is available, or that a just and equitable solution can be built into an order.

[202] It is therefore clear that the courts interpret section 26(2) of the Constitution as placing an obligation on the State and on State institutions to make provision for emergency situations, described above, which includes persons who stand being deprived of a place of habitation and occupation of land as a result of a land eviction order in terms of PIE.

[203] In *President of the Republic of South Africa & Others v Modderklip Boerdery (Pty) Ltd (Agri SA & Others, amici curiae)*, 2005 (5) SA 36 (C) the Constitutional Court had to deal with an eviction order which was granted, and which could not be executed by the owner of property because of the cost implications thereof. The Supreme Court of Appeal granted an order declaring that the State, by failing to provide land for

occupation to the unlawful occupiers, infringed upon the rights of the land owner, with particular reference to section 26(1) of the Constitution, and also upon the rights of the occupiers. It further declared that the residents would be entitled to occupy the land until alternative land had been made available to them by the State or the province local authority.

[204] The Supreme Court of Appeal held that the State could have ended the occupation of the unlawful occupiers by purchasing a portion of the property that was unlawfully occupied, or by providing the occupiers with alternative land on which to settle. The failure by the State in that matter to provide assistance to the occupiers, amounted to breach of their rights under sections 26(1) and 26(2) of the Constitution. The Constitutional Court in that matter per Langa ACJ, (as he then was), said the following on page 21 I to 22 B:

> "[43] The obligation on the State goes further than the mere provision of the mechanisms and institutions referred to above. It is also obliged to take reasonable steps, where possible, to ensure that large-scale disruptions in the social fabric do not occur in the wake of the execution of court orders, thus undermining the rule of law. The precise nature of the State's obligation in any particular case and in respect of any particular right will depend on what is reasonable, regard being had to the nature of the right or interest that is at risk, as well as on the circumstances of each case."

as well as the following on page 23 F to I:

> "[50] No acceptable reason has been proffered for the State's failure to assist Modderklip. The understandable desire to discourage 'queue-jumping' does not explain or justify why Modderklip was left to carry the burden imposed on it to provide accommodation to such a large number of occupiers. No reasons have been given why Modderklip's offer for the State to purchase a portion of Modderklip's farm was not taken up and why no attempt was made to assist Modderklip to extricate itself.
>
> [51] The obligation resting on the State in terms of s 34 of the Constitution was, in the circumstances, to take reasonable steps to ensure that Modderklip was, in the final analysis, provided with effective relief. The State could have expropriated the property in question or provided other land, a course that would have relieved Modderklip from continuing to bear the burden of providing the occupiers with accommodation. The State failed to do anything and accordingly breached Modderklip's constitutional rights to an effective remedy as required by the rule of law and entrenched in s 34 of the Constitution."

[205] It therefore appears that the Constitutional Court, as well as the Supreme Court of Appeal, in that matter were both of the view that the State could have purchased the relevant land, and it could also have provided the occupiers with alternative land on which to settle. The State failed to fulfil its duties in

that regard, and therefore infringed Modderklip's constitutional rights in terms of section 34 of the Constitution, and it also infringed upon the rights of the residents in terms of section 26(1) of the Constitution.

[206] I must pause to mention here that the right infringed in section 26(1) of the Constitution is a right which a person has which does not extend towards specific housing or a specific property. It is a right which extends to all citizens and all persons entitled to protection in terms of the Bill of Rights. The fact that the respondents in this case unlawfully settled upon the land of the applicant, and that the respondents are entitled to be assisted by the State under these circumstances, is not a fact, or a matter, or a right which should be balanced as against the applicant as a property owner, who is entitled to protection of his property. It could surely not have been the intention of the legislature to allow a constitutional right in terms of section 26(1) of the Constitution, to which unlawful occupiers are entitled, to infringe upon the property rights of a landowner. In my view, section 26 of the Constitution should therefore be seen and interpreted totally divorced from the exercise of a landowner's property rights.

[207] The right enshrined in section 26, which is afforded to an unlawful occupier, is not a right that can or should be utilized to unnecessarily limit the property rights of a property owner in terms of section 25 of the Constitution. It is only section 26(3) of the Constitution which may have a bearing upon the

exercise of a landowner's right in terms of section 25 of the Constitution.

[208] PIE makes provision for the right enshrined in section 26(3) of the Constitution, and provides for principles applicable to a court granting an eviction order, to give effect to section 26(3).

[209] It is therefore correct, as referred to in some of the judgments referred to above, that the moment an eviction order is granted, the State, and in this case the third respondent, *inter alia*, has an obligation to act in terms of such legislation as may be available to it, and which has been promulgated in terms of section 26(2) of the Constitution, such as the provisions of the National Housing Act and the other statutory provisions referred to above.

[210] It is also clear from the aforegoing that it is incumbent upon, *inter alia*, the local authority to have in place funds and a program to deal with emergency situations, and desperate situations, such as where an eviction order is granted, to provide for adequate housing, even on an interim basis, to desperate, destitute and landless people.

<u>The evidence of third respondent</u>:

[211] In the light of the aforegoing, it is necessary to consider the evidence which the third respondent placed before the court. The third respondent states that it has developed a housing development plan in terms of which it seeks to ensure access by the inhabitants of Randfontein to adequate housing on a progressive basis.

[212] The strategies and programs in accordance with which the plan are implemented, are in terms of the South African National Housing Code which was published by the Minister of Housing in terms of section 4 of the National Housing Act. The ultimate goal of the plan is the complete eradication of informal settlements in Randfontein and the resettlement of the inhabitants thereof in fully serviced formal townships by 2014.

[213] The third respondent states that it is operating its housing projects in accordance with the information contained in a waiting list in which the property in question in these proceedings does not feature. The following is then stated:

> "If this is the case because when the property was first occupied – namely November 2005 – the waiting list had already been compiled. The waiting list indicates that there are some fourteen thousand families or households which have their homes in some eight informal settlements."

[214] It is then stated that if the court should order that the occupiers of the property must vacate the property, the third respondent will not have alternative accommodation to provide them with. The third respondent then makes the following statements:

> "4.9.1 we are concerned that this is a settled community and would not like them to be uprooted. We are engaging with Land Affairs to help them with the issue.
>
> 4.9.2 the third respondent, according to its projections, anticipates that the construction of houses in the new

housing project will be completed in approximately 24 months hence.

4.9.3 a new aiding list in respect of the new housing project will be opened in 2007. I have reason to believe that the first and second respondents will, if they came forward, be registered in the new waiting list as beneficiaries-to-be of the new housing project.

4.9.4 in the meanwhile, and notwithstanding the fact that neither does the first and second respondents nor the property feature on the waiting list, the third respondent has been rendering, and continues to render, basic municipal services to them on an *ad hoc* basis in the form of refuse removal services."

[215] The third respondent then states that the housing code provides the means, norms and standards with which the State subsidizes houses, and that it must comply therewith. Unless the third respondent provides the occupiers of the property with such alternative accommodation as will meet the minimum norms and standards as provided for in the code, it will not be complying with the code. The third respondent therefore argues that, in the light of this, it will not have any alternative accommodation to provide the first and second respondents with, let alone providing them with such accommodation that satisfies the means, norms and standards as prescribed by the code.

[216] Any reference to an emergency situation, as referred to in the court decisions above, is glaringly absent in the affidavit of the third respondent. The third respondent appears not to have such a plan or procedure in place, and therefore finds itself, in exactly the same position as the Cape Metro found itself in the decision of *The City of Cape Town v Rudolph & Others*, 2004 (5) SA 39 (CPD).

[217] The following information which one would have expected to have been included in the affidavit is also absent:

1. All property owned by the third respondent.
2. All property being developed by the third respondent for purposes of settlement under normal circumstances.
3. Funds available for emergency issues.
4. Funds made available in the budget for emergency measures.
5. Houses provided during the last few years to landless people.
6. More information pertaining to steps taken to comply with its statutory obligations, as referred to above.
7. The affidavit in which the information was contained, referred to above, by the third respondent was deposed to on 28 April 2006. On 20 April 2008, the then current housing project, according to the third respondent, will be completed. There is a complete absence of details of the possibility to accommodate the unlawful occupiers in that housing project.

8. Information pertaining to the names on the new waiting list in respect of the new housing project which was to be opened in 2007.
9. Funds available to purchase the property.
10. Funds available to purchase alternative property.
11. Open property belonging to the State within the jurisdiction area of the third respondent, excluding the third respondent, which could be utilized for resettlement of the respondents on State property, and investigations in respect thereof.

[218] I find it peculiar, disconcerting and extremely disappointing that the third respondent did not, during the whole course of the proceedings in this matter, which commenced on 8 December 2005, and which was ultimately dealt with by this court, and could not, provide this Honourable Court with the necessary information to assist the court to make a decision.

[219] However, the court is in a position to conclude, in the light of the affidavit which was filed by the third respondent, that a new housing project was to be opened in 2007. That housing project must therefore now have been opened, and a new waiting list must have been compiled. According to the third respondent, the first and second respondents would have been able to have been registered on such waiting list as beneficiaries of that new housing project. The third respondent also stated that the new housing project would be completed in approximately twenty-four months, and it can therefore be

accepted that the housing project, referred to by third respondent, would probably be finished during April 2008.

[220] I can therefore safely conclude, on the evidence before me, that the third respondent will be in a position to provide housing in terms of the new housing project to the first and second respondents, in accordance with its own evidence.

[221] I can also safely presume and accept that the third respondent has had ample time to put in place emergency measures to deal with the first and second respondents on an emergency basis, and I accept that the third respondent has taken such steps to do so. In any event, the order that will be granted in this matter will provide ample time to the third respondent to put all such measures in place, to make all necessary arrangements and to take all required steps to provide emergency housing and accommodation to the first and second respondents, should the third respondent not have included the first and second respondents in the new housing project.

Statutory and constitutional obligations of local authorities:

[222] In *City of Johannesburg v Rand Properties (Pty) Ltd & Others*, 2007 (6) SA 417 (SCA) Harms ADP referred to the National Housing Program which was launched in response to the judgment of the Constitutional Court in *Government of the Republic of South Africa & Others v Grootboom & Others*, 2000 (1) SA 46 (CC).

[223] Chapter 12 deals with housing assistance in emergency housing situations. Central Government undertook to provide a grant to local authorities of a sum of R24 000,00 per household to assist people who, for reasons beyond their control, find themselves in an emergency situation, for instance, because of the destruction of existing shelter, or because their prevailing situation poses an immediate threat to their life, health and safety, or if they are evicted, or when they face the threat of eviction. According to the scheme, the funds have to be used by municipalities to provide land and infrastructure for services and shelter.

[224] A municipality must present its requirements and prepare a plan for submission to the relevant provincial authorities before funds are granted to such a municipality. The provincial authorities must assess the program and once funds become available, the municipality must implement the program. This issue arose in the *City of Johannesburg*-decision, referred to above.

[225] The municipality, in that matter, introduced a project which provided for emergency shelter and accommodation for emergency situations.

[226] Harms ADP points out on pages 430 to 431 of that judgment that, with reference to the right to access to housing in section 26 of the Constitution, it does not sanction arbitrary seizure of land. It expressly acknowledges that eviction from homes in

informal settlements may take place, even if it results in the loss of a home.

[227] In that decision, the provisions of PIE did not apply. The decision is, however, important for purposes of the consideration of the order that the court made without PIE being applicable, and with reference to the court's findings pertaining to the obligations of a local authority.

[228] The court dealt with the circumstances of the unlawful occupiers on page 439 J to 441 B as follows:

> "[72] I need no persuading that government, at every level in varying degrees, is constitutionally obliged to realise the right of every person to have access to adequate housing, albeit that it can only be realised progressively, if it can ever be fully realised at all. I also need no persuading that the enormity of meeting that commitment cannot excuse inaction on the part of government.
>
> [73] There is some merit in the submission on behalf of the respondents and the *amici* that government at all levels and the city in particular have yet to firmly grasp the nettle of the obligations that they have towards the poor. For while it is true that the city has developed, with broad strokes, visions and plans that it has for the city, and that those plans do not altogether leave out the poor, there is little evidence to demonstrate what the city has actually done.

[74] But I do not think this is the case in which to attempt to make an assessment of the extent to which the city has or has not made acceptable progress towards fulfilling its obligations, nor, if it has not, in which to devise structural relief to spur it along that path. I have already indicated that the present respondents are not concerned with such an enquiry being conducted in general terms nor in structural relief that might be appropriate to that enquiry. They ask for nothing less than that the city should provide adequate housing for the poor in the inner city and they seek structural relief only if it is directed towards that end. Even at the end of argument in the present appeal the respondents remained steadfast in that stance.

[75] I have already held that the city is not obliged to provide housing for the poor in the inner city specifically (though it might be obliged to do so elsewhere). Where housing is to be provided for any particular economic group is a matter that lies within the province of the policy-making functions of the city and I do not think a Court can usurp that function. In those circumstances an enquiry to determine whether structural relief is appropriate is not material to the relief that is sought in the present proceedings.

[76] But notwithstanding the approach taken by the respondents this Court, in my view, would be remiss if it were to ignore the consequences that might follow up eviction. It seems probable that, once evicted, at least

some respondents will be left without any shelter at all, and will have no resources with which to secure any. In my view the duties the city accepts that it has extend to ensuring that persons who are left in that position are provided at least with temporary shelter to alleviate the desperate plight in which they will find themselves.

[77] The respondents' insistence on nothing short of permanent accommodation in the inner city has meant that we have had little assistance in devising what the extent of those obligations might be and we have been compelled to rely in this regard largely upon the tender that has been made by the city. That is unfortunate because we have little doubt that a more constructive approach by the respondents might have been capable of producing a more constructive solution. However, eviction at the hand of the city creates an emergency for some that triggers, as mentioned, special duties. The city has offered, as mentioned, emergency shelter for two weeks at no cost. But that is not enough and something more is required. I am not satisfied that the city has pursued with any vigour the application under Ch 12. Writing a letter or two is not enough. Plans are one thing, execution is another. This failure means that the city has failed to make any provision for those that are evicted beyond the first two weeks. To order the city to comply with its accepted duty appears to me to be eminently fair and since it only caters for those

> who are to be evicted cannot tax its budget unduly. The order that issues follows in this regard the lines of the agreement that was sanctioned in *Grootboom*."

[229] I am of the view that the essence of this judgment should be followed in the light of the constitutional obligations resting upon the third respondent in the current matter. I am, however, also of the view that because PIE is applicable to this matter, I should give proper and due consideration to the circumstances of the respondents, and to the fact that there are elderly persons, children, households headed by women and persons dependent on others, on the land. I must also take into account the approach of the third respondent in this matter.

Considerations in respect of the court order:

[230] I have come to the conclusion that I am enjoined to grant an eviction order in this matter, and that I do not have a discretion in that regard. I have furthermore come to the conclusion that the respondents have no defence to the application for eviction.

[231] However, I must consider all the circumstances referred to in sections 4(7), 4(8), 4(9), 4(10), 4(11) and 4(12) of PIE in formulating the order.

[232] In particular, I must consider an order that is just and equitable, and I must also consider whether alternative land has been made available, or can reasonable be made available by the municipality, or any other organ of state, or another land

owner, and I must consider the rights of the occupants, as referred to above.

[233] I have taken into account all the facts and circumstances of the first and second respondents, referred to above, which were placed before me.

[234] I also weigh up the fact that the applicant is the lawful landowner, that the unlawful occupants have presented various versions to this court pertaining to the time period of their occupation, and that they have stated under oath that they have occupied the land with consent to the land owners, which does not seem to be true or correct.

[235] I am also taking into account the fact that the municipality has taken a simple approach that no land is available, where a municipality has a statutory and constitutional obligation, confirmed in various court decisions, to provide for emergency housing in the case of an eviction order, and in the case of emergency situations.

[236] I am also taking into account that the municipality has not provided this court with full and complete information necessary to assist in formulating the order.

[237] I have also taken into consideration the fact that, in accordance with the affidavit of the third respondent, the occupants would be entitled to occupation of housing during April 2008 in terms of the housing program of the third respondent, referred to above.

[238] I am further of the view that, even if I was to exercise a discretion in this matter, I would come to the same conclusion namely that an eviction order should follow on the grounds referred to above..

[239] I am of the view that the most just and equitable order in these circumstances would be an order in terms of which third respondent is provided with sufficient time to plan the removal of all the occupants, and to incorporate the removal of the occupants and the housing of the occupants, with the third respondent's own programs.

[240] I also take into account that the third respondent most probably has not applied for financial assistance in terms of the Housing Act for purposes of the emergency housing, and that I should provide time for the third respondent to do so.

[241] It will also not be just and equitable that families, and especially school children, are uprooted and removed to a different area which would cause huge disruption to schools and persons travelling to and from their employment.

[242] I also take into account the magnitude of the removal, the persons involved, and the judicial and other arrangements which have to be made in this regard.

[243] I will not allow eviction of occupants which will leave them without any shelter at all, and without any access to secure shelter. At least temporary shelter should be provided by the third respondent, and the third respondent should be placed in a position to do so. Preferably, the third respondent should be

placed in a position to create a permanent housing solution in respect of the occupants, which would obviously take more time than providing for temporary emergency shelter and housing.

[244] I am furthermore of the view that it would be just and equitable to order the third respondent to comply with its duties to make provision for emergency shelter and housing in terms of the National Housing Code, as was done in the case of *City of Johannesburg*.

[245] Section 4(12) of the Act provides as follows:

> "4(12) Any order for the eviction of an unlawful occupier or for the demolition or removal of buildings or structures in terms of this section is subject to the conditions deemed reasonable by the court, and the court may, on good cause shown, vary any condition for an eviction order."

[246] I am of the view that the approach by the third respondent in this matter, which was neither helpful to the court, nor of great assistance pertaining to the issues and information a court requires for purposes of an order, should be sanctioned. Furthermore, the absence of information pertaining to the third respondent's actions in terms of the National Housing Code, the provision of any emergency housing, and possible alternatives, is unacceptable. It is not the applicant who must provide access to housing to the occupants. It is the municipality, namely the third respondent, who has that duty and obligation. It appears that the third respondent does not

properly grasp its obligations and does not want to, or does not wish to, or is incapable of, complying with its constitutional obligations and duties.

[247] I am of the view therefore that it is necessary to force third respondent to do so and to bear the consequences of its actions. If the third respondent had taken steps referred to in the various decisions above, such as the purchasing of property, determining if any property could be made available by another organ of state, or another landowner, and if the municipality had taken steps to provide this court with practical possible solutions to the problem, the situation might have been totally different. However, the third respondent was of no assistance to the court whatsoever, and was simply of the view that the eviction order should not be granted because it would affect the current housing program of third respondent. That is simply not good enough.

[248] The fact that the court has to grant an eviction order, and that the court has to deprive the applicant of the use and enjoyment of its property for a period of time so as to provide the third respondent with an opportunity to comply with its constitutional obligations, is neither fair, nor equitable, nor reasonable towards the applicant as landowner.

[249] In *President of the RSA v Modderklip Boerdery (Pty) Ltd*, 2005 (5) SA 3 (CC) the Constitutional Court endorsed the decision made by the Supreme Court of Appeal to award compensation to Modderklip for the unlawful occupation of its property and

violation of its rights. The court held open the question if the court could decide to order the expropriation of the property. The court did not rule out the possibility that such an order can be made. The court indicated that possible expropriation of the land would be an answer to the problem, or the repurchase of the land. The court in that decision declared that the State failed to provide an appropriate mechanism to give effect to the eviction order which was granted and for that reason compensation should be ordered.

[250] In this matter no such compensation is asked for, and I do not intend to grant an order in respect of such compensation. I am, however, of the view that it would be fair and reasonable, should the third respondent eventually make alternative land available, and when the occupants of the property are removed to such alternative land, that the costs pertaining to such removal should be borne by the third respondent, in accordance with my powers in terms of section 4(12) of PIE. It is time for local authorities to bear the consequences of their lackadaisical approach to their constitutional obligations, and their attitude towards the courts in eviction applications.

Costs:

[251] I have considered the issue of costs in this matter. I am of the view that this matter warrants a costs order to be granted against the first, second and third respondents, because of their dilatory and contemptuous approach to the filing of papers in this matter, the contradictory statements made on the

papers by the respondents, and the lack of respect shown to this court by ignoring the court orders which were granted in respect of the filing of papers.

[252] I furthermore also take into account the lack of assistance of the third respondent to the court in respect of information, and an apparent lack of any will to resolve the issue, or to provide the court with plans and possible solutions.

[253] In my view, this case warrants a costs order in favour of the applicant, which will include costs of every previous order where costs have been reserved.[20]

The order:

[254] I therefore make the following order:

1. The first and second respondents, including all occupants, of the property know as Portion 24 of the farm Elandsvlei 249 IQ Randfontein, situated within the municipality area of the Randfontein Local Municipality are evicted from the property.
2. The date on which the eviction order may be carried out if the first and second respondents, and all occupiers of the property, have not vacated the property, is 31 October 2008.
3. In the event that the first and second respondents, and any occupier, or any part of them, do not vacate the

[20] *Singh & Others v North Central & South Central Local Councils & Others*, 1999 (1) All SA 350 (LCC); *In re Kranspoort Community*, 2000 (2) SA 124 (LCC); *Nphela & Others v Engelbrecht & Others*, (2005) 2 All SA 135 (LCC); *Port Elizabeth Municipality v Peoples Dialogue on Land & Shelter & Others*, 2001 (4) SA 759 (ECD); *Richtersveld Community & Others v Alexkor Ltd & Another*, (2003) 12 BCLR 1301 (CC); *Wormald NO & Others v Kambule*, 2006 (3) SA 562 (SCA)

property on or before 31 December 2008, the sheriff is permitted to remove from the property all persons occupying the property, and to take such steps as may be necessary to prevent re-occupation of the property, and to demolish and remove all buildings and structures that are on the land in question.

4. The third respondent is ordered to pay all the costs incurred in respect of the removal of the first and second respondents, and any other occupiers, on the property, as well as the costs of demolishing and the removal of buildings and structures on the property.
5. The sheriff is authorized to approach the South African Police Service for assistance that may be required, and the South African Police Service is directed to render such assistance or support as may be required to enforce the order.
6. The third respondent is ordered to offer and provide to those respondents who are evicted and are, at that time, desperately in need of housing, assistance with relocation to a temporary settlement area as described in Chapter 12 of the National Housing Code, within its municipal area, which temporary accommodation is to consist of a place where they may live secure against eviction, in a structure that is waterproof, and with access to basic sanitation, water and refuse services.

7. The third respondent is ordered to take all steps required, and which may be necessary, to obtain land through any other organ of State, or belonging to any other organ of State, or from another landowner, for purposes of relocation of the first and second respondents, and all other unlawful occupiers of the property, from the date of this order to 31 October 2008, and to comply with its constitutional duties in terms of section 26(1) of the Constitution, in accordance with its housing development plan.
8. The Sheriff is authorized to compile a list of all occupiers of the property as at the date of this order, and to file such list with a return in the court file, and to provide applicant and respondents with copies thereof.
9. No other person who is not reflected on the list of the Sheriff shall be entitled to occupy the property after the date of this order.
10. First, second and third respondents are ordered to pay the costs of this application.

SIGNED at JOHANNESBURG on this day of JANUARY 2008

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ROELOF DU PLESSIS
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
WITWATERSRAND LOCAL DIVISION