IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case No: CCT 24/07

SCA Case No: 253/2006

In the matter between:

OCCUPIERS OF 51 OLIVIA ROAD, BEREA TOWNSHIP AND 197 MAIN STREET, JOHANNESBURG	Applicants
and	
CITY OF JOHANNESBURG	First Respondent
RAND PROPERTIES (PTY) LTD	Second Respondent
MINISTER OF TRADE AND INDUSTRY	Third Respondent
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	Fourth Respondent

SUBMISSIONS OF THE AMICI CURIAE: COMMUNITY LAW CENTRE (UWC) AND CENTRE ON HOUSING RIGHTS AND EVICTIONS (COHRE)

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INTRODUCTION[1]

1. This case involves the complex and difficult dilemma of how to reconcile respect for the rights and needs of people living on the margins of our society, who have been able to secure only inadequate accommodation, with the statutory powers and duties of local authorities to ensure that the conditions of accommodation do not constitute a threat to the safety of persons.

2. The case should be seen in the context of the pervasive problems of poverty and homelessness which continue to cast their long shadow over our land over twelve years into our democracy. The occupiers are amongst about 7.5 million people who lack access to adequate housing and secure tenure in South Africa.[2] They live in extreme poverty. Most lack formal employment, and manage to eke out a livelihood in the Johannesburg Inner City through informal trading, collecting and re-selling waste material, and cleaning and doing odd jobs.[3]

3. The current housing situation of the occupiers is the legacy of apartheid urban development and spatial planning. The report prepared by the *amicus curiae* the Centre for Housing Rights and Evictions (COHRE), entitled *Any Room for the Poor? Forced Evictions in Johannesburg, South Africa*, describes how the politics

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[1] We acknowledge the considerable contribution made to these heads of argument by Prof Sandra Liebenberg and Mr Geo Quinot of the Faculty of Law, University of Stellenbosch.
[2] Centre on Housing Rights and Evictions, *Any Room for the Poor? Forced Evictions in Johannesburg, South Africa* (2005), p. 6. This report is contained in volume 8 of the Record.
[3] *City of Johannesburg v Rand Properties (Pty) Ltd and Others* 2007 (1) SA 78 (W); 2006 (6) BCLR 728 (W), para 20 (R15, p1048)

of racial segregation in both the pre-apartheid and apartheid eras have shaped the racial geography of present day Johannesburg.[4] The direct result of the plethora of legislation and policy over decades is that urban accommodation in Johannesburg developed the following features:

3.1 a substantial under-provision of decent housing opportunities for black people;[5]

3.2 the segregation of black people in overcrowded townships and informal settlements on the periphery of the City far away from employment opportunities and facilities.

4. This legacy of inadequate and peripheral accommodation for the urban poor of Johannesburg is unfortunately still very much with us in the post-apartheid period.[6] The COHRE Report notes:

> *"New housing developments have largely taken place on the outer edges of existing townships, far away from jobs, facilities and services. This has marginalized new settlements and contributed to the further fragmentation*

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[4] COHRE Report, pp. 13 – 21 (R8)

[5] One of the consequences of this was proliferation of backyard shacks in African townships. As the COHRE Report (at 16) notes: "Apart from being the only affordable housing option for many urban Africans, backyard shacks allowed 'illegal' Africans to squat in the shadow of 'legal' African householders. Life was hard and precarious. Not only were living conditions harsh. If caught, 'illegal' residents were prosecuted, fined and expelled to a Bantustan." (R8)

[6] See the observations of Langa ACJ (as he then was) in *President of RSA and Another v Modderklip Boerdery (Pty) Ltd and Others* 2005 (5) SA 3; 2005 (8) BCLR 786 (CC) para 36

of the urban fabric of Johannesburg."[7]

5. The result is a dire shortage of housing opportunities for the urban poor whose livelihoods depend on proximity to the inner City, and who cannot afford the transport and other costs of being located far away from where they are able to make a living.[8] The COHRE Report describes the social and economic forces which compel people like the occupiers to cling desperately to whatever accommodation they can obtain in the inner City, however inadequate it may be.

> *"Although now legally allowed to live wherever they wish, the migrants at Joel Street are corralled into their social circumstances in much the same way as migrant labourers were under apartheid. Trapped between rural poverty and a poor education, a low-wage job in Johannesburg is by far their best option. For accommodation, the slums of Johannesburg are the best they can do. The closer this is to their work, the better their chances of survival."*[9]

6. The effect of allowing local authorities to resort to eviction in circumstances such as these, without consulting the occupants and without considering all relevant circumstances, will be the loss by these occupiers of the only home they have, and the destruction of the fragile web of their livelihood strategies.

7. We recognise that local authorities are under a duty to ensure that conditions of accommodation do not constitute a threat to the safety of persons. The difficult

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[7] COHRE Report, p. 19 (R8)
[8] See, for example, the case studies documented in the COHRE report relating to residents of the Joel Street property: pp 55 – 58 (R8)
[9] COHRE Report at 57 (R8)

question is how they are to carry out those duties in present circumstances, in a manner which is consistent with our Constitution.

8. Ours is a transformative Constitution. It requires that we deal with the consequences of our past in a manner which transforms our society – by having special regard for the needs of those on the margins, and by treating them respectfully as citizens who hold rights. The whole society is impoverished and weakened if this is not done.

9. We suggest that if profound problems of the kind in this case are to be resolved in a manner which is consistent with our transformative Constitution, then the following are basic requirements:

9.1 A solution has to be found which will have regard to the concerns of both the occupiers and the City, both of which are legitimate.

9.2 It is absolutely critical that the process be fair and respectful of the people who are affected, and their needs. The occupiers did not ask to live in these circumstances, and plainly do not wish to do so. They are compelled to do so by social and historical circumstances which are beyond their control.

9.3 There is a need to find case-specific solutions. No two cases are identical.

9.4 The solutions should mitigate, and not intensify, the marginalisation of those affected.

10. In other words, there is a need for outcomes which are pragmatic, humane and people-centred. In *Port Elizabeth Municipality v Various Occupiers*,[10] Sachs J observed:

> *"[13] Thus, the former depersonalised processes that took no account of the life circumstances of those being expelled were replaced by humanised procedures that focused on fairness to all. People once regarded as anonymous squatters now became entitled to dignified and individualised treatment with special consideration for the most vulnerable….*
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> *[18] It is not only the dignity of the poor that is assailed when homeless people are driven from pillar to post in a desperate quest for a place where they and their families can rest their heads. Our society as a whole is demeaned when State action intensifies rather then mitigates their marginalisation. The integrity of the rights-based vision of the Constitution is punctured when governmental action augments rather than reduces denial of the claims of the desperately poor to the basic elements of a decent existence.*"

11. This approach advances the transformative ethos of the Constitution, which aims

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[10] *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) ("*PE Municipality*")

at establishing a society based on human dignity, equality and freedom.[11] This Court has consistently recognised that such a society must seek to ensure that the basic necessities of life are accessible to all if it is to be a society in which human dignity, freedom and equality are foundational.[12]

12. At the heart of this approach must be the recognition of the core importance of fostering participation by those affected. This is necessary both because it recognises and enhances their dignity, and because it facilitates solutions which enjoy the support of beneficiaries, and which are sustainable in the long term. As Sachs J wrote in *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as Amicus Curiae)*[13]:

> *"The right to speak and to be listened to is part of the right to be a citizen in the full sense of the word. In a constitutional democracy dialogue and the right to have a voice on public affairs is constitutive of dignity. Indeed, in a society like ours, where the majority were for centuries denied the right to influence those who ruled over them, the 'to be present' when laws are being made has deep significance."*[14]

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[11] See, for example, section 39(1)(a) which requires the courts when interpreting the Bill of Rights to "*promote* the values that underlie an open and democratic society based on human dignity, equality and freedom." (emphasis added)

[12] *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (CC); *Grootboom* (*supra*) para 44; *Khosa and others v Minister of Social Development; Mahlaule and others v Minister of Social Development and others* 2004 (6) SA 505 (CC); 2004 (6) BCLR 569 (CC), para 52

[13] 2006 (2) SA 311 (CC) para 627 ("*New Clicks*")

[14] See also: *Doctors for Life International v The Speakers of the National Assembly and Others* 2006 (6) SA 416 (CC) paras 112 – 117

13. The same considerations apply to the taking of administrative action which has a major impact on people's constitutionally protected human rights.

14. The theme of these heads of argument is that the City has consistently shown an unfortunate failure to take an approach which is people-centred, which is respectful of the rights of the occupiers, and which shows a willingness to listen to what they have to say. The City undoubtedly has a genuine problem. But the City's attitude and chosen manner of proceeding have disabled it from dealing with the problem effectively and in the manner required by the Constitution.

15. In this context, the City's refusal to provide any water supply to the buildings in question is, with respect, quite incomprehensible.[15] A solution oriented approach, which is respectful of the needs of the people concerned, would in the first instance attempt to see to it that their basic needs are met and the danger is reduced while a solution is being found. Instead of this, the City has left the occupiers of San Jose without any water supply for a period of 47 months[16] since it had first established the existence of the problem, and 38 months[17] since issuing the notice in terms of s 12(4)(b) of the NBRA. This is frankly irreconcilable with a public authority which is concerned with, and respectful of, the needs of the people affected and the danger to their lives and those of others.

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[15] See appellants' heads, paras 50.2 – 50.3; 50.6 & 50.7
[16] i.e. since September 2003 (see AA, para 13, R2,p59)
[17] i.e. since June 2004 (see NBRA notice, R1, p55)

16. Similarly, it is inexplicable that the City has not discussed the problem with the occupiers at all, and has not attempted to find constructive solutions by way of agreement. This is fundamentally inconsistent with the duties of public authorities as explained in the *PE Municipality* case. It is, regrettably, conduct which reminds one of our past.

17. In these submissions, the *amici* will argue that a resolution to the apparent conflict between the housing rights of the occupiers and the duties of the City to ensure safe accommodation must be sought through a process which takes seriously –

17.1 the rights of the occupiers in terms of section 26 of the Constitution, including the injunction in section 26(3) that a court is to consider "all relevant circumstances" before people are evicted from their homes (Part I)

17.2 the constitutional and statutory rights of the occupiers to just administrative action (Part II); and

17.3 a remedial approach which encourages a process of engagement and participation of the occupiers and those supporting them in achieving a fair and mutually satisfactory resolution of their housing situation (Part III).

PART I: THE REQUIREMENTS OF SECTION 26 OF THE CONSTITUTION

A. Introduction: Section 26 and its application to evictions

18. Section 26 places both negative and positive duties on the State in realising the right of everyone to have access to adequate housing. The overall aim of section 26 is to create "a new dispensation in which every person has adequate housing and in which the State may not interfere with such access unless it would be justifiable to do so."[18] The provisions are interconnected and mutually reinforcing. In many situations the State will be obliged both to refrain from taking action which impairs access to housing, and to take positive measures to assist people in securing access to adequate housing. This is such a case.

The relationship between section 26(1) and section 26(3)

19. Section 26(1) imposes a negative obligation "upon the State and all other entities and persons to desist from preventing or impairing the right of access to adequate housing."[19] In *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others* Mokgoro J held on behalf of this Court that "any measure which permits a person to be deprived of existing access to adequate housing, limits the rights protected in section 26(1)." Such a measure was only justifiable if it

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[18] *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others* 2005 (2) SA 140; 2005 (1) BCLR 78 (CC) paras 28 – 29

[19] *Government of the RSA v Grootboom and Others* 2001 (1) SA 46 (CC) para 34.

fulfilled the requirements of the general limitations clause (s 36). Section 26(3) is a specific manifestation of this negative duty to respect housing rights. It establishes basic pre-requisites for the eviction of people from their home or the demolition of people's homes, but does not purport to be exhaustive.

20. The City, as an organ of State, is under a duty to respect the right of access to adequate housing. As has been repeatedly explained, the duty to "*respect"* means the obligation not to deprive people of existing access. Action which will have this result is presumptively unconstitutional. There may of course be circumstances under which it is justified, but that is the second leg of the enquiry.

Does section 26(1) protect existing access to inadequate housing?

21. The City plainly appreciates the difficulty caused by the negative obligation contained in s 26(1) of the Constitution. The City's answer to this is twofold.

22. First, it contends that it is not depriving the occupiers of access to adequate housing, because they do not have adequate housing.

23. This approach is either cynical or misguided. The focus of s 26 is on access to housing. The interest which it seeks to protect and promote is housing. The word "*adequate*" describes the quality of the housing to which people have a right. Action which deprives people of access to any housing at all, is *prima facie*

in breach of the duty to respect the right.

24. If the City's approach is correct, it means the following. If one assumes a group of people who are living in secure housing, which is safe but which fails to meet the standard of adequacy described by this Court in *Grootboom*,[20] then the State may deprive them of that housing, and leave them entirely homeless, without any constitutional issue being raised at all.

25. That would be a bizarre result. It would mean that the only people who receive the benefit of the negative right contained in s 26(1) are those who have access to *"adequate"* housing. Those who are securely housed, but whose housing is not adequate – for example, because they do not have adequate access to services, or because they live in overcrowded circumstances – would receive no benefit at all from the negative obligation. That is not only counter-intuitive, but it is completely contrary to the purpose of the constitutional right, which is to protect those who are most vulnerable. The protection of s 26(1) is not aimed at those who live in comfortable homes in the leafy suburbs: it is designed for those who are vulnerable to homelessness. By definition, they will often be living in housing which does not meet the standard of adequacy. That can not possibly mean that they can therefore be deprived of the little which they have, without a constitutional issue being raised.

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[20] *Grootboom (supra)*

26. The interpretation proposed by the City, which rests on a statement by the SCA in *Standard Bank of South Africa Ltd v Saunderson*,[21] is therefore founded on a fundamental misconception. That misconception arises from a construction of the core element of the right as being the "*adequacy*" of housing, whereas in fact what the right is about is housing. The core value is housing for all. The qualitative aspect introduced by the adjective "adequate" is intended to describe the goal towards which the State must direct its positive measures. The measures must progressively achieve the full realisation of the right – everyone's access to "adequate" housing.[22]

27. Second, the City argues that because legislation which prohibits the payment of sub-minimum wages cannot be said to interfere with the right to a decent wage, therefore legislation which prohibits occupation of unsafe buildings cannot contradict the right of access to adequate housing.[23]

28. That argument is fundamentally fallacious. The purpose of minimum wage legislation is to stipulate a minimum floor of decent wages, and thereby oblige employers to pay higher wages. The theory behind the legislation is that employers wish to obtain the labour of their employees, and if they are prohibited from employing them at sub-minimum wages, they will employ them at the legally

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[21] *Standard Bank of South Africa Ltd v Saunderson* 2006 (2) SA 264 (SCA) paras 15 – 16
[22] This is illustrated by the Rental Housing Act 50 of 1999, which creates institutions and procedures designed to achieve the adequacy of rental housing, rather than seeking to put an end to rental housing which is not adequate: see for example s13(4).
[23] Respondent's heads of argument, paras 175-179.

prescribed wages in order to avoid prosecution. In other words, the purpose of the legislation is to compel the payment of decent wages.

29. Legislation which provides for the eviction of people from inadequate housing, however, has a completely different purpose. It is not intended to ensure the provision of decent or adequate housing. It is entirely negative in its purpose and effect. Evicting people from inadequate housing will not induce anyone to provide them with adequate housing. If this case shows nothing else, it shows that.

30. It is therefore logically fallacious to suggest that because legislation which prohibits the payment of inhuman wages can not be said to interfere with the right to a decent wage, therefore legislation which prohibits occupation of unsafe buildings can not contradict the right of access to adequate housing. The nature and purpose of the legislation is entirely different in the two cases. One has the purpose of ensuring the payment of decent wages; the other has only the purpose of preventing the occupation of inadequate or unsafe housing.

The relevance of section 26(2) to evictions

31. Section 26(2) of the Constitution requires the State to devise and implement a comprehensive, co-ordinated housing programme which is capable of facilitating the progressive realisation of the right of everyone to have access to adequate

housing.[24] This programme must be reasonable in both its design and its implementation. It must include reasonable provision for those whose housing needs are urgent and who are living in intolerable conditions.[25]

32. We agree with the submission on behalf of the City that a failure by the City to carry out its s 26(2) obligations cannot, logically, by itself confer on the occupiers immunity from eviction. The provisions of the NBRA are not automatically nullified by the failure of a City to carry out its constitutional obligations in terms of s 26(2).

33. The failure of the City to carry out its obligations has a different relevance, which arises from the consequences of that failure. If the City fails to carry out its obligations under s 26(2), and if the consequence is that the evictees are left homeless because there is no place where they may lawfully live, then that homelessness is an unconstitutional consequence of the City's failure to carry out its obligations. That failure does not itself confer any immunity on the occupiers. But if an eviction will lead to homelessness, then it is *prima facie* inconsistent with the Constitution. Under those circumstances, a court will not order eviction unless it has been shown to be justified under s 36.

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[24] *Grootboom (supra*) paras 40 – 42
[25] Ibid., para 44

B. Section 26(3): The requirement of a court order

34. An indispensable requirement of all evictions of people from their homes is that they may only take place under judicial control. This expresses the constitutional commitment to make a decisive break with the regime of summary forced evictions authorised under apartheid-era legislation such as the Prevention of Illegal Squatting Act.[26] It also serves the important purpose of ensuring that evictions which lead to the loss of a home are justifiable in all the circumstances. Important constitutional rights and values are at stake when people are deprived of their access to a home through an eviction. This Court has pointed out, in relation to the impact of eviction on people's privacy and sense of security:[27]

> *"Section 26(3) evinces special constitutional regard for a person's place of abode. It acknowledges that a home is more than just a shelter from the elements. It is zone of personal intimacy and family security. Often it will be the only relatively secure space of privacy and tranquility in what (for poor people in particular) is a turbulent and hostile world. Forced removal is a shock for any family, the more so for one that established itself on a site that has become its familiar habitat."*

35. This is consistent with the approach of the UN Committee on Economic, Social and Cultural Rights, which supervises States Parties' obligations under the

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[26] See *Despatch Municipality v Sunridge Estate and Development Corporation (Pty) Ltd* 1997 (4) SA 597 (SE)
[27] *PE Municipality* para 17

International Covenant on Economic, Social and Cultural Rights, 1966.[28] The Committee requires a high standard of justification for forced evictions which it has held "are *prima facie* incompatible with the requirements of the Covenant and can only be justified in the most exceptional circumstances and in accordance with the relevant principles of international law."[29]

36. In similar vein, the African Commission on Human and Peoples' Rights observed in the case of *The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria*[30] that forced evictions have a drastic impact on people's social, economic, physical and psychological well-being:

> *"Wherever and whenever they occur, forced evictions are extremely traumatic. They cause physical, psychological and emotional distress; they entail losses of the means of economic sustenance and increase impoverishment. They can also cause physical injury and in some cases sporadic deaths. Evictions break up families and increase existing levels of homelessness."*

37. Judicial oversight is thus crucial to ensure that evictions are justifiable and that all relevant circumstances have been taken into account before resort is had to such

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[28] South Africa has signed but not yet ratified the International Covenant on Economic, Social and Cultural Rights. In terms of article 18 of the Vienna Convention on the Law of Treaties (1980), South Africa as a signatory to this treaty is legally obliged not to defeat its object and purpose, including the right to adequate housing.

[29] Committee on Economic, Social and Cultural Rights, General Comment No. 4 (Sixth session 1991), UN doc E/1992/23 *The right to adequate housing (art 11(1) of the Covenant*), para 18.

[30] African Commission on Human and Peoples' Rights, Communication No. 155/96; (2001) AHRLR 60 (ACHPR 2001) at para 63. In this case, the Commission derived a right to adequate housing, including a prohibition on unjustified evictions, from a combined reading of articles 14, 16 and 18(1) of the African Charter on Human and Peoples' Rights (1981).

a drastic measure with its attendant impact on a range of human rights and the social disruption it causes.

38. The City contends in effect that the issuing of the s 12(4)(b) notices does not constitute an eviction, and that no judicial oversight of that part of the process is therefore necessary. This was also the approach of the SCA.

39. This is, with due respect, an entirely artificial approach. The fact is that the issuing of the notice automatically made it an offence for any occupier to continue to live on the premises. The occupiers were, by that action, deprived of the right to live in the premises.

40. If the City is correct in its approach, a municipality could in effect avoid s 26(3) of the Constitution. It could issue a s 12(4)(b) notice, and then institute a prosecution. The matter would become one for the criminal law, namely the appropriate punishment for someone admittedly occupying a building in breach of a s 12(4)(b) notice. This would be a reversion to the historical situation described in the *PE Municipality* case: "Expulsion from land of people referred to as squatters was, accordingly, accomplished through the criminal and not the civil courts."[31]

41. It is true that in this case, there had not yet been any physical removal. That,

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[31] *PE Municipality* (*supra*) para 8

however, cannot be determinative of the case. The point can be illustrated thus. Imagine that the day after the notice had been issued, the municipality had arranged for a police officer to be stationed at the entrance to the premises. An occupier who left the building to buy groceries or to go to work, and who then attempted to return to the building, would be prevented by the police officer from re-entering the building. It would be a strained and artificial interpretation of the word *"eviction"* to say either that there had been no eviction, or that it was the police officer who had evicted the occupier. In truth, the occupier in such a situation would be evicted by the order having the force of law. The police officer would simply enforce the law.

42. In this respect, the case would be similar to *Jaftha*, but even clearer. There too, the issuing of the writ for a sale in execution did not by itself bring about a physical eviction. However, the Court held that "*at the very least, any measure which permits a person to be deprived of existing access to adequate housing limits the rights protected in s. 26(1)"*[32]. As the Court pointed out in *Jaftha*, such a limitation can of course be justified in terms of s 36 of the Constitution. That, however, is a different sort of enquiry to an enquiry as to whether there has been a *prima facie* breach or limitation of a right at all.

43. If the issuing of a writ for a sale in execution – which has no immediate impact on continued occupation – limits the s 26(1), then a fortiori an order which makes it a

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[32] *Jaftha* (*supra*) para 34

crime to remain on the premises, is a limitation of the s 26(1) right.

44. This order is issued by an administrative body without judicial oversight. Just as section 66(1)(a) of the Magistrates' Courts Act was for that reason inconsistent with the Constitution, so too is s 12(4) of the NBRA. We submit that the conclusion is inescapable.

C. Section 26(3): The requirement that a court consider "all relevant circumstances"

45. Section 26(3) of the Constitution prohibits evictions without an order of Court "made after considering all the relevant circumstances".

46. In *Brisley v Drotsky*, the SCA held that for circumstances to be "relevant" for the purposes of this section, they must be legally relevant.[33] There is a dispute between the parties as to whether the PIE Act is applicable. We do not enter into that debate. We address the requirements of section 26, which apply whether or not it is found that PIE is applicable.

47. We agree that what is "relevant" is what is "legally relevant". In the first instance, what is legally relevant is the requirements of the Constitution. In *PE Municipality*, the Court held that this phrase in 26(3) serves

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[33] *Brisley v Drotsky* 2002 (4) SA 1 (SCA) para 42

> *"…a clear constitutional purpose. It is there precisely to underline how non-prescriptive the provision is intended to be. The way in which the courts are to manage the process has accordingly been left as wide open as constitutional language could achieve, by design and not by accident, by deliberate purpose and not be omission."*[34]

48. This does not mean that a court has an open-ended discretion as to whether to order an eviction. What is does mean is that a court should have regard to the constitutional consequences before deciding whether to order an eviction. Those consequences include the likely impact of the eviction on the rights of the occupiers.

49. The European Court of Human Rights has held that the existence of procedural safeguards is a crucial consideration in the Court's assessment of the proportionality of an interference with the right to respect for a person's home. *Connors v United Kingdom*[35] concerned the eviction of a gypsy family from a halting site by a local authority on the grounds of alleged anti-social behaviour. It was challenged as a violation of article 8 of the European Convention on Human Rights.[36] The Court noted that article 8 "concerns rights of central importance to

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[34] *PE Municipality* (*supra*) para 22. See also the critique of the *Brisley* decision by Prof. André van der Walt in *Constitutional Property Law* (2005) 422 – 424.
[35] *Connors v United Kingdom* (2005) 40 EHRR 9
[36] Article 8 reads:

> "(1) Everyone has the right to respect for his private and family life, his home and his correspondence;
> (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

the individual's identity, self-determination, physical and moral integrity, maintenance of relationships with others and a settled and secure place in the community."[37] The effect of the eviction was to render the family concerned homeless, "with the adverse consequences on security and well-being which that entails."[38] The Court held that the seriousness of the impact of the eviction required "particularly weighty reasons of public interest by way of justification and the margin of appreciation to be afforded to the national authorities must be regarded as correspondingly narrowed."[39] Although the applicants were entitled to apply for a judicial review of the decision, this did not provide an opportunity for an examination of the facts in dispute between the parties. The fact that UK law did not provide for an inquiry by a court into the substantive justification for the evictions of gypsy families on halting sites led the European Court of Human Rights to find a violation of article 8 of the European Convention on Human Rights.

The fundamental flaw in the approach of the City

50. The facts show, we submit, that the City itself failed to consider all relevant circumstances.

51. The discretionary power in s 12(4)(b) of the NBRA has two discrete components,

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[37] *Connors* (*supra*) para 82
[38] *Connors* (*supra*) para 85
[39] *Connors* (*supra*) para 86

requiring separate consideration.

52. First, a local authority must form a view as to the threat to the safety of any person posed by a particular building. The focus of the provision is not on the building, but on the safety of a person. Accordingly, when an administrator sets out to establish whether this precondition is fulfilled, the focus of the inquiry should also be on the people involved. Another way of looking at this first leg of the inquiry, is that the purpose of the powers granted in subsections (4)(a) & (b) is to ensure the safety of the persons involved. Whether eviction is "necessary" will depend in part on whether their safety van be achieved by methods other than eviction.

53. The second leg of the discretion emerges once that precondition has been fulfilled. A conclusion that there is a safety hazard does not automatically necessitate an eviction notice under s 12(4)(b). The section states that the administrator "may … order any person … to vacate." The scheme of s 12(4)(b) indicates that factors in addition to the safety of the particular building must be taken into account before a decision is taken to issue the notice. Those factors must include the consequences for the people concerned if they are forced to leave, and alternative solutions.

54. The NBRA therefore creates the opportunity and the obligation for the City to have regard to the constitutional consequences of issuing a notice to vacate.

55. The City's conduct, including its failure to consult with the occupiers, indicates that its focus in deciding whether to issue the notices was restricted to the state of the relevant buildings, without giving due consideration to the alternatives, to the personal circumstances of the persons involved, and to the consequences for them of an order to vacate. While the state of the buildings is obviously relevant, it can only form part of the inquiry. The City is required to consider the consequences for the people concerned of their being forced to abandon their homes, and alternative solutions. This exercise does not appear to have been undertaken. Indeed, it could hardly be undertaken without some consultation with the occupiers as to their personal circumstances, what would happen to them if they were compelled to vacate, and whether they had any alternatives to suggest.

56. We submit that in the present instance, City was required to consider, before deciding whether to issue a notice:

56.1 the state's obligations under s 26 of the Constitution, as set out in part I above;

56.2 the rights of the occupiers in terms of s 26;

56.3 the personal circumstances of the individual occupiers, and in particular their likely housing and safety situations before and after the proposed evictions;

56.4 possible alternatives to notices to vacate.

57. The fundamental flaw in the City's conduct is its failure to do this.

Applying these principles to this case

58. What is "relevant" in a particular eviction application, and the merits of that application, will be determined by its factual and legal context – in the words of the Court in *PE Municipality*, it is a case-specific approach which is required. In this case, the ostensible reason for the eviction is the health and safety of the occupiers. It is submitted that under these circumstances, a court ought to have regard to the following matters.

59. First, a court ought to regard the claim with a measure of scepticism where it is clear that the context of the claim is a policy with regard to the development of the inner city, which requires the large-scale removal of low-income occupiers from buildings. In this instance, the policy involves the "eradication" of 235 "bad"

buildings in the Johannesburg inner city.[40] The first step in that process is the eviction of their current occupiers. It is of course not for the court to say that the policy is either right or wrong. However, the policy context requires that a claim of pressing health or safety need ought to be regarded with an appropriate measure of scepticism. There are other reasons at play.

60. Second, the court ought to have regard to the practice of the City in matters of this kind.[41] The scepticism ought to be deepened if the practice of the applicant is to obtain orders in advance, often on an urgent basis, and then "stockpile" them for future use as and when considered appropriate.[42] It should be further deepened if the evidence shows that the steps prior to litigation are taken at a leisurely pace, and application is then made to the court on an urgent basis. And the scepticism should be still further deepened when it is shown that the applicant's practice is to proceed with the litigation at an even more leisurely pace, if at all, if there is opposition to the application. [43] All of this casts real doubt on whether there truly is a pressing need for a removal.

61. Third, the court ought to examine whether the City has attempted to discuss the

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[40] The policy and its mode of implementation are described in the COHRE report (R8). They are summarised at paragraphs 41 to 50 of the Second City's heads of argument.
[41] The practice is described in paras 18 – 26 of the Answering Affidavit of Poto (R2, pp 61 – 66)
[42] See in this regard the report on the City's website "Inner City being reborn" http://www.joburg.org.za/2005/nov/nov9_regeneration.stm: "Makda said 60 court orders were issued in the last month"; also reported in "Residents of 60 Jo'burg buildings face eviction": http://www.sundayindependent.co.za/index.php?fArticleId=2992427 where Mr Makda of the City confirmed that this number of orders had been obtained, but had not yet been acted on.
[43] The evidence in this regard is set out in the Applicants' heads of argument at para 82 (the general practice) and 84-91 (the practice in these particular cases).

matter with the occupiers in order to explore reasonable alternatives to improve the safety and habitability of the buildings without resorting to what should be a last option of eviction – and, if necessary, to seek to persuade the occupiers that it is indeed in their best interests to vacate the building. In this regard, it is relevant that section 12(1) – (3) of the NBRA envisages that the first option is the taking of steps in order to render a building safe. Where genuine consultation has not taken place, there is further reason to doubt whether a concern for the health and welfare of the occupiers is the true cause of the steps which are being taken. In this matter, the City did not approach the occupiers to discuss how what steps might be taken to improve health or safety on the properties.[44]

62. Fourth, the court ought to enquire whether the City has complied with its constitutional obligation to conduct negotiations, and if appropriate mediation, before resorting to proceedings for eviction. In *PE Municipality*, the Court observed that a relevant factor was the extent to which "serious negotiations had taken place with equality of voice for all concerned".[45] The Court held:

> *"They [local authorities] must attend to their duties with insight and a sense of humanity. Their duties extend beyond the development of housing schemes, to treating those within their jurisdiction with respect. Where the need to evict people arises, some attempts to resolve the problem before seeking a court order will ordinarily be required."*[46]

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[44] Judgment, para 21 (R15, p1049)
[45] *PE Municipality (supra)* para 30
[46] *PE Municipality (supra)* para 56

63. Genuine consultation with affected communities prior to resorting to evictions is also an internationally recognised human rights standard.[47] It is clear that there was no consultation, let alone negotiation, in this instance.[48]

64. Fifth, the court ought to investigate whether the City has genuinely considered all alternatives to removal and homelessness. The local government is obliged at the very least to give serious consideration to enabling them to remain where they are, by assisting them to improve the conditions under which they are living to a satisfactory level. Evicting them from where they are, into a condition of homelessness, is *prima facie* inconsistent with the obligations on local government.

65. A local government which does not give serious consideration to alternatives to homelessness is in breach of its constitutional obligations. Its conduct is also inconsistent with international law jurisprudence. For example, in *European Roma Rights Centre v Greece*, the European Committee of Social Rights held:[49]

> *"The right to housing permits the exercise of many other rights – both civil and political as well as economic, social and cultural. It is also of central*

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[47] UN Committee on Economic, Social and Cultural Rights, General Comment No. 7 (sixteenth Session 1997), UN doc E/C.12/1997/4 *The right to adequate housing (Forced evictions)*, para 16(a). And see on this point and on the other international standards to which reference is made in this section, the "Basic Principles and Guidelines on Development Based Evictions and Displacement" (developed at the International Workshop on Forced Evictions, Berlin, June 2005) and attached to the recent report of the UN Rapporteur on Adequate Housing, Mr Miloon Kothari, referred to in the Applicants' heads of argument at para 109.

[48] Judgment para 21 (R15, p1049), para 47 (R15, p1062)

[49] *European Roma Rights Center v Greece,* Complaint No. 15/2003, para 24

importance to the family. The Committee recalls its previous case law to the effect that in order satisfy Article 16 states must promote the provision of an adequate supply of housing for families, take the needs of families into account in housing policies and ensure that existing housing be of an adequate standard and include essential services (such as heating and electricity). The Committee has stated that adequate housing refers not only to a dwelling which must not be sub-standard and must have essential amenities, but also to a dwelling of suitable size considering the composition of the family in residence. Furthermore the obligation to promote and provide housing extends to security from unlawful eviction."

66. In similar vein, the UN Committee on Economic, Social and Cultural Rights has concluded:

States parties must ensure, prior to carrying out any evictions, and particularly those involving large groups that all feasible alternatives are explored in consultation with the affected persons, with a view to avoiding, or at least minimizing, the need to use force." [50]

67. The events in the Joel Street case, where remedial action after the issuing of the s 12(4)(b) notices and institution of the application resulted in the City no longer seeking an eviction order, vividly demonstrate that alternative solutions can be viable.[51] It seems that they were not even considered, let alone in consultation with the occupiers.

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[50] General Comment No. 7 (sixteenth Session 1997), UN doc E/C.12/1997/4 *The right to adequate housing (Forced evictions)*, para 14

[51] Judgment para 24 (R15, p1050)

68. Sixth, if removal does seem genuinely unavoidable, the court should require the local government to show what measures it has taken to secure alternative accommodation for the residents, if necessary on a temporary basis while they are awaiting permanent accommodation.[52] It is important to stress that the offer made by the City at the SCA, namely temporary accommodation for two weeks, does not adequately address this issue. This was clearly recognised by the SCA.[53]

69. While there is no unqualified constitutional duty on local authorities to provide alternative accommodation in all eviction circumstances, this is a factor that should weigh strongly in cases where settled occupiers are to be evicted through no fault of their own, and the result of such an eviction will be to render them effectively homeless. As the Court observed in *PE Municipality*:[54]

> *"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 an interim measure pending ultimate access to housing in the formal housing programme."*

70. The European Committee of Social Rights, which supervises the obligations of Contracting States under the European Social Charter (1961), its Protocols, and

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[52] In *Grootboom*, for example, an order was made by consent, in terms of which the government made available vacant land, some materials, and access to basic services: see para 5 and the court's order of 21 September 2000. In *Minister of Public Works and Others v Kyalami Ridge Environmental Association and Others* 2001 (3) 1151 (CC) paras 51 & 106, the Court emphasised that the flood victims concerned had a constitutional right to relief and to be given access to housing.
[53] SCA judgment, para 77 (R17, p1278)
[54] *PE Municipality* (*supra*) para 28

the Revised European Social Charter (1996), has also held that the provision of suitable alternative accommodation must accompany evictions. Thus in *European Roma Rights Centre v Bulgaria*[55] it stated:

> *"In particular the Committee observes that through in certain cases the Roma evicted were provided with alternative accommodation or compensation…the accommodation was either substandard or of a temporary nature (vans, barracks or municipal dwellings whose rent was too expensive for low income families such as Roma). The Committee recalls that it is the responsibility of the state to ensure that evictions, when carried out, respect the dignity of the persons concerned even when they are illegal occupants, and that alternative accommodation or other compensatory measures are available."*[56]

71. In this regard, the City refers to developments in Indian law since the landmark judgment in the *Olga Tellis* case.[57] It is undeniable that the track record of the Supreme Court of India has in recent years been ambiguous. In a detailed discussion Muralidhar[58] has noted that in decisions on the right to work and rights in work, "the trend of judicial decisions has witnessed a moving away from recognition and enforcement of such rights and toward deferring to executive policy that has progressively denuded them."[59] He shows that in several other areas the rights of disadvantaged groups appear to have been subordinated to

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[55] *European Roma Rights Centre v Bulgaria* Complaint No. 31/2005 (Strasbourg, 30 November 2006) para 56
[56] See also *European Roma Rights Centre v Italy*, Complaint No. 27/2004, para 41.
[57] *Olga Tellis & Others v Bombay Municipal Corporation* (1985) 3 SCC 545; AIR 1986 SC 180.
[58] Previously a practising advocate and member of the Law Reform Commission, now a judge of the Delhi High Court.
[59] S Muralidhar 'India' in M Langford (ed) *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (forthcoming).

considerations of economic efficiency, environmental considerations, and the functioning of private market institutions in an era of increasing liberalisation. However, the Indian courts have generally willing been willing to uphold a duty on the State to provide a basic minimum of the necessities of life. The subject is a complex one. For present purposes it is sufficient to point out that a firm anchoring of judicial decisions to core constitutional values will limit the extent of the inevitable swings of the pendulum in jurisprudential development.

72. Alternative measures, both short-term and long-term, must be reasonable. This means that they must have regard to the circumstance and needs of the people affected. They should provide security of tenure against future evictions,[60] and the nature of this accommodation should take into account the need of people to pursue their livelihoods, maintain their social networks, and ensure that their children's schooling is not unduly disrupted.[61] In this regard, consultation with the affected residents would facilitate a solution that is both consonant with the Constitution and developmentally sustainable. Such consultations should also include the possibility of returning to their former accommodation once it has been rendered safe and habitable. The impact of the eviction on the livelihoods of the residents can not be ignored by local authorities. To be heard effectively to say to the residents that "your plight does not concern us" is not consistent with a constitutional democracy in which each person is entitled to have their human

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[60] See, for example, the decision of the SCA in *Baartman v Port Elizabeth Municipality* 2004 (1) SA 560 (SCA)

[61] High Court judgment, para. 64 (R15, p1072). See also: S Wilson 'Judicial enforcement of the right to protection from arbitrary eviction: Lessons from Mandelaville' (2006) 22 *SAJHR* 535 – 562.

dignity respected and protected.[62]

73. Seventh, once all of these factors have been considered, the court ought to enquire into the proportionality of eviction as a response to the problem. *Jaftha* illustrates the importance of a proportionality inquiry which takes into account the relevant contextual factors, in circumstances where the state seeks to take action which will have the effect of depriving people of their access to housing.[63]

74. The exigencies of the particular case will dictate the weight to be attached to each of these factors. In a genuine emergency situation, the requirements of prior consultation and mediation will obviously not be appropriate, although the need for alternative accommodation will remain a relevant factor. Ultimately what is called for is a flexible approach which seeks to balance and reconcile people's interests in having their housing respected, with the duty of local authorities to ensure the safety of such accommodation. This is particularly required in circumstances where people are desperately poor and living on the margins of society. Threatened evictions in these circumstances make them doubly vulnerable to the loss of both their homes and livelihoods. An eviction in these circumstances can result in their being exposed to a greater degree of insecurity and danger than in their former homes.

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[62] On the value of human dignity in protecting socio-economic rights see S Liebenberg 'The value of human dignity in interpreting socio-economic rights' 21 *SAJHR* (2005) 1 – 31.
[63] *Jaftha (supra)* paras 39 – 43 & 56 – 60.

D. Section 26(3): The prohibition on arbitrary evictions

75. Section 26(3) of the Constitution prohibits arbitrary evictions. The structure of this subsection is similar to that of section 25(1). Section 25(1) provides that deprivation of property is permissible, but only if the deprivation is not arbitrary: no law may permit arbitrary deprivation of property. The jurisprudence on "arbitrary" deprivation of property is therefore helpful for the analysis of section 26(3).

76. In the context of property rights, this Court has explained that a deprivation may be arbitrary in two respects: it may be procedurally arbitrary, because the procedure is unfair; and it may be substantively arbitrary, in that there is not "sufficient reason" for it. [64]

77. Section 26(3) explicitly addresses one aspect of the prohibition of evictions which are procedurally arbitrary, by prescribing that an eviction may not take place except by virtue of an order of court. Other aspects are fair and effective notice of eviction proceedings, and fair notice of when an eviction order is to be carried out (if granted). International law also recognises that that appropriate procedural protection and due process are essential in eviction cases.[65]

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[64] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another* 2002 (4) SA 768 (CC) at para 100

[65] UN Committee on Economic, Social and Cultural Rights, General Comment No. 7(sixteenth Session 1997), UN doc E/C.12/1997/4 *The right to adequate housing (Forced evictions)*, paras.14, and 16

78. The Court has held that the consideration of substantive arbitrariness requires an analysis of the interplay between the means employed and the ends sought to be achieved, and the full complexity of the relationships involved:

> *(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 ….* [66]

79. We submit that this passage indicates the nature of the enquiry which a court is required to undertake in determining whether a proposed eviction is substantively arbitrary.

80. In this matter, the eviction of the occupiers will lead to their becoming homeless. They will be deprived of access to any housing at all, let alone adequate housing. Because of this likely consequence of eviction, and because of the nature of an eviction, we submit that in this matter the appropriate test is a form of proportionality evaluation. In order to determine whether an eviction will be

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[66] *First National Bank* (*supra*) para 100 (g) and (h)

arbitrary, it is necessary to consider:

80.1 The ends which the City seeks to achieve by the eviction.

80.2 The means which it has chosen to achieve those ends.

80.3 The impact which that particular means will have on the people affected.

80.4 Whether the legitimate means can reasonably be achieved by another means which will be less invasive of the rights of the occupiers.

81. Professor Van der Walt sums up the requirements of section 26(3), as set out in the *PE Municipality* judgment, as follows:

> *"… in line with section 26(3), the order can only be granted if eviction is justifiable in view of all the circumstances. Secondly, consideration of the order in view of the circumstances amounts to a balancing exercise … Thirdly, this balancing exercise takes place against the background of the history of eviction in the apartheid era and its lasting and enduring effects on the distribution of land and access to housing today."*[67]

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[67] A J Van der Walt *Constitutional Property Law* (2005), 426. He is writing there in the context of the contest between the respective rights of owners and occupiers, but his analysis applies equally to the balancing of other considerations.

E. The "standard of review"

82. A substantial part of the argument of the City is based on the contention that the occupiers brought a review; that this means that the "*standard of review"* is applicable; and that this in turn means that the Court should exercise some deference as to the views of the City.

83. That would be so if the challenge was to the *"merits"* of the decision to issue the s 12(4)(b) notice. A court would have regard to such expertise as has been displayed by the City in making its determination, and would also be aware of the fact that it was not sitting in appeal on that decision.

84. We submit however that the matter is fundamentally different where it is alleged that the decision was in breach of a constitutional right. The City has no discretion as to whether or not to breach a constitutional right. It may not do so. No deference is due to a decision by a public authority which breaches a constitutional right, or for that matter to the view of a public authority as to whether its action breaches a constitutional right. That is a matter which only the courts can decide.

85. The repeated reliance on the need for "*deference"* is therefore, with respect, fundamentally misplaced. The question of deference does not arise when the issue is whether there has been a breach of a constitutional right. The fact that the challenge takes the form of a review under PAJA does not automatically

make a deferential "review" standard applicable. The test depends on the question which the court is required to answer. Where the question is the constitutionality of the administrative action, or (for example) whether the administrator acted within the scope of its powers, then the need for deference does not arise.

86. Deference may well arise on the determination of the underlying facts. There, the City may be thought to have some expertise, and the determination of the facts may be a matter in respect of which there ought to be some deference to its views, given that this is a review and not an appeal. But once the facts have been determined, then the application of the law to those facts is a question for a court. No deference is due to the City's view as to the meaning or requirements of the Constitution.

F. The constitutionality of the NBRA and the appropriate remedy

87. In this part we consider the constitutionality of the relevant provisions of the NBRA in the light of the above analysis of the requirements of section 26 of the Constitution, particularly section 26(3).

88. The Minister responsible for the Act has not opposed the application for an order declaring sections 12(4)(b), 12(5) and 12(6) of the NBRA inconsistent with the Constitution.

89. Section 12(4)(b) authorises a local authority to order the occupier of a building to vacate it immediately or within a period specified. No hearing is provided, and no judicial authority is required for the making of the order. Section 12(5) prohibits the occupation of a building in respect of which a notice was served or delivered. Section 12(6) creates the criminal offence and stipulates the penalty.

90. We have already submitted that on the authority of *Jaftha*, the power to issue the s 12(4)(b) notice, without any judicial authority, is inconsistent with s 26(3) of the Constitution.

91. On the face of it, these sections also create a procedure for eviction without consideration of "all the relevant" circumstances, and permit evictions which are "arbitrary" in the sense described above.

92. The City indicates that its practice is to apply to court for an eviction order in the event of non-compliance with an order to vacate in terms of section 12(4)(b). However:

92.1 there is nothing in the Act which requires such judicial oversight; and more fundamentally,

92.2 the very issuing of the notice, which still takes place without judicial oversight, creates criminal consequences, and limits the s 26(1) rights of the occupiers.

Reading down

93. It is a general principle of constitutional interpretation that findings of constitutional invalidity of legislation should be avoided, if this is reasonably possible. Section 39(2) of the Constitution requires a court when interpreting any legislation to "promote the spirit, purport and objects of the Bill of Rights".[68]

94. This is achieved by, when it is possible, interpreting legislation so that it conforms to the Bill of Rights. Where legislation is capable of being read in two ways – either as a violation of fundamental rights or, if read more restrictively or expansively, as not violating rights – the latter reading must be preferred.

95. The approach to constitutional challenges to legislation was summarised by this Court in *Govender v Minister of Safety and Security*.[69] The interpretation which is sought in order to save the provision from unconstitutionality must be "reasonably possible",[70] or not "unduly strained".[71] Thus, in *De Beer NO v North-*

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[68] *Investigating Directorate Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit NO* 2001 (1) SA 545 (CC) para 21 - 23; *Daniels v Campbell NO and Others* 2004 (5) SA 331 (CC); 2004 (7) BCLR 735 (CC) paras 19 – 37.
[69] *Govender v Minister of Safety and Security* 2001 (4) SA 273 (SCA)
[70] *Mateis v Ngwathe Plaaslike Munisipaliteit* 2003 (4) SA 361 (SCA)

Central Local Council & South-Central Local Council [72] the relevant ordinance was capable of two interpretations. It was reasonably possible to interpret it in a way that enabled a court to exercise a discretion as to whether to grant an order of execution against property in the particular circumstances.[73] This interpretation was preferred, and saved the ordinance from unconstitutionality.

96. The Promotion of Administrative Justice Act 3 of 2000 creates what might be regarded as a form of statutory (as opposed to constitutional) reading down. Section 3(1) of PAJA stipulates that administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair. Section 3(2) sets out the requirements of procedural fairness.

97. It appears that the effect of this is that a local authority which is considering whether to issue a section 12(4) order under the NBRA is obliged to comply with the requirements of section 3 of PAJA. Such a reading is reasonably possible and not unduly strained. There is nothing in the NBRA which expressly or by implication excludes such a procedure. Section 12(4) can therefore be read in a manner which is consistent with the requirements of the Constitution as far as procedural fairness is concerned.

98. However, the inconsistency with s 26(3) can not be resolved in this manner. It

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[71] *Hyundai* (*supra*) para 24
[72] *De Beer NO v North-Central Local Council & South-Central Local Council* 2002 (1) SA 429 (CC)
[73] *De Beer* (*supra*) para 24

explicitly authorises the local authority to issue a notice ordering occupiers to vacate the building. It can not reasonably be suggested that the section requires the municipality to obtain the authority of a court in order to do so. Such an interpretation is not reasonably possible, and is unduly strained.

99. This is illustrated by a simple question: If, properly interpreted, the NBRA requires that an application be made to court, when is that application to be made to court, and for what order? Various possibilities present themselves. An application could be made to court:

99.1 before the local authority makes a determination deeming the issuing of an order necessary, for authority to make that determination;

99.2 after the local authority has made the determination, but before it has issued an order, for authority to issue the order;[74] or

99.3 before instituting a prosecution or taking another step to achieve the eviction of the occupiers, for authority to take that step.

100. One searches the Act in vain for anything which would indicate which of these is to be preferred. In truth, it is plain that none of them is contemplated. What is plainly contemplated is a procedure which does not involve the determination of

[74] This is the procedure followed by the City in this case.

any issue by a court, except of course in the case of a criminal prosecution. Any attempt to infer the contrary is unduly strained, and not reasonably possible.

101. Reading down is thus not possible. From this it flows that sections 12(4)(b), 12(5) and 12(6) are inconsistent with section 26(3) of the Constitution.

The appropriate remedy

102. A court must declare a law that is inconsistent with the Constitution invalid to the extent of that inconsistency.[75] A court making such a declaration may also make any order that is just and equitable.[76] That includes the remedy of "reading in".

Reading in

103. Reading words into a statute permits some reconstruction in order to cure the constitutional defect. However, there are limits to the extent to which a court will do this. Underlying these limits is a respect for the separation of powers. The limits which are relevant to this matter include the following:

103.1 It will not be appropriate to read words in, unless in so doing a court can define *with sufficient precision* how the statute ought to be extended in order to comply with the Constitution;

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[75] Constitution, section 172(1)(a)
[76] Section 172(1)(b)

103.2 When reading in, a court should endeavour to be *as faithful as possible to the legislative scheme* within the constraints of the Constitution;[77]

103.3 the court will be reluctant to use its 'reading-in' powers where there are *various options open* to the legislature to cure the constitutional defect:

> *"Where, as in the present case, a range of possibilities exists, and the Court is able to afford appropriate interim relief to affected persons, it will ordinarily be appropriate to leave the legislature to determine in the first instance how the unconstitutionality should be cured. The Court should be slow to make those choices which are primarily choices suitable for the legislature."*[78]

104. In *Lawyers for Human Rights v Minister of Home Affairs*,[79] the relevant statute contained two sections dealing with suspected illegal immigrants. One limited the period of detention, and provided for the detainee to be brought before a court before the end of that period. The other did not. The court read words into the latter section, in terms virtually identical to the former section. The insertion was faithful to the legislative scheme.

105. In *Jaftha*,[80] the statute did not provide for judicial oversight over execution against immovable property. The court read in words which conferred on a court,

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[77] *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC), para 75
[78] *Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC), para 64
[79] *Lawyers for Human Rights v Minister of Home Affairs* 2004 (4) SA 125 (CC)
[80] *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others* 2005 (2) SA 140 (CC)

instead of the clerk of the court, the power to authorise execution against immovable property "after consideration of all relevant circumstances." In its judgment in *Jaftha*, the court also provided some guidance as to the relevant circumstances which courts should consider in authorising execution against the immovable property of judgment debtors.[81]

106. In both of those case, the "surgery" required was very limited, it was clear where it was required, and it was clear what was required.

107. In this matter, however, it is somewhat more difficult, for two reasons.

108. First, as we have pointed out above, it is not clear where the judicial decision is to be inserted. Is it necessary to approach a court:

108.1 for authority to make a determination that the issuing of an order is necessary;

108.2 for authority to issue the order; or

108.3 for authority to institute a prosecution or take another step to achieve the physical eviction of the occupiers.

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[81] Ibid., paras 52 – 60

109. Secondly, it is not clear what the nature of the judicial decision is to be. The City appears to take the view that it should in effect be a review of the determination already made by the municipality. An alternative approach is that there should be a judicial decision on the merits of whether a notice should be issued. There are in fact multiple possibilities. That is a choice which it is probably more appropriate for the Legislature to make.

110. Thirdly, it is not clear on what grounds the judicial decision should be made. It could be open-text, for example "after considering all the relevant circumstances"; it could be value-bound, for example "just and equitable"; it could be specific as to particular matters to be taken into account; or it could be a variety of combinations of those possibilities.

111. We submit that the Act should provide a nuanced, appropriately calibrated regime for dealing with the residents of buildings that pose a health and safety threat. Of critical importance is that relevant legislation gives full effect to relevant constitutional rights and values, particularly those underpinning section 26 of the Constitution. In terms of international human rights law, the UN Committee on Economic, Social and Cultural Rights has held that legislation against forced evictions "is an essential basis upon which to build a system of effective protection". Such legislation must be "designed to control strictly the

circumstances under which evictions may be carried out."[82] Similarly, in its General Comment on article 17 of the International Covenant on Civil and Political Rights, the UN Human Rights Committee concluded that all interference with a person's home may take place only in terms of a law and that "relevant legislation must specify in detail the precise circumstances in which such interferences may be permitted."[83]

112. We submit that the wide range of legitimate options makes it more appropriate for the Legislature to design an appropriate scheme than for the courts to do so.

113. In *Zondi v Member of the Executive* Council *for Traditional and Local Govt Affairs and Others*[84] the Ordinance was inconsistent with the Constitution. The decision as to how to remedy the defects was best made by the Legislature. The question was then what should happen in the interim. Immediate invalidity of the Ordinance would not have been just and equitable, because there was a need for workable legislation in this area. This suggested that a suspended declaration of invalidity would be appropriate. However, the Ordinance could not be allowed to remain in force in its existing form while the Legislature went about the task of remedying the defect. The Ordinance affected fundamental rights, and dealt with a matter involving social conflict. The Court resolved the issue by:

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[82] General Comment No. 7 (sixteenth Session 1997), UN doc E/C.12/1997/4 *The right to adequate housing (Forced evictions)*, para 10
[83] UN Human Rights Committee, General Comment No. 16 (Thirty-Second Session) UN doc A/43/40, annex VI, paras 3 & 8
[84] *Zondi v Member of the Executive* Council *for Traditional and Local Govt Affairs and Others* 2005 (3) SA 589 (CC)

113.1 making an order of suspended invalidity; and

113.2 crafting fair and constitutionally competent procedures which would apply during the period of suspended invalidity.

114. We submit that this would be a just and equitable remedy in this case. The NBRA neither complies with the rights in s 26 of the Constitution nor promotes the spirit, objects and values of the Constitution. The structure and content of the s 12 procedure are inconsistent with the Constitution. They hark back to another time. They ought to be amended to bring them into line with our new Constitutional order.

115. It is accordingly appropriate that Parliament applies its mind to drafting new building health and safety legislation that gives effect to the rights and values of the Constitution.

PART II: THE OCCUPIERS' RIGHTS TO JUST ADMINISTRATIVE ACTION

116. There can be no doubt that the City's decision to issue eviction notices in terms of s 12(4)(b) of the NBRA amounted to administrative action in terms of both s 33 of the Constitution and PAJA.[85] Consequently, the appellants had the right to administrative action that was lawful, reasonable and procedurally fair.

A. Sections 3 and 4 of PAJA

117. Section 33 of the Constitution guarantees the right to administrative action that is procedurally fair. This right is given further content in ss 3 and 4 of PAJA.

118. Section 3 of PAJA sets out the procedure to be followed in relation to "administrative action which materially and adversely affects the rights or legitimate expectations of any person". Section 4 applies to cases where an administrative action "materially and adversely affects the rights of the public". "The public" is defined in s 1 of PAJA to include "any group or class of the public".

119. A notice in terms of s 12 (4)(b) is address to "any person" and has an impact on the rights of that person. This makes s 3 applicable. The administrator is therefore obliged to follow mandatory procedures laid down in s 3(2)(b). These

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[85] This is acknowledged by the City in its heads of argument at para 67. See also the judgment of the SCA at para 56 (R17, p1276).

are:

119.1 adequate notice of the nature and purpose of the proposed administrative action;

119.2 a reasonable opportunity to make representations;

119.3 a clear statement of the administrative action;

119.4 adequate notice of any right of review or internal appeal, where applicable; and

119.5 adequate notice of the right to request reasons in terms of s 5.

120. The failure to meet these requirements results in the City's decision being *prima facie* procedurally unfair.

B. Departures from the mandatory procedures

121. There are two ways in which administrative action that fails to comply with the mandatory procedures in s 3(2)(b) can nevertheless be found to be procedurally fair:

121.1 Section 3(5) allows an administrator "to follow a procedure which is fair but different from the provisions of subsection (2)", but only where such procedure is mandated by an "empowering provision." In this matter there is no empowering provision which authorises an alternative procedure.

121.2 Section 3(4)(a) authorises a departure from the mandatory procedures of subsection (2) if "it is reasonable and justifiable in the circumstances." It follows that the only way in which the City's decision can be said to be in accordance with the requirements of s 3 is if a departure is justified in terms of s 3(4).

122. Section 3(4)(b) contains a number of factors that must be taken into account to determine whether a departure from the mandatory procedures will be reasonable and justifiable. These are:

(i) the objects of the empowering provision;

(ii) the nature and purpose of, and the need to take, the administrative action;

(iii) the likely effect of the administrative action;

(iv) the urgency of taking the administrative action or the urgency of the matter; and

(v) the need to promote an efficient administration and good governance.

123. These factors reveal an attempt to achieve a proportional balance between the competing interests involved when taking administrative action.

124. Paragraph 63 of the judgment of the SCA does not refer to s 3(4), but does refer to various factors which, it says, justify the City's failure to give the occupiers a hearing before it issued the notices.

125. First, the SCA stated: "In cases of crisis the audi principle can hardly apply." This may have been intended as a reference to the statutory factor of urgency.

126. We submit that the undisputed facts of the City's conduct show that urgency can not be seriously raised as a basis for departing from the mandatory requirements of PAJA. For example, in respect of the Zinns building:[86]

126.1 The City's first inspection of the building took place on 28 January 2003.

126.2 The s 12(4)(b) notice was issued on 14 May 2003.

126.3 A second inspection took place on 9 September 2003.

126.4 The eviction application was launched (on an urgent basis) on 25 September 2003.

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[86] This account is borrowed and summarised from the applicants' heads of argument, para 84-91.

126.5 When the matter became opposed, the City did nothing for more than 18 months.

127. Under these circumstances, a claim of urgency justifying a failure to follow a fair procedure could hardly succeed.

128. The SCA judgment also refers to the difficulty of identifying the occupiers.[87] This however can also not provide a valid basis for departing from the mandatory procedural fairness requirements in s 3(2)(b) of PAJA. The people affected were all occupiers of the buildings in question. It would have been a relatively simple matter to issue the notice to occupiers, for example by standing at the entrance and handing them out.

129. The SCA judgment also appears to suggest that in any event, there was nothing which the occupiers could have said.[88] This approach is with respect clearly mistaken, for four reasons.

130. First, there are many matters on which the occupiers could usefully have made representations, for example:

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[87] SCA Judgment, para 63 (R17, p1274)
[88] SCA Judgment, para 63 (R17, p1274)

130.1 Determining whether it is “necessary” for a building to be vacated involves making a judgment as to a matter of degree – there is no bright-line moment when it changes from “unnecessary”. This is a matter on which the occupiers could have made representations.

130.2 The determination that it is “necessary” involves a determination that there is no alternative solution. This too is a matter on which the occupiers could have made submissions.

130.3 The determination must involve some consideration of the consequences of the eviction or evacuation. If the likely consequence was a greater risk to human life or health, then it would not be “necessary” for the occupiers to leave the building. This too is a matter on which they could have made representations.

130.4 The notice may (as in this case)[89] stipulate a time by which the occupiers are to leave. This too is a matter on which the occupiers could have made submissions.

131. Procedural fairness is critical in bringing all the relevant considerations to the attention of the administrator before decisions are taken. This matter illustrates the importance of this function of procedural fairness. The City’s focus seems to

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[89] Section 12(4)(b) notice: R1, p55:26.

have been largely on the buildings rather than on the people involved. If it had afforded the occupiers an opportunity to respond to proposed notices, the City may have realised that evictions could result in the occupiers being worse off from a safety point of view. It may have realised that it should put in place realistic alternative housing options for these occupiers before issuing notices.

132. Secondly, the oft-quoted remark of Megarry J in *John v Rees and others; Martin and another v Davis and others; Rees and another v John*[90] is very apposite here:

> *"As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not: of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change."*

133. Thirdly, and perhaps most fundamentally, it is important to recognise the paradigm shift brought about by the constitutional entrenchment of the right to administrative justice.

134. The rules of procedural fairness can no longer simply be viewed in instrumental terms. They go to a core value of the society which the Constitution seeks to achieve. Procedural fairness is at the heart of the notion of participatory

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[90] *John v Rees and others; Martin and another v Davis and others; Rees and another v John* [1970] Ch 345, 402D–E

democracy, an essential characteristic of the Constitution's vision of South African society. In *Doctors for Life International v The Speakers of the National Assembly and Others*[91] Ngcobo J held:

> *"Commitment to principles of accountability, responsiveness and openness shows that our constitutional democracy is not only representative but also contains participatory elements. This is a defining feature of the democracy that is contemplated."*

135. We have already referred to the comments of Sachs J in the *New Clicks* case but they bear repeating to emphasise the fundamental link between full citizenship and human dignity, and the right to participate in public decisions that affect one:

> *"The right to speak and to be listened to is part of the right to be a citizen in the full sense of the word. In a constitutional democracy dialogue and the right to have a voice on public affairs is constitutive of dignity. Indeed, in a society like ours, where the majority were for centuries denied the right to influence those who ruled over them, the right 'to be present' when laws are being made has deep significance."*[92]

136. Procedural fairness as an element of administrative justice is a key driver of participatory democracy in South Africa. It guarantees individuals an active role in that aspect of state functioning that impacts them most directly and most often, namely state administration. In this role, procedural fairness reinforces the

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[91] *Doctors for Life International v The Speakers of the National Assembly and Others* 2006 (6) SA 416 (CC) para 111

[92] *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as Amicus Curiae)* 2006 (2) SA 311 (CC) para 627

dignity of beneficiaries of state socio-economic programmes. Comprehensive socio-economic assistance from the state inevitably runs the risk of creating a culture of dependence. The problem is not so much dependence on the provision of the actual assistance (e.g. food, housing or social assistance), but the perception it may create amongst recipients and non-recipients of the former as dependent, passive, weak, subjugated 'external objects of judgment'.[93] It is the latter perception which principally undermines such beneficiaries' dignity. By affording them the opportunity actively to participate in decisions in this regard, procedural fairness can achieve much in giving such beneficiaries a sense of control, participation and accordingly significance and worth. Nedelsky puts this function of procedural fairness eloquently:

> *"The opportunity to be heard by those deciding one's fate, to participate in the decision at least to the point of telling one's side of the story, presumably means not only that the administrators will have a better basis for determining what the law provides in a given case, but that the recipients will experience their relations to the agency in a different way. The right to a hearing declares their views to be significant, their contribution to be relevant. In principle, a hearing designates recipients as part of the process of collective decision-making rather than as passive, external objects of judgment. Inclusion in the process offers the potential for providing subjects of bureaucratic power with some effective control as well as a sense of dignity, competence, and power. A hearing could of course be a sham, or be perceived to be so even if it were not. But the possibility of failure or perversion of the process leaves its potential*

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[93] Nedelsky "Reconceiving Autonomy: Sources, Thoughts and Possibilities"(1989) *Yale Journal of Law and Feminism* 7 at 27

contribution to autonomy unchanged."[94]

137. Even where a hearing allegedly cannot achieve much by way of substantive outcome (as the SCA seems to suggest would be the case in this matter), this remains an important function of procedural fairness. Granting an individual the opportunity to participate in decision-making by providing her with adequate information regarding the matter at hand, listening to her views and giving her point of view serious consideration, is no longer a nicety of public administration or merely, as the SCA suggests, "desirable".[95] It is a constitutional imperative that goes to the heart of the society the Constitution envisages.

138. Plasket J put it as follows in *Police and Prisons Civil Rights Union and others v Minister of Correctional Services and others*:[96]

> *"Because of the purpose of the requirements of procedural fairness and the values that due observance of these requirements is designed to further – accurate, rational and legitimate decision-making that can further the public interest, and that serves as something of a safeguard against oppressive or otherwise improper official decision-making – an insistence by the courts that they be observed "is an end in its own right". As a result, the rules of procedural fairness "are considered to be so important that they are enforced by the courts as a matter of policy, irrespective of the merits of the particular case in question."*

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[94] Ibid.
[95] SCA Judgment, para 63 (R17, p1274)
[96] *Police and Prisons Civil Rights Union and others v Minister of Correctional Services and others* [2006] 2 All SA 175 (E) para 76 (footnotes omitted)

139. And Megarry J expressed a similar thought as follows in *Rees v John*:

> *"Nor are those with any knowledge of human nature who pause to think for a moment likely to underestimate the feelings of resentment of those who find that a decision against them has been made without their being afforded any opportunity to influence the course of events."*

140. Fourthly, there is a fundamental connection between the right to administrative justice and the other rights in the Constitution. Administrative justice is the underpinning of many of those rights.

141. There is a need for an integrated and coherent approach to the body of fundamental rights entrenched in the Constitution. It is essential to recognize the interconnectedness of the entrenched rights, in this case particularly administrative justice and socio-economic rights such as housing. Procedural fairness facilitates the reasonable realisation of other (substantive) rights. It must therefore be a central element of both *a priori* design, when administrators set up and implement state programmes aimed at the realisation of substantive rights, and of *ex post facto* scrutiny, when courts constitutionally assess such state action.

142. The realisation of socio-economic rights is largely effected through government programmes involving the exercise of administrative power. As such, the administrative justice rights, and in particular procedural fairness requirements, have an important function to fulfil in relation to the realisation of socio-economic

rights.

143. A proper analysis of the factors listed in s 3(4)(b) of PAJA must have regard to the impact of the decision to issue the eviction notices. The greater the impact of administrative action is on individuals, the stronger the competing factors should be to justify a departure from the procedural fairness requirements of s 3 of PAJA. In this regard, we refer again to what this Court held in *PE Municipality*:

> *"… a home is more than just a shelter from the elements. It is zone of personal intimacy and family security. Often it will be the only relatively secure space of privacy and tranquility in what (for poor people in particular) is a turbulent and hostile world. Forced removal is a shock for any family, the more so for one that established itself on a site that has become its familiar habitat."*

144. This aspect was apparently not considered at all by the SCA.

145. We submit, therefore, that the reasons given by the SCA for its willingness to countenance a failure to comply with the mandatory fair procedure requirements do not stand up to analysis.

C. A "pre-review"?

146. The City plainly recognises that a claim of justified failure to comply with the mandatory procedures can not be sustained. It is therefore driven to suggesting,

it seems, that there was in fact no administrative action at all. The application to the High Court for an eviction order, it repeatedly contends, amounted to a "*pre-review"* by the Court which allowed the occupiers a hearing.

147. This attempt, too, must however fail. The City acknowledges that the decision to issue the s 12(4)(b) notice was administrative action.[97] This must be so. It was a decision of an administrative nature by an organ of state, performing a function in terms of legislation; it adversely affected the rights of the occupiers, who were thereby automatically prohibited from remaining in their homes; and it had a direct, external legal effect by criminalising their continued occupation of their homes.

148. The City's application for an eviction order dealt with an entirely different matter. It did not address the question whether the s 12(4)(b) notice should have been issued; it did not ask for an order by the court that the City had been entitled to issue such a notice, and had acted correctly in doing so; and it did not invite the court to determine the legality of the notice, and the illegality of the continuing occupation of the buildings. What was in issue was whether the court should take the <u>further</u> step of ordering the eviction of the occupiers, and authorising their removal if they failed to comply. By that time, the continued occupation was unlawful as a result of the administrative action of issuing a notice in terms of s 12(4)(b).

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[97] Respondent's heads of argument, para 67

149. This was therefore not a case, as the City seems to suggest, of the "*intended*"[98] exercise of statutory power. The City had already exercised the power. It was now seeking something further from the court. The fact that it was not obliged to give notice before seeking that relief from the court does not detract from the fact that it was required to act fairly before initially issuing a notice prohibiting occupation of the buildings.

D. A post-decision hearing?

150. To the extent that the City might contend that the application to court gave the occupiers a post-decision hearing, and that this procedure is justified, we submit that this too can not succeed.

151. PAJA does not allow the City a free choice as to whether it wishes to comply with the procedures set out in the Act before it takes a decision which constitutes administrative action. By requiring adequate notice of the "proposed" administrative action, and a reasonable opportunity to make representations, PAJA clearly requires a fair procedure before the action is taken. If the City wishes to depart from the prescribed procedure, it must bring itself within the provisions of s 3(4). For the reasons we have given above, we submit that it has not done so.

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[98] Respondent's heads of argument, para 63

152. PAJA is binding. It is not open to a party to proceed as if PAJA does not exist, and choose to follow another course of action, on the basis that this was permitted under the pre-PAJA dispensation. We submit that the City erred in doing so, and the SCA erred in finding that this was permissible.

153. In any event, recourse to court is inappropriate as an alternative source of a hearing. This is so for the following reasons:

153.1 The procedural fairness requirements are intended to facilitate participation by those affected in the decision-making process. This is not achieved by compelling a party to oppose an application to the High Court if it wants its views to be considered and debated.

153.2 The test in the High Court is quite different from the test applied by a conscientious administrator. A conscientious administrator considers all of the arguments and submissions made by the person affected, and makes what it considers would be the best decision on the merits. As the City itself is at pains to point out in the heads of argument submitted on its behalf, a court is precluded from undertaking this exercise on review. In relation to the “merits” it is limited to “review” grounds, is obliged to give

some deference to the views of the administrator, and is not entitled to substitute what it considers would have been a better decision.[99]

153.3 Particularly where poor people are involved, recourse by the administrator to the courts is in fact a way of restricting individual participation in administrative decision-making. PAJA requires much more direct participation, and without the cost of obtaining legal representation.

154. In reality, following this procedure is a denial of procedural fairness in administrative decision-making.

155. We accordingly submit that given that:

155.1 the issuing of the notice constituted administrative action;

155.2 no hearing of any kind was given; and

155.3 there was no effective justification of this failure by virtue of one of the exceptions to the mandatory requirements of s 3(2),

the issuing of the notice has to be set aside as inconsistent with the requirements of the Constitution and PAJA on the grounds that it was procedurally unfair.

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[99] The decision of the European Court of Human Rights in the *Connors* case, to which we have referred above, is apposite here.

PART III: APPROPRIATE REMEDY IN RESPECT OF THE BREACH OF S 26(2)

156. In this section we address the question of the appropriate remedy if it is found that the City has failed to comply with its obligations under s 26(2) of the Constitution.

A. The breach

157. In the papers before the High Court, the City did not claim to have implemented any emergency housing programme for those in desperate need. The High Court made comprehensive findings in this regard, and concluded this was in breach of the Constitution.[100] The findings in this regard were not challenged on appeal.[101]

158. In response to the occupiers' allegations of what a reasonable programme would entail,[102] the City stated that:[103]

158.1 the primary responsibility under s 26(1) and (2) obligations lies with national and provincial government: "the constitutional obligation of

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[100] High Court judgment paras 43, 47, 51, 52, 53, 57, 65. (The judgment is contained at R15, p1037ff)
[101] Application for Leave to Appeal, R15, 1076.
[102] AA, para 185 (R2, p101). See also R10, p726ff and R12, p890
[103] RA, para 27.1 (R3, p199). See also R13, p968 and R13, p992ff

municipalities is primarily to administer national housing programmes"; and

158.2 the City "itself has not devised any programme for emergency housing applicable to the circumstances prevailing in this matter" and although "the applicant has adopted the housing implementation plan … it unfortunately does not cover the present situation".

159. What is particularly worrying about these critical admissions, is that that they indicate not only did the City fail to comply with its obligations, it was not even aware of what those obligations were.[104] We return to this in the discussion of remedies that follows.

160. The City's papers betray a generally uncaring approach to the plight of the applicants and those similarly situated. In the founding papers in each of the eviction applications, the only indication of a concern for what might happen to the occupiers once the evictions were effected was the suggestion that "on the occasion of the service of [the eviction application], the applicant will cause to be delivered lists of suitable alternative accommodation available to the Respondents within the Inner City Area".[105] However, not only were these lists

[104] This point is made by the appellants at RA para 30ff (R7, p458ff)
[105] FA, para 119 (R1, p50)

not provided in some instances,[106] the City admits that they "should not be seen as an attempt to provide alternative accommodation", but only as an attempt to assist the appellants.[107] The hollow nature of this assistance is demonstrated graphically in Wilson's affidavit of February 2007 in which he describes his efforts to identify suitable accommodation using one of the lists.[108]

161. The policy documentation for the Inner City Regeneration Strategy ("ICRS") shows that that there are significant problems with the funding of the programme, especially the parts designed to "address sinkholes" in terms of which the evictions are justified by the City. A number of the relevant elements of the ICRS (including the "transitional shelter programme",[109] "social programmes",[110] and "private sector residential development facilitation"[111]) have no money allocated to them at all, despite most of them being designated as "current" (as opposed to "proposed") and having extensive budgetary implications.

162. After the hearing in the SCA, the City delivered an affidavit in which it sought to set out its activities in relation to emergency housing.[112] In this affidavit, reference was made to three initiatives:

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[106] AA para 150 (R2, p94); AA, para 208 (R2, p110). See also R3, pp155 – 156 & R10, p734. The list may be found at R9, p641
[107] RAA, para 40.1 (R3, p203). See also R13, p967
[108] Affidavit of S Wilson, para 7 (R16, p1166ff)
[109] ICRS para 5.1.19 (R4, p249)
[110] ICRS para 5.1.23 (R4, p250)
[111] ICRS, para 5.1.57 (R4, p259)
[112] Affidavit of Karen Brits (R16, p1143)

163. First, a request made to the Gauteng Department of Housing in terms of the Emergency Housing Programme in relation to certain evictions in Marlborough South. This does not assist the inner city evictees. It does not address the problem of emergency housing in a programmatic manner.

164. Secondly, the establishment of an emergency shelter at the Europa Hotel. In their reply to this affidavit, the applicants graphically show how the accommodation available here would not be suitable for people in their position.

165. Thirdly, the City's identification of "seven buildings in the inner city to convert into interim emergency shelters", using the City's own funds and the interim emergency accommodation available in Protea South. These developments are undoubtedly well-intentioned and are welcome. However, there is no indication of how they will operate - for example, for how long will the emergency housing be offered? And how will the programme ensure that people are put in a position that they will not be in crisis when the "interim" period has expired?

166. It is noteworthy that Brits does not refer in her affidavit to the "Affordable Rental Housing" programme referred to in the earlier affidavit of Sibongile Mazibuko[113] and which was described in the High Court judgment as lacking in clarity, albeit being well-intentioned. The only explanation for this is that the programme indeed "does not cater for persons such as the respondents" as found by the

[113] Affidavit of S Mazibuko, R14, p998ff. See the replying affidavit of Nelson Kethani (R14, p1006ff)

High Court.[114]

167. The steps identified by Mazibuko and Brits do not (with the limited exception of the Marlborough South example) in any way relate to the carefully planned and considered requirements of the Emergency Housing Programme (Chapter 12 of the Housing Code). As pointed out by the High Court, reasonable action on the part of the City is required to implement this programme.

168. The SCA order makes some provision for the applicants in this case. However, there is still no effective provision for the remaining 67 000 people whom the City intends to have removed from their homes in the Inner City. The simple fact is that the City is planning to force the removal of a further 67 000 people from their homes, without having any plan in place as to how to deal with the overwhelmingly probable outcome that very many of them will be left homeless.

169. The City asserts that the occupiers have not shown what resources were available to it. This is, with respect, misplaced. The fact is that the City made no emergency provision for the occupiers and the other 67 000 people who are similarly placed - the very people whom it will render homeless through the exercise of its powers. That must be *prima facie* unconstitutional. That breach subsists whether or not provision is now made for the applicants as a result of the order made by the SCA.

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[114] Judgment, para 22 (R15, p1049)

170. It may well be, of course, that City does not have sufficient resources available to provide for all of those in need. In that event, the resources must be allocated in a fair and reasonable manner. But it can never be either fair or reasonable to fail to make any emergency provision at all for the 67 000 people in the inner city, whom it seeks to remove from their homes. The City thus failed to take "*reasonable"* measures within its available resources, as explained in *Grootboom*.

171. We submit that it is a matter for comment that more than ten years after the 1996 Constitution was introduced, and more than six years after this Court explained the requirements of s 26(2) of that Constitution, South Africa's richest and largest city had still not complied with its constitutional obligations.

172. Having established the infringement of s 26(2), the applicants are entitled under s 38 of the Constitution to "appropriate relief". This means an effective remedy:

> *"[A]n appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced".*[115]

173. Kriegler J expressed the approach as follows in *Fose*:

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[115] *Fose v Minister of Safety and Security* 1997(3) SA 786 (CC) para 69

"[96] … The defence of the Constitution - its vindication - is a burden imposed not exclusively, but primarily, on the judiciary. In exercising our discretion to choose between appropriate forms of relief, we must carefully analyse the nature of a constitutional infringement, and strike effectively at its source.

"[97] Once the object of the relief in s 7(4)(a)[116] *has been determined, the meaning of 'appropriate relief' follows as a matter of course. When something is appropriate it is 'specially fitted or suitable'. Suitability, in this context, is measured by the extent to which a particular form of relief vindicates the Constitution and acts as a deterrent against further violations of rights enshrined in chap 3. In pursuing this enquiry one should consider the nature of the infringement and the probable impact of a particular remedy. One cannot be more specific. The facts surrounding a violation of rights will determine what form of relief is appropriate."*

B. The role of dialogue in achieving progressive realisation of section 26(2)

174. In *PE Municipality*, the court held that municipalities have a "major function" under s 26(2) "systematically to improve access to housing for all within their area". The court referred to the change of approach brought about by the Constitution and the PIE Act in relation to the problems posed by evictions and emphasised the importance of the underlying values of human dignity, equality and freedom in the context of addressing housing issues.

175. When the state's obligations are viewed in this light, the courts have a new

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[116] Of the interim Constitution

complex, and constitutionally ordained, function to ensure that justice and equity prevail in relation to all concerned. This new role requires the exercise of a

> *"… managerial role [that] may need to find expression in innovative ways. Thus, one potentially dignified and effective mode of achieving sustainable reconciliations of the different interests involved is to encourage and require the parties to engage with each other in a proactive and honest endeavour to find mutually acceptable solutions. Wherever possible, respectful face-to-face engagement or mediation through a third party should replace arm's-length combat by intransigent opponents."*[117]

176. The benefits of avoiding "forensic combat" and the adversarial processes that typify traditional court procedures were described as including a reduction in the costs of litigation, decreasing tensions, narrowing the areas of dispute and "facilitating mutual give-and-take". Processes such as mediation can be used to "facilitate an outcome that ends a stand-off, promotes respect for human dignity and underlines the fact that we all live in a shared society".[118]

> *"In South African conditions, where communities have long been divided and placed in hostile camps, mediation has a particularly significant role to play. The process enables parties to relate to each other in pragmatic and sensible ways, building up prospects of respectful good neighbourliness for the future. Nowhere is this more required than in relation to the intensely emotional and historically charged problems [of eviction and homelessness]."*[119]

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[117] *PE Municipality* (*supra*) para 39
[118] *PE Municipality* (*supra*) para 42
[119] *PE Municipality* (*supra*) para 43

177. It is submitted that the adjudicative approach set out in *PE Municipality* reflects and is a manifestation of the growing perception internationally that judicial review can be regarded as a form of "dialogue" between courts and legislatures.[120] The Canadian scholar Kent Roach[121] refers to a number of cases from the Canadian Supreme Court and articles by Canadian, US, UK[122] and Australian[123] legal scholars (as well as those writing about international law) that support this perception. Roach also notes that the President of the Supreme Court of Israel has referred to the notion of a "constant dialogue between the judiciary and the legislature" in an article on the role of a Supreme Court in a democracy.[124]

178. According to Roach there is a perceptible move in a variety of areas of legal endeavour towards an understanding of judgments as "the start of a continued process of critical self-reflection and dialogues as opposed to being final commands that must be obeyed with no questions asked".

179. Roach identifies the question of court-ordered remedies as an area in which the

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[120] See in general: Alexander Bickel *The Least Dangerous Branch: the Supreme Court at the Bar of Politics* 2 ed 1986 at 239 - 241

[121] K Roach "Constitutional, remedial and International Dialogues about Rights: the Canadian Experience" 40 *Texas International Law Journal* 537 (2004) (hereafter Roach "Dialogues about Rights") at fn1 – fn7.

[122] Richard Clayton "Judicial Deference and 'Democratic Dialogue': The Legitimacy of Judicial Intervention under the Human Rights Act, 1998" (2004) *Public Law* 33.

[123] Leighton McDonald "Rights, 'Dialogue' and Democratic Objections to Judicial Review" 32 *Federal Law Review* 1 (2004)

[124] Aharon Barak "A Judge on Judging: The Role of a Supreme Court in a Democracy" 116 *Harvard Law Review* 16 (2002).

concept of dialogue has emerging significance.[125] L'Heureux-Dubé J of the Canadian Supreme Court[126] has held that:

> *"The principle of democracy … is one of the important factors guiding the exercise of a court's remedial discretion. It encourages remedies that allow the democratic process of consultation and dialogue to occur."*[127]

180. For the reasons set out below, we submit that in a context such as the present, the use of a structural interdict would harness the benefits of dialogue. It would enable and promote the consultation and dialogue which have been so sorely missing from this whole series of events. It would thereby support the achievement of the values underlying the Constitution.

C. The nature of structural interdicts, and their use

181. An order containing a structural interdict usually includes declaratory and mandatory relief of the usual kind. What distinguishes the structural interdict is that it generally contains either or both of the following additional elements:

181.1 An order requiring the respondent to report on what it has done and will do in order to give effect to the mandatory order. We refer to this as the "reporting" element; and

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[125] Roach "Dialogues about Rights" at 546ff
[126] *Corbiere v Canada (Minister of Indian & Native Affairs)* [1999] 2 S.C.R. 203
[127] At para 116, referring to *Reference re Secession of Quebec* [1998] 2 SC 217 para 68

181.2 An order that the parties may file papers in relation to that report, and then return to the court for the court to determine whether the respondent has complied with its obligations, and if not, to consider ordering further relief. We refer to this as the "supervisory" element.

182. Structural interdicts of these kinds have, since the adoption of the Constitution, been increasingly utilised by the South African courts.[128]

183. The recognition of power of courts to grant structural interdicts in appropriate circumstances was foreshadowed (at least in relation to the reporting element) by this Court in *Pretoria City Council v Walker*,[129] and established beyond doubt in the *Minister of Health and Others v Treatment Action Campaign and Others (No 2)* where it was held that appropriate relief might, "where necessary … include … the exercise of supervisory jurisdiction".[130]

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[128] *Strydom v Minister of Correctional Services* 1999 (3) BCLR 342 (W); *Grootboom v Oostenberg Municipality* 2000 (3) BCLR 277 (C); *Ngxuza v Permanent Secretary, Dept of Welfare, Eastern Cape* 2001 (2) SA 609 (E); 2000 (12) BCLR 1322; *Treatment Action Campaign v Minister of Health* 2002 (4) BCLR 356 (T); *Rail Commuter Action Group v Transnet Ltd t/a Metrorail (1)* 2003 (5) SA 518 (C); *President van die Republiek van Suid-Afrika en Andere v Modderklip Boerdery (Edms) Bpk* 2003 (6) BCLR 638 (T); S v Z and 23 Similar Cases 2004 (1) SACR 400 (E); *City of Cape Town v Rudolph* 2004 (5) SA 39 (C); *Minister of Education (Western Cape) v Mikro Primary School* 2006 (1) SA 1 (SCA); *Magidimisi v Premier of the Eastern Cape & others* [2006] JOL 17274 (Ck); *Kiliko and Others v Minister of Home Affairs and Others* 2006 (4) SA 114 (C); *Centre for Child Law and Others v MEC for Education and Others*, Transvaal Provincial Division, Case No. 19559/2006, 30 June 2006 (unreported); *EN and Others v Govt of the RSA and Others* 2006 JOL 18038 (D); *Ngxuza & others v Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government & Another* [2006] JOL 18239 (E)

[129] *Pretoria City Council v Walker* 1998 (2) SA 363 (CC) para 96.

[130] *Minister of Health and Others v Treatment Action Campaign and Others (No 2)* 2002 (5) SA 721 (CC) ("*Treatment Action Campaign*") para 106

184. In *Treatment Action Campaign* the Court emphasised that the decision to grant mandatory and structural interdicts would depend on the circumstances of the case. It held that structural interdicts would constitute "appropriate relief" when they are "necessary to secure compliance with a court order". This could be the case, for example, where there is a proven "failure to heed declaratory orders or other relief granted by a court in a particular case".[131]

185. Although the court did not order a structural interdict in the *Treatment Action Campaign* case, it has done so on two other occasions.[132] Drawing on these cases one can begin to establish the sorts of cases in which various forms of structural interdicts will provide appropriate relief.

186. In *August* the Court ordered the Independent Electoral Commission to deliver a once-off compliance report in the form of an affidavit dealing with its compliance with the court's order that it take all reasonable steps to ensure the registration of eligible prisoners to vote. No provision was made in the order for any further hearing on the matter. The requirement of filing was ordered so that "any interested person may inspect this affidavit at the Registrar's office once it has been lodged".[133]

187. In *Sibiya (1)*, the Court ordered a structural interdict in order to enable it to

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[131] *Treatment Action Campaign* para 129
[132] *August v Electoral Commission* 1999 (3) SA 1 (CC) ("*August*") and *Sibiya and Others v Director of Public Prosecutions, Johannesburg, and Others* 2005 (5) SA 315 (CC) ("*Sibiya (1)*")
[133] *August* para 39.

exercise supervisory jurisdiction over the process of converting the sentences of those who had been sentenced to death prior to the decision in *S v Makwanyane*. The court engaged in an extended process of receiving reports prepared by the government, considering them, and giving further directions as to the steps required for compliance. The process was finally completed by a judgment given on 30 November 2006,[134] in which the Court expressed its satisfaction at the effectiveness of the procedure which had been followed. The Court noted that it had ordered a structural interdict because:

> *"[5] … The mandamus was therefore principally aimed at ensuring compliance with the order of this Court in Makwanyane.*
> *"[6] The Court felt that given the delay that had occurred since its order in Makwanyane coupled with the pressing need for the sentences to be replaced, it was an appropriate case for a supervisory order to be made in addition to the mandamus."*[135]

188. A failure to comply with a previous order of court is perhaps the paradigmatic case for a structural interdict. There are other situations where a structural interdict may be appropriate. They include the following.[136]

189. First, proven past non-compliance is not a prerequisite for the court to take steps to ensure compliance. Where it is found, as it was in *Sibiya (1)*, that it would be

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[134] *Sibiya and Others v Director of Public Prosecutions, Johannesburg, and Others* 2007 (2) BCLR 293 (CC) ("Sibiya (2)")
[135] *Sibiya 1* paras 5 – 6.
[136] In the analysis which follows we borrow liberally, without further attribution, from K Roach & G Budlender "Mandatory Relief and Supervisory Jurisdiction: When is it Appropriate, Just and Equitable?" (2005) *SALJ* 325

"inadvisable for the court to assume" that the order would be carried out promptly, that would justify the grant of a structural interdict.

190. Secondly, a structural interdict may be considered necessary where the consequences of even a good-faith failure to comply with a court order are so serious that the court should be at pains to ensure effective compliance.

191. Thirdly, a structural interdict may be necessary to ensure compliance where the order in question is so general that it is not possible to define with any precision what the government is required to do – either because of the general nature of the obligation it enforces, or because the court is anxious to leave the state with as much latitude as possible with regard to compliance.

192. *Sibiya* is an example of this: The Constitutional Court ordered the respondents to take "all the necessary steps", without describing each step in specific terms, or stating when each step should be taken. As the Court noted, its use of the phrase "as soon as possible" also had a lack of specificity. This was plainly relevant to the decision to order a structural interdict, as there would be debate, in any enforcement proceedings, as to whether the respondents had done everything in their power that was necessary.[137]

193. In such circumstances, a structural interdict may provide benefit to all, including

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[137] See the discussion in *Sibiya (No2),* para 6

government. The approval of a plan (including a timeline) by the court can allow the government to move forward with implementation, secure in the knowledge that implementation will constitute compliance with its obligations. The court can make an order which is as non-intrusive as possible on the choices which the elected government makes, because it can be secure in the knowledge that this will not be an invitation to non-compliance, but rather an invitation to the government to formulate a policy in order to achieve compliance with the Constitution.

194. Fourthly, a structural interdict may be appropriate where it is desirable that members of the public, and particularly those who will be directly affected, are informed of what steps are likely to be taken. This so because of the inherent desirability of their knowing what is likely to happen, and because it creates the opportunity for them to engage in dialogue and debate with those in authority. A reporting order opens up the policy-making process and the implementation process to democratic dialogue. This furthers the constitutional goal of achieving a participatory democracy.

195. The South African jurisprudence in relation to structural interdicts is still developing. We do not suggest the above as either rigid categories or a *numerus clausus*: rather, they demonstrate some of the types of instances in which it will be “appropriate” to order structural relief.

196. In appropriate cases, structural interdicts not only require the state to comply with its obligations, but actually assist it to do so better, and in a way that that nurtures the democratic process and furthers the constitutional value of dialogue. Properly conceived, they have the tendency to resolve, rather than raise, concerns about separation of powers.

197. Roach[138] identifies cases where structural interdicts (such as that approved by a majority of the Canadian Supreme Court in *Doucet-Boudreau v Nova Scotia (Minister of Education)*[139] are granted as instances in which courts exercise remedial choices in a manner that encourages dialogue.[140] In *Doucet-Boudreau*, the majority of the court upheld an order requiring the government make best efforts to build minority language schools by certain times and report back to the court on its progress. The court retained jurisdiction over the case and allowed all parties to participate in the reporting sessions.[141]

D. Identifying the cause of the constitutional breach

198. In determining what relief will be appropriate, the most useful starting point will

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[138] Roach "Dialogues about Rights" (*supra*) 546ff
[139] [2003] 3 S.C.R. 3
[140] Roach also identifies "dialogic" remedial principles at play in the decisions of some international bodies, for example, the power of the UN Human Rights Committee to call on a State found to have violated the ICCPR to respond within ninety days with information about the measures taken to give effect to the committee's views in relation to a violation of the Covenant. Roach "Dialogues about Rights" (*supra*) at 551.
[141] The dissenting judges took the view that the court could only retain jurisdiction in the context of a contempt hearing and any attempt to persuade the government to act was a breach of the separation of powers. This approach is clearly not applicable in South Africa, where this court has accepted that structural interdicts of this kind an element of the courts' remedial armoury.

often be to determine the cause of the constitutional breach. Once the cause of the infringement has been determined, it is easier to "strike effectively at its source".

199. Hansen has identified three primary reasons for governmental non-compliance with constitutional standards: inattentiveness, incompetence and intransigence.[142] Each of these calls for different remedial techniques. What works with a government that is simply inattentive to constitutional standards may not work with a government that is incompetent. Even stronger remedies, including ultimately the threat and use of contempt proceedings, may be necessary to deal with government actors that are simply opposed or intransigent to constitutional standards.

Inattention

200. Remedies that are merely persuasive in nature may be sufficient to deal with the situation where the cause of non-compliance is simply inattention on the part of the relevant state actor. In such circumstances, a declarator may be sufficient to simply remind the defaulter that it has obligations, point out that they have not been fulfilled, and bring about prompt and competent action.

201. Even at this lowest level, however, and even in the absence of any bad faith on

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[142] C Hansen "Making It Work: Implementation of Court Orders Requiring Restructuring of State Executive Branch Agencies" in SR Humm (ed) Child, Parent and State (1994)

the part of government, a declarator may be not be sufficient to ensure that the relief is effective. This may be the case where the action required from government is complex and programmatic, or requires action by a variety of agencies, some of which may not have been directly involved in the litigation. To this may be added the situation (common in socio-economic rights cases) where the required action may have an effect on a broad range of potential claimants who are not before the court. In such circumstances, the declaratory relief may usefully be coupled with a requirement that government report to the public (as opposed to the court for supervisory purposes) on its compliance. In this way, a court harnesses the power of the core democratic mechanism of transparency, and enables supervision of the declaratory order by the public at little or no additional cost to the state.

202. An order requiring public reporting is not a novel remedy, as is shown by the decision in *August*.

203. In some circumstances, other forms of publication might be ordered, in terms of either the number of reports or the manner of publication. Thus in *Western Cape Minister of Education v Mikro Primary School*, the SCA approved an order made by the Cape High Court requiring the respondent to report to the school governing body on a monthly basis regarding its compliance with the order, and leave was granted to the parties to approach the court on the same papers “for

further relief in this regard".[143]

204. We submit that the mere fact of having to report requires the defaulting authority to apply its mind to the problem at hand and encourages the development and implementation of a plan within a reasonable period.

Incapacity and incompetence

205. Where a government is aware of its obligations but has nevertheless failed to comply with them, as a result of an admitted lack of capacity or proven incompetence, some form of mandatory relief with court supervision is suitable. The emphasis here is not on "punishing" non-compliance or setting government up for failure and consequent contempt orders, but rather on seeking to assist compliance.

206. In a recent judgment, Froneman J stated:

> *"in my personal experience [structural interdicts] have contributed to a better understanding on the part of public authorities of their constitutional legal obligations in particular areas, whilst it has also assisted the judiciary in gaining a valuable insight in the difficulties that these authorities encounter in their efforts to comply with their duties"*[144]

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[143] *Mikro* (*supra*) para 51
[144] *Magidimisi* (*supra*) para 29, (referring to *S v Z* (*supra*) and *Ngxuza* (2001) (*supra*))

207. While this form of structural interdict does involve the judiciary more closely in reviewing the work of the executive, and imposes greater burdens on the court, the choice of plan remains squarely within the purview of the administrator. The court's only role is to evaluate the plan for compliance with the constitutional obligation. In the case of a housing plan, for example, the question would be whether it complies with the reasonableness requirement laid down by the Court in *Grootboom*. Issues such as budgeting and policy priorities would remain under the control of the executive, subject only to the reasonableness requirement.

208. The procedural aspects of such an order need not place a significantly greater burden on the courts than would otherwise be the case. This course of action may in fact be resource-efficient, because it avoids the institution of serial litigation on exactly the same issue.

Intransigence

209. The last category of infringers is the intransigent state. The most invasive remedies should be reserved for these officials or institutions which, in the words of Iaccobucci J of the Canadian Supreme Court "have proven themselves unworthy of trust".[145]

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[145] *Little Sisters Book and Art Emporium v Canada (Minister of Justice)* [2000] 2 S.C.R. 1120 para 257

210. Remedies in these instances may include detailed mandatory interdicts enforced by contempt proceedings aimed at deterrence, punishment, and if necessary incapacitating those who are beyond assistance.

E. Applying this analysis to the present case

211. We submit that this matter presents a clear case for structural relief:

211.1 More than six years have now passed since the Court gave its judgment in *Grootboom*. The City has still not complied. There has been a sustained and systemic failure to comply with the requirements of the judgment.

211.2 The consequences of non-compliance are such that it is not advisable to assume that there will now be compliance. People are driven to live in unsafe and unhealthy conditions, and are made homeless, because there is no short-term provision for people in desperate circumstances. This results in profound, multiple and sustained invasions of the most fundamental rights.

211.3 Even if the City now takes steps to carry out its obligations, the consequences of even a good-faith failure to comply effectively will be very severe for the most marginal and vulnerable members of our society. If that transpires, they are not people who are likely to be able to come to

court to vindicate their rights. This is demonstrated by the facts of this case.

212. The precise content of the City's obligations is, inevitably, difficult to determine. It should be left the latitude to make the policy choices which are properly within the ambit of its functions; but it should be required at least to make public what action it intends to take, and when it will take such action. That will enable members of the public to engage in dialogue with it, and to hold it to its undertakings.

213. We therefore submit that at the very least, the City should be ordered to submit periodic reports to the applicants and to the public (we suggest every six months) on:

213.1 what it has done to comply with its obligations;

213.2 what further steps it will take in order to comply with its obligations; and

213.3 when it will take such steps.

214. We submit that this is necessary both because of the history of this case, and also because it is an appropriate element of accountability. Accountability is a founding value of our Constitution:

"[74] Accountability of those exercising public power is one of the founding values of our Constitution and its importance is repeatedly asserted in the Constitution. Section 1 of the Constitution provides as follows:

> *'The Republic of South Africa is one, sovereign, democratic State founded on the following values: …*
>
> *(d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.'*

Accountability is also to be found in ch 3 of the Constitution, in which s 41(1) provides:

> *'All spheres of government and all organs of State within each sphere must - …*
>
> *(c) provide effective, transparent, accountable and coherent government for the Republic as a whole.'*

It is again recognised as one of the key values of public administration in s 195 of the Constitution which provides that:

> *'(1) Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles: ….*
>
> *(f) Public administration must be accountable."*[146]

215. Public reporting enables those who are affected by the exercise of public power to hold those in power accountable for what they do. It is a core element of the democratic process. We submit that a systemic and sustained constitutional breach of the kind revealed in this case requires systemic and sustained

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[146] *Rail Commuters Action Group and others v Transnet Ltd t/a Metrorail and others* 2005 (2) SA 359 (CC) para 74

accountability.

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