

CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 20/04

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA First Applicant

MINISTER OF AGRICULTURE AND LAND AFFAIRS Second Applicant

versus

MODDERKLIP BOERDERY (PTY) LTD Respondent

together with

AGRI SA First Amicus Curiae

NKUZI DEVELOPMENT ASSOCIATION Second Amicus Curiae

COMMUNITY LAW CENTRE, UNIVERSITY
OF THE WESTERN CAPE Third Amicus Curiae

PROGRAMME FOR LAND AND AGRARIAN STUDIES,
UNIVERSITY OF THE WESTERN CAPE Fourth Amicus Curiae

Heard on : 4-5 November 2004

Decided on : 13 May 2005

JUDGMENT

LANGA ACJ:

[1] This is an application for leave to appeal against the decision of the Supreme Court of Appeal,¹ in which, among other things, the state was ordered to compensate Modderklip Boerdery (Pty) Ltd (Modderklip), a private company, for the violation of its property rights under section 25(1)² read with section 7(2)³ of the Constitution, as

¹ *Modderfontein Squatters, Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, amici curiae); President of the Republic of South Africa and Others v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, amici curiae)* 2004 (6) SA 40 (SCA).

² Section 25 reads:

- “(1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.
- (2) Property may be expropriated only in terms of law of general application—
- (a) for a public purpose or in the public interest; and
 - (b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.
- (3) The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including—
- (a) the current use of the property;
 - (b) the history of the acquisition and use of the property;
 - (c) the market value of the property;
 - (d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and
 - (e) the purpose of the expropriation.
- (4) For the purposes of this section—
- (a) the public interest includes the nation’s commitment to land reform, and to reforms to bring about equitable access to all South Africa’s natural resources; and
 - (b) property is not limited to land.
- (5) The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.
- (6) A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.
- (7) A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.
- (8) No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36 (1).
- (9) Parliament must enact the legislation referred to in subsection (6).”

³ Section 7(2) reads:

“The state must respect, protect, promote and fulfil the rights in the Bill of Rights.”

well as the section 26 rights⁴ of the unlawful occupiers of Modderklip’s farm. The Supreme Court of Appeal also held that Modderklip’s equality rights under sections 9(1)⁵ and 9(2)⁶ of the Constitution have been breached.

Factual background

[2] The facts relevant to the issues are set out in the judgment of the Supreme Court of Appeal. It will suffice to repeat a few salient facts.

[3] The farm Modderklip adjoins Daveyton Township in Benoni on the East Rand. During the 1990s, because of overcrowded conditions in the township, a number of its residents began settling on the strip of land between the township and Modderklip’s farm. The strip became known as the Chris Hani informal settlement. The municipality reacted by evicting the residents of the Chris Hani settlement. In May 2000 about 400 of them moved onto Modderklip’s farm where they erected some 50 informal dwellings.

⁴ Section 26 provides:

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

⁵ Section 9(1) reads:

“Everyone is equal before the law and has the right to equal protection and benefit of the law.”

⁶ Section 9(2) provides:

“Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.”

[4] In May 2000, the Benoni City Council alerted Modderklip to the unlawful occupation of its land and gave it notice in terms of section 6(4) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (the Act),⁷ requiring it to institute eviction proceedings against the unlawful occupiers. Modderklip refused to do so and informed the City Council that it considered it to be the Council's responsibility to evict the occupiers. Modderklip stated however that it would cooperate with the Council to the extent necessary should it take steps to evict the occupiers. The Council did not respond to this communication, nor did it take any steps as suggested by Modderklip.

[5] Modderklip then laid charges of trespass against the occupiers. Those convicted were given warnings by the court and released. The unlawful occupiers however simply went back to the farm after their release by the court and resumed their occupation. The local head of the prison then requested both Modderklip and representatives of the South African Police Service (the police) not to proceed with further criminal prosecutions as the prison would be hard-pressed to find space to accommodate convicted unlawful occupiers should they be sentenced to prison terms.

⁷ Section 6(4) reads:

“Eviction at instance of organ of state.—

.....
 (4) An organ of state contemplated in subsection (1) may, before instituting such proceedings, give not less than 14 days' written notice to the owner or person in charge of the land to institute proceedings for the eviction of the unlawful occupier.”

[6] For its part, Modderklip continued to search for ways to resolve the problem. It sought assistance from several organs of state, including the police and officials of the Ekurhuleni Metropolitan Municipality (the municipality) into which the Benoni City Council had become subsumed. No help was forthcoming from any of these organs of state. Modderklip also offered to sell to the municipality the portion of the farm that was unlawfully occupied at a negotiable price of R10 000 per hectare. Although the municipality initially showed some interest in the offer, nothing came of it. In the meantime, the number of unlawful occupiers continued to grow. By October 2000 there were approximately 4000 residential units, occupied by some 18 000 persons.

Proceedings in the Johannesburg High Court

[7] In October 2000, still within a period of 6 months of the initial occupation of its property,⁸ Modderklip instituted proceedings in the Johannesburg High Court⁹ for an eviction order in terms of the Act. The occupiers and the municipality were cited as respondents and the occupiers opposed the application. In April 2001 the High Court granted the eviction order and gave the occupiers two months within which to vacate Modderklip's farm. The court order also authorised the sheriff to enlist the assistance of the police in the eviction or removal of the occupiers and the removal or demolition of their informal dwellings.¹⁰

⁸ Section 4(7) of the Act requires a court dealing with an eviction application instituted after the expiration of 6 months to have regard, among other things, to the availability of alternative accommodation to the occupiers. There is no such requirement where, as in this case, proceedings are instituted within 6 months.

⁹ *Modderklip Boerdery (Pty) Ltd v Modder East Squatters and Another* 2001 (4) SA 385 (W).

¹⁰ *Id* at 396.

[8] The order of the Johannesburg High Court for the eviction of the occupiers was never complied with, nor was an appeal lodged against it at that stage.¹¹ Instead, the number of the occupiers continued to increase. Later estimates put their number at approximately 40 000 of whom roughly a third were alleged to be illegal immigrants. The settlement has streets and the erven are mostly fenced and numbered. It has shops and other modest commercial ventures. There is one tap from which the occupiers draw water and there are no other services except for pit toilets. The community, which is now fairly settled and has a voluntary form of civic structure, calls itself the Gabon Informal Settlement. About 50 hectares of Modderklip's property are now under illegal occupation.¹²

[9] Pursuant to the judgment and order of the Johannesburg High Court, a writ of execution was issued at Modderklip's instance. The sheriff however indicated that she would have to engage a security firm to assist her in carrying out the evictions and therefore insisted on a deposit of R1,8 million to secure the costs of the evictions.¹³ This amount far exceeds the value of the piece of land which is illegally occupied. Modderklip refused to pay this amount. It instead approached the President and the Ministers of Safety and Security, Agriculture and Land Affairs and of Housing, respectively, for assistance but to no avail. On being requested to enforce the eviction

¹¹ A belated application for leave to appeal 18 months later was refused by the Supreme Court of Appeal. See above n 1 at paras 47-9.

¹² In the abortive negotiations between Modderklip and the Council, a figure of 140 hectares was mentioned. At R10 000 per hectare, the purchase price would accordingly have been approximately R1,4 million.

¹³ This amount later increased to R2,2 million.

order, the police refused because they regarded the matter as a private civil dispute between Modderklip and the occupiers. They however indicated that they would be prepared to stand by when the evictions were taking place in order to ensure that there was no breach of the peace. Finding itself with an eviction order that it could not enforce, Modderklip then approached the Pretoria High Court for relief.

Proceedings before the Pretoria High Court

[10] The respondents in the proceedings before the Pretoria High Court¹⁴ were the President of the Republic of South Africa, the Minister of Safety and Security, the Minister of Housing, the Minister of Agriculture and Land Affairs, the National Commissioner of Police and the sheriff for the district of Benoni. Modderklip later joined the municipality as well as the occupiers, who were referred to in that case as the Modder East Squatters, as respondents, but sought no relief against either.

[11] Although the relief sought was wide-ranging, the essence of it was that the state should be ordered to enforce the eviction order. Modderklip asked for a declaration that its section 25(1)¹⁵ and its equality rights under sections 9(1) and (2),¹⁶ as well as the rights of the unlawful occupiers to access to adequate housing (section 26)¹⁷ had been violated. It further contended that the state had failed to ensure the protection of

¹⁴ *Modderklip Boerdery (Edms) Bpk v President van die Republiek van Suid Afrika en Andere* [2003] 1 All SA 465 (T).

¹⁵ Above n 2.

¹⁶ Above nn 5 and 6.

¹⁷ Above n 4.

its property rights and was accordingly in breach of its obligations under section 7(2) of the Constitution.¹⁸ It further sought an order compelling the state to remove the occupiers from its property. In the alternative, Modderklip asked the Court to order the arrest and criminal prosecution of the occupiers for the illegal occupation and for contempt of court for their failure to comply with the eviction order.¹⁹

[12] Modderklip sought to bolster its submissions on the obligation of the state to ensure the enforcement of the eviction order by invoking section 41(1) of the Constitution, which sets out principles for co-operative government and intergovernmental relations;²⁰ section 165(4) which requires organs of state to assist

¹⁸ Above n 3.

¹⁹ A further claim by Modderklip that the conduct of the sheriff in demanding a deposit of R1,8 million be declared unconstitutional, ultra vires or unreasonable and therefore invalid was not pursued at the hearing and nothing further need be said about it.

²⁰ Section 41(1) reads:

“Principles of co-operative government and intergovernmental relations.—

(1) All spheres of government and all organs of state within each sphere must—

- (a) preserve the peace, national unity and the indivisibility of the Republic;
- (b) secure the well-being of the people of the Republic;
- (c) provide effective, transparent, accountable and coherent government for the Republic as a whole;
- (d) be loyal to the Constitution, the Republic and its people;
- (e) respect the constitutional status, institutions, powers and functions of government in the other spheres;
- (f) not assume any power or function except those conferred on them in terms of the Constitution;
- (g) exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere; and
- (h) co-operate with one another in mutual trust and good faith by—
 - (i) fostering friendly relations;
 - (ii) assisting and supporting one another;
 - (iii) informing one another of, and consulting one another on, matters of common interest;
 - (iv) co-ordinating their actions and legislation with one another;
 - (v) adhering to agreed procedures; and
 - (vi) avoiding legal proceedings against one another.”

and protect the courts²¹ and section 205 which sets out the duties and functions of the police.²²

[13] The application by Modderklip was opposed by the police and by the Minister of Agriculture and Land Affairs who did so on behalf of the state. Agri SA, a voluntary association representing the economic, social and safety interests of commercial farmers, obtained leave to submit evidence and to present argument as *amicus curiae*.

[14] In opposing the application, the police contended that the problem was not a police matter but one of land reform. They also pointed to the expense, estimated to be at least R18 million, that would be incurred if the eviction order were to be implemented. In his affidavit articulating the attitude of the police to the application, Assistant Commissioner Van der Westhuizen put his finger on what became one of the central issues of this case. He asked the question where the occupiers, with their possessions, would be accommodated after eviction. He pointed out that if the occupiers were simply thrown onto the street, they would either return to

²¹ Section 165(4) of the Constitution states that:

“Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.”

²² Section 205 of the Constitution provides:

(1) The national police service must be structured to function in the national, provincial and, where appropriate, local spheres of government.

(2) National legislation must establish the powers and functions of the police service and must enable the police service to discharge its responsibilities effectively, taking into account the requirements of the provinces.

(3) The objects of the police service are to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law.”

Modderklip's farm or occupy some other property unlawfully. The Assistant Commissioner also questioned the wisdom of prosecuting the occupiers because it would not be possible to identify those who should be prosecuted for contempt of court, or those upon whom the eviction application or the order had been served. Because of the continuing influx of unlawful occupiers onto Modderklip's farm, it would also be difficult to make a distinction between the unlawful occupiers on the one hand and transient visitors on the other.

[15] The relief requested by Modderklip was, to a substantial extent, granted by the Pretoria High Court. It declared that Modderklip's property rights under section 25(1) of the Constitution²³ had been violated by the illegal occupation and the failure of the occupiers to comply with the eviction order. It also held that the state had breached its obligations in terms of sections 26(1) and (2) of the Constitution,²⁴ read with section 25(5),²⁵ to take reasonable steps within its available resources to realise the right of the occupiers to have access to adequate housing and land. According to the High Court, this failure by the state effectively amounted to the unlawful expropriation of Modderklip's property and also infringed Modderklip's rights to equality – under sections 9(1) and 9(2) of the Constitution – by requiring it to bear the burden of providing accommodation to the occupiers, a function that should have been undertaken by the state.

²³ Above n 2.

²⁴ Above n 4.

²⁵ Above n 2.

[16] The Court held that the provision by the state of land or accommodation to the occupiers would have facilitated compliance with the eviction order. Accordingly, it held that the state's failure to provide such land or accommodation amounted to a breach of its obligation to protect the efficacy of the eviction order as required by section 165(4) of the Constitution.²⁶ It further held that the police had likewise failed to comply with their duty, in terms of section 205(3) of the Constitution²⁷ read with section 14 of the South African Police Services Act 68 of 1995,²⁸ to investigate complaints by Modderklip with a view to the prosecution of the occupiers and protecting Modderklip's property rights. Finally, the Court imposed a structural interdict requiring the state to present a comprehensive plan to the Court and to the other parties indicating the steps it would take to implement the court order. It was against this judgment and order of the Pretoria High Court that the state applied for leave to appeal to the Supreme Court of Appeal.

Proceedings in the Supreme Court of Appeal

[17] In addition to Agri SA, three other non-governmental organisations active in the fields of policy advocacy and support in respect of landless and homeless communities were admitted by the Supreme Court of Appeal as amici curiae when the

²⁶ Above n 21.

²⁷ Above n 22.

²⁸ Section 14 provides:

“Employment of Service in preservation of life, health or property.—
The National or Provincial Commissioner may employ members for service in the preservation of life, health or property.”

matter came before it on appeal. These were the Nkuzi Development Association, the Community Law Centre of the University of the Western Cape and the Programme for Land and Agrarian Studies also of the University of the Western Cape.

[18] The Supreme Court of Appeal agreed in general with the findings of the Pretoria High Court, in particular, that Modderklip's rights to property and the rights of the occupiers to have access to adequate housing had been infringed. It is these findings that were challenged in this Court. The Supreme Court of Appeal however disagreed with the Pretoria High Court's finding that the police had failed to fulfil their obligations to ensure that the eviction order was executed.

[19] The judgment of the Supreme Court of Appeal was premised firstly on its finding that Modderklip's rights entrenched in section 25(1) have been breached by the unlawful occupation of Modderklip's property as well as by the refusal of the occupiers to obey the eviction order. The second leg to this was the Court's endorsement of the finding of the Pretoria High Court that the state had breached its obligation, under sections 26(1) and (2) of the Constitution, to provide the occupiers with land. The provision of land would have enabled Modderklip to vindicate its section 25(1) right, while at the same time enabling the occupiers to comply with the eviction order. The Supreme Court of Appeal held that the state has accordingly failed to protect Modderklip's rights, an obligation that flows from the provisions of

section 25(1) read with section 7(2) of the Constitution.²⁹ It also held that the equality provisions in terms of sections 9(1) and (2) of the Constitution had been infringed.³⁰

[20] Citing *Fose v Minister of Safety and Security*,³¹ and *Minister of Health and Others v Treatment Action Campaign and Others (No 2)*,³² the Supreme Court of Appeal went on to state that the courts “have a duty to mould an order that will provide effective relief to those affected by a constitutional breach.”³³ It pointed out that

“constitutional remedies will differ by circumstance. The only appropriate relief that, in the particular circumstances of the case, would appear to be justified is that of ‘constitutional’ damages, ie damages due to the breach of a constitutionally entrenched right. No other remedy is apparent. Return of the land is not feasible. There is in any event no indication that the land, which was being used for cultivating hay, was otherwise occupied by the lessees or inhabited by anyone else. Ordering the State to pay damages to Modderklip has the advantage that the Gabon occupiers can remain where they are while Modderklip will be recompensed for that which it has lost and the State has gained by not having to provide alternative land. The State may, obviously, expropriate the land, in which event Modderklip will no longer suffer any loss and compensation will not be payable (except for the past use of the land). A declaratory order to this effect ought to do justice to the case. Modderklip will not receive more than what it has lost, the State has already received value for what it has

²⁹ Above n 3.

³⁰ Above nn 5 and 6.

³¹ 1997 (3) SA 786 (CC); 1997 (7) BCLR 851 (CC) at para 94.

³² 2002 (5) SA 721 (CC); 2002 (10) BCLR 1033 (CC) at para 102.

³³ Above n 1 at para 42.

to pay and the immediate social problem is solved while the medium and long term problems can be solved as and when the state can afford it.”³⁴ [footnote omitted]

[21] The relevant part of the order of the Supreme Court of Appeal was accordingly in the following terms:

“(a) The appeal is upheld in part.

(b) Paras 1 to 5 of the order of the Court below are set aside and replaced with an order—

(i) Declaring that the State, by failing to provide land for occupation by the residents of the Gabon Informal Settlement, infringed the rights of Modderklip Boerdery (Pty) Ltd, which are entrenched in ss 7(2), 9(1) and (2), and 25(1), and also the rights of the residents which are entrenched in s 26(1) of the Constitution.

(ii) Declaring that the applicant is entitled to payment of damages by the Department of Agriculture and Land Affairs in respect of the land occupied by the Gabon Informal Settlement.

(iii) Declaring that the residents are entitled to occupy the land until alternative land has been made available to them by the State or the provincial or local authority.

(iv) The damages are to be calculated in terms of s 12(1) of the Expropriation Act 63 of 1975.

(v) If, in relation to the investigation and determination of the damages suffered, the parties are unable to reach agreement regarding the pleadings to be filed, and discovery, inspection, and other matters of procedure relating thereto, leave is granted to any of the parties to make application to the Court in terms of Rule 33(5) for directions.

(c) The third appellant is to pay the costs of appeal of the respondent.”³⁵

³⁴ Above n 1 at para 43.

The state's contentions in this Court

[22] In its application to this Court for leave to appeal against the above order, the state essentially advanced two basic contentions. The first challenged the findings of the Supreme Court of Appeal that Modderklip's right to property under section 25(1), and the occupiers' rights to have access to adequate housing in terms of sections 26(1) and (2) had been breached. The second contention by the state was that Modderklip was not entitled to the relief it claimed because it had neglected to apply for an urgent eviction order timeously, under the provisions of section 5 of the Act.³⁶ It was argued that if the eviction proceedings had been instituted during May 2000, the evictions would have been manageable and affordable. I deal with the two contentions in turn.

³⁵ Above n 1 at para 52(b) and (c).

³⁶ Section 5 reads:

“Urgent proceedings for eviction.—

(1) Notwithstanding the provisions of section 4, the owner or person in charge of land may institute urgent proceedings for the eviction of an unlawful occupier of that land pending the outcome of proceedings for a final order, and the court may grant such an order if it is satisfied that—

- (a) there is a real and imminent danger of substantial injury or damage to any person or property if the unlawful occupier is not forthwith evicted from the land;
- (b) the likely hardship to the owner or any other affected person if an order for eviction is not granted, exceeds the likely hardship to the unlawful occupier against whom the order is sought, if an order for eviction is granted; and
- (c) there is no other effective remedy available.

(2) Before the hearing of the proceedings contemplated in subsection (1), the court must give written and effective notice of the intention of the owner or person in charge to obtain an order for eviction of the unlawful occupier to the unlawful occupier and the municipality in whose area of jurisdiction the land is situated.

(3) The notice of proceedings contemplated in subsection (2) must—

- (a) state that proceedings will be instituted in terms of subsection (1) for an order for the eviction of the unlawful occupier;
- (b) indicate on what date and at what time the court will hear the proceedings;
- (c) set out the grounds for the proposed eviction; and
- (d) state that the unlawful occupier is entitled to appear before the court and defend the case and, where necessary, has the right to apply for legal aid.”

The rights under sections 25(1) and 26(1) and (2) of the Constitution

[23] Dealing with the first contention, the state argued that section 25(1) has application to state conduct only and not to the conduct of private individuals. It contended that Modderklip's property rights had been invaded by private individuals and not by any action of the state. Accordingly, in terms of the state's submission, section 25(1) could not be invoked as the conduct of the unlawful occupiers was not one that was contemplated by that provision of the Constitution. This raised the question of whether or not section 25(1) has horizontal application, that is, whether it can be invoked to govern relations between private parties.

[24] The rights affected were characterised by the state as private law rights for which private and public law remedies were provided by the state. In this, the executive's interest could only be indirect and general. It was argued that in eviction proceedings and in subsequent steps to enforce eviction orders, this obligation or interest was limited to the provision by the state of an infrastructure to "oil the statutory machinery"³⁷ in order to facilitate the execution of court orders. The legislative framework, which includes sections 4 and 5 of the Act, together with mechanisms such as the courts would be part of this infrastructure. The state submitted that once such a statutory framework has been established and placed at the disposal of parties desirous of engaging the mechanisms, it is not for the executive, but for institutions such as the courts to operate the machinery.

³⁷ *De Lange v Smuts NO and Others* 1998 (3) SA 785 (CC); 1998 (7) BCLR 779 (CC) at para 116.

[25] Linked to the finding of the Supreme Court of Appeal that Modderklip's rights to property had been infringed was the conclusion reached by the Court that the rights of the occupiers to access to adequate housing under sections 26(1) and (2) have been breached. This finding by the Supreme Court of Appeal was based on its acceptance that the continued unlawful occupation of Modderklip's property, even after an eviction order had been issued, occurred because the occupiers had nowhere else to go. The Court held, in effect, that the state could have ended this occupation by purchasing the portion of Modderklip's property that was unlawfully occupied, or by providing the occupiers with alternative land on which to settle. The Court accordingly held that the failure by the state to provide assistance to the occupiers in this manner amounted to a breach of their rights under sections 26(1) and (2). It held that this finding "leads ineluctably to the conclusion that the State simultaneously breached its s 25(1) obligations towards Modderklip."³⁸

[26] For purposes of this judgment, and for the reasons that will emerge below, I consider it unnecessary in this case to reach any conclusions (a) on the question whether or not section 25(1) has horizontal application and if so, under what circumstances; and (b) whether Modderklip's section 25(1) right to property and the rights of the unlawful occupiers under sections 26(1) and (2) have been breached and if so, to what extent. It will be convenient, however, to deal at this stage with the second contention advanced by the state in this Court.³⁹

³⁸ Above n 1 at para 28.

³⁹ See para 22 of this judgment.

The state's contention that Modderklip was to blame

[27] The contention that Modderklip was not entitled to the relief it claimed because it had neglected to institute eviction proceedings under the urgent provisions of section 5 of the Act⁴⁰ assumes that Modderklip would probably have succeeded had it instituted such proceedings. It was argued that Modderklip brought its woes upon itself by not taking effective steps to protect its own property, when it could have done so. The state contended that there was no evidence at that time that the occupiers could not be accommodated elsewhere.

[28] In terms of the provisions referred to, the owner or person in charge of land may, when certain factors which are specified in the section are present,⁴¹ institute proceedings for the eviction of an unlawful occupier pending the outcome of proceedings for a final order. The state, quite correctly, accepted that Modderklip's delay in seeking to assert its rights would be material only if it were found to be culpable and unreasonable.⁴²

⁴⁰ Above n 36.

⁴¹ The factors required to be present are that the court must firstly be satisfied that there is a "real and imminent danger of substantial injury or damage to any person or property" if the occupiers were not evicted immediately from the land [section 5(1)(a)]; second, that the likely hardship to the owner or any other person affected by the eviction order exceeds the likely hardship to the unlawful occupier [section 5(1)(b)]; and third, that there is no other effective remedy other than the order under the provisions of section 5 [section 5(1)(c)].

⁴² Above n 1 at para 32.

[29] There is no doubt, as was held by this Court in *Mkontwana v Nelson Mandela Metropolitan Municipality and Another*,⁴³ that owners of property bear the primary responsibility to take reasonable steps to protect their property. The complaint in that case was that a provision which provided for the payment of arrear consumption charges by the owner of property before the transfer of such property could be effected, imposed an unfair burden upon an owner wishing to effect transfer of property. Yacoob J, writing for the majority, stated:

“It is nevertheless the duty of the owner to safeguard the property, to take reasonable steps to ensure that it is not unlawfully occupied and, if it is, to take reasonable steps to ensure the eviction of the occupier. If the owner performs these duties diligently, unlawful occupiers will not, in the ordinary course, remain on the property for a long period. It is ordinarily not the municipality but the owner who has the power to take steps to resolve a problem arising out of the unlawful occupation of her property.”⁴⁴

[30] There are however two answers to the state’s contentions in this respect. The first is that, as the Supreme Court of Appeal found, it was by no means clear that Modderklip would have been able to satisfy all the stringent requirements of section 5 of the Act⁴⁵ if it had invoked those urgent procedures. Modderklip’s case for eviction was not based on any of those factors but simply on the fact that it had been deprived of the enjoyment of its right of ownership of the land in question.

⁴³ *Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bissett and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign and Others v MEC, Local Government and Housing, Gauteng, and Others (Kwazulu-Natal Law Society and Msunduzi Municipality as amici curiae)* 2005 (1) SA 530 (CC); 2005 (2) BCLR 150 (CC).

⁴⁴ Id at para 59 in respect of section 118(1) of the Local Government: Municipal Systems Act 32 of 2000.

⁴⁵ Above n 36.

[31] The second answer is that Modderklip had not been idle nor did it neglect to assert its rights of ownership from the outset. It had immediately engaged the municipality and the other organs of state in search of a humane way out of the impasse. The municipality, for its part, refused to involve itself or to cooperate with Modderklip in the search for solutions. The conduct of the state throughout was consistent with the view articulated on its behalf in this Court that the responsibility for the implementation of the evictions rested solely on Modderklip.

[32] It is to be noted that the provisions of the Act envisage the involvement of the state, in certain circumstances, in evictions from privately owned property. Section 4 requires that the municipality be informed of any action for eviction being undertaken by a property owner. Section 6(1) of the Act provides for the institution of eviction proceedings by a municipality against an unlawful occupier from privately owned land which falls within the jurisdiction of such municipality. Before instituting such proceedings, the municipality may give notice requiring the owner or person in charge of such property to institute eviction proceedings.⁴⁶ In this case, when Modderklip declined to bring eviction proceedings pursuant to the notice,⁴⁷ the municipality could itself have instituted eviction proceedings against the occupiers.⁴⁸ This it did not do. As mentioned earlier in this judgment,⁴⁹ further attempts by Modderklip to get

⁴⁶ Section 6(4) of the Act.

⁴⁷ See para 4 of this judgment.

⁴⁸ Section 6(3)(c) of the Act provides that one of the factors to be considered by the court when proceedings are instituted by the municipality is the availability of alternative accommodation or land.

⁴⁹ See para 6 of this judgment.

assistance from various organs of state failed to bear fruit and the judgment and eviction order granted by the Johannesburg High Court brought no relief to Modderklip because of the circumstances which I have already described.

[33] The failure by the state to take the steps needed to resolve the problem must be seen against the background of its conduct throughout, from the time when the original group of occupiers was evicted by the Benoni City Council from the Chris Hani settlement. The considerations that influenced the state are explained in the affidavits attested to by Mr Mayende, the director-general of the Department of Agriculture and Land Affairs, Mr Chainee, the municipality's executive director of housing and Mr Odendaal, the provincial chief director of housing. Briefly stated, the reason is that the state could not be seen to be rewarding "queue-jumping" to the prejudice of law-abiding citizens who patiently await their turn to benefit from housing and law reform programmes. In the words of Mr Chainee:

"Should the view be spawned that unlawful occupations are compensated with the expedited allocation of land and housing, the entire programme of land reform and housing would collapse."

[34] In similar vein, Mr Odendaal speaks of the need to take into account the "existing priorities and obligation to accommodate people according to their ranking on the waiting list" and decries the practice of "queue-jumping".

[35] The Supreme Court of Appeal however expressed doubt whether the concern was justified on the facts of this case. It found nothing to indicate that the occupiers

acted with an intention to leapfrog others in the queue, but rather that the occupation took place because the occupiers, who mistakenly believed that the land was unoccupied municipal property, had nowhere else to go following their eviction by the Benoni City Council from the Chris Hani settlement.

[36] The problem of homelessness is particularly acute in our society. It is a direct consequence of apartheid urban planning which sought to exclude African people from urban areas, and enforced this vision through policies regulating access to land and housing which meant that far too little land and too few houses were supplied to African people. The painful consequences of these policies are still with us eleven years into our new democracy, despite government's attempts to remedy them. The frustration and helplessness suffered by many who still struggle against heavy odds to meet the challenge merely to survive and to have shelter can never be underestimated. The fact that poverty and homelessness still plague many South Africans is a painful reminder of the chasm that still needs to be bridged before the constitutional ideal to establish a society based on social justice and improved quality of life for all citizens is fully achieved.⁵⁰

[37] The Supreme Court of Appeal further accepted that after their eviction was ordered by the court, the occupiers believed that negotiations were taking place that would have enabled them to remain on Modderklip's farm. The successful conclusion

⁵⁰ See the preamble to the Constitution. See also *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC); 2000 (11) BCLR 1169 (CC) at para 2.

of the negotiations would have meant that the unlawful occupation would have ended because the occupiers would have had a place on which to settle lawfully.

[38] I agree with the finding of the Supreme Court of Appeal that Modderklip cannot be blamed for any delay in instituting eviction proceedings and for the failure to consummate the eviction order. As already mentioned, the costs of the eviction order if implemented by the sheriff far exceed the price at which the land was offered for sale.⁵¹ I agree also that Modderklip’s conduct in its pursuit of an effective solution has been prudent and reasonable in the circumstances. Even if a delay on the part of Modderklip were found to have occurred, it could not, on the facts of this case, be sufficient to deny Modderklip the relief it is entitled to. The contentions of the state in this respect must accordingly fail.

The rule of law and the provisions of section 34 of the Constitution

[39] Section 1(c) of the Constitution refers to the “[s]upremacy of the constitution and the rule of law” as some of the values that are foundational to our constitutional order.⁵² The first aspect that flows from the rule of law is the obligation of the state to provide the necessary mechanisms for citizens to resolve disputes that arise between them. This obligation has its corollary in the right or entitlement of every person to

⁵¹ See para 9 of this judgment.

⁵² Section 1(c) reads:

“The Republic of South Africa is one, sovereign, democratic state
founded on the following values:

.....
(c) Supremacy of the constitution and the rule of law.”

have access to courts or other independent forums provided by the state for the settlement of such disputes. Thus section 34 of the Constitution provides as follows:

“Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.”

[40] In *Chief Lesapo v North West Agricultural Bank and Another*,⁵³ Mokgoro J pointed to some of the consequences that section 34 and the rule of law seek to avoid when she stated that

“[t]he right of access to court is indeed foundational to the stability of an orderly society. It ensures the peaceful, regulated and institutionalised mechanisms to resolve disputes, without resorting to self-help. The right of access to court is a bulwark against vigilantism, and the chaos and anarchy which it causes. Construed in this context of the rule of law and the principle against self-help in particular, access to court is indeed of cardinal importance. As a result, very powerful considerations would be required for its limitation to be reasonable and justifiable.” [footnote omitted]

[41] The mechanisms for the resolution of disputes include the legislative framework, as well as mechanisms and institutions such as the courts and an infrastructure created to facilitate the execution of court orders. In this case, the legislative framework includes the provisions of the Act which are directed at assisting both the landowner and the unlawful occupier. In argument, the state has accepted the existence of this obligation but claimed that it had been fulfilled.

⁵³ 2000 (1) SA 409 (CC); 1999 (12) BCLR 1420 (CC) at para 22.

[42] It is obvious in this case that only one party, the state, holds the key to the solution of Modderklip's problem. There is no possibility of the order of the Johannesburg High Court being carried out in the absence of effective participation by the state. The only question is whether the state is obliged to help in resolving the problem, in other words, whether Modderklip is entitled to any relief from the state.

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

[44] The position of Modderklip, as a victim of the unlawful occupation of its property on a massive scale, is aggravated by the failure to have the eviction order carried out. Its efforts to extricate itself were frustrated by the ineffectiveness of the mechanisms provided by the state to resolve this specific problem because of the sheer magnitude of the invasion and occupation of Modderklip's property. The judgment in the eviction case and the order granted by the Johannesburg High Court did not provide an answer. The eviction order became unenforceable because the occupiers, in their thousands, would have had nowhere to go when the order to evict them was

carried out. The problem was compounded by the inordinate increase in the number of occupiers. Indeed, in the founding affidavit, it is stated that Modderklip found itself in a checkmate position, having followed the correct legal procedures and having obtained a court order, only to find that the organs of state were either unwilling or unable to assist in enforcing it.

[45] It is unreasonable for a private entity such as Modderklip to be forced to bear the burden which should be borne by the state of providing the occupiers with accommodation. Land invasions of this scale are a matter that threatens far more than the private rights of a single property owner. Because of their capacity to be socially inflammatory, they have the potential to have serious implications for stability and public peace. Failure by the state to act in an appropriate manner in the circumstances would mean that Modderklip, and others similarly placed, could not look upon the state and its organs to protect them from invasions of their property. That would be a recipe for anarchy.

[46] The execution of an eviction order does not ordinarily raise problems which cannot be accommodated through the existing mechanisms. They allow for the execution of court orders so that citizens have no justification to take the law into their own hands. Consequently order in society is preserved and inappropriate societal disruptions are prevented. It follows that court orders must be executed in a manner that prevents social upheaval. Otherwise the purpose of the rule of law would be subverted by the very execution process that ought to uphold it.

[47] The circumstances of this case are extraordinary in that it is not possible to rely on mechanisms normally employed to execute eviction orders. This should have been obvious to the state. It was not a case of one or two or even ten evictions where a routine eviction order would have sufficed. To execute this particular court order and evict tens of thousands of people with nowhere to go would cause unimaginable social chaos and misery and untold disruption. In the circumstances of this case, it would also not be consistent with the rule of law.

[48] The question that needs to be answered is whether the state was, in the circumstances, obliged to do more than it has done to satisfy the requirements of the rule of law and fulfil the section 34 rights of Modderklip. I find that it was unreasonable of the state to stand by and do nothing in circumstances where it was impossible for Modderklip to evict the occupiers because of the sheer magnitude of the invasion and the particular circumstances of the occupiers.

[49] The state is under an obligation progressively to ensure access to housing or land for the homeless. I am mindful of the fact that those charged with the provision of housing face immense problems. Confronted by intense competition for scarce resources from people forced to live in the bleakest of circumstances, the situation of local government officials can never be easy. The progressive realisation of access to adequate housing, as promised in the Constitution, requires careful planning and fair procedures made known in advance to those most affected. Orderly and predictable

processes are vital. Land invasions should always be discouraged. At the same time, for the requisite measures to operate in a reasonable manner, they must not be unduly hamstrung so as to exclude all possible adaptation to evolving circumstances. If social reality fails to conform to the best laid plans, reasonable and appropriate responses may be necessary. Such responses should advance the interests at stake and not be unduly disruptive towards other persons. Indeed, any planning which leaves no scope whatsoever for relatively marginal adjustments in the light of evolving reality, may often not be reasonable.

[50] No acceptable reason has been proffered for the state's failure to assist Modderklip. The understandable desire to discourage "queue-jumping" does not explain or justify why Modderklip was left to carry the burden imposed on it to provide accommodation to such a large number of occupiers. No reasons have been given why Modderklip's offer for the state to purchase a portion of Modderklip's farm was not taken up and why no attempt was made to assist Modderklip to extricate itself.

[51] The obligation resting on the state in terms of section 34 of the Constitution was, in the circumstances, to take reasonable steps to ensure that Modderklip was, in the final analysis, provided with effective relief. The state could have expropriated the property in question or provided other land, a course that would have relieved Modderklip from continuing to bear the burden of providing the occupiers with accommodation. The state failed to do anything and accordingly breached

Modderklip's constitutional rights to an effective remedy as required by the rule of law⁵⁴ and entrenched in section 34 of the Constitution.

Justification

[52] Section 36 of the Constitution is not applicable in this case since no law of general application has been invoked in the limitation of Modderklip's rights.

Section 4(12) of the Act

In an alternative argument the second, third and fourth amici argued that the Pretoria High Court should have relied on section 4(12) of the Act. The purpose of section 4(12) is to create an opportunity for the amelioration of the conditions, which could have drastic consequences to the evictees, under which eviction orders are implemented, in order to take into account changing circumstances. The eviction order itself has not been appealed against; all the parties involved are not before us and accordingly, it would not be appropriate at this stage to invoke the provisions of section 4(12).

Appropriate relief

[53] The appropriateness of an award for compensation was challenged by the state on several grounds. First, the state contended that this type of relief was not foreshadowed in Modderklip's application. It stated that this omission precluded it from considering this form of order and placing evidence before the Court why it

⁵⁴ Section 1(c) of the Constitution. See above n 52.

ought not to be granted. In its judgment, the Supreme Court of Appeal points out that this option was put to state counsel during his opening argument and he neither resisted it nor did he “submit that such an order would be incompetent or unfair.”⁵⁵ If the state was taken by surprise, it is not clear to me why it could not have requested time to get instructions to deal with an issue which, undoubtedly, was to have important consequences for it. I agree with the observation of the Supreme Court of Appeal that:

“If a constitutional breach is established, this Court is (as was the Court below) mandated to grant appropriate relief. A claimant in such circumstances should not necessarily be bound to the formulation of the relief originally sought or the manner in which it was presented or argued.”⁵⁶

[54] A number of factors that had to be taken into account in the determination of appropriate relief for purposes of this case were listed by counsel who argued on behalf of the second, third and fourth amici. These are that:

- (a) the occupiers have formed themselves into a settled community and built homes for themselves;
- (b) the occupiers have no other option but to remain on Modderklip’s property;
- (c) their investment into their own community on Modderklip’s farm must be weighed against the financial waste that their eviction would represent;

⁵⁵ Above n 1 at para 44.

⁵⁶ Id at para 18. The Court referred to *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies intervening)* 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC); and *Bannatyne v Bannatyne (Commission for Gender Equality, as amicus curiae)* 2003 (2) SA 363 (CC); 2003 (2) BCLR 111 (CC) in support of this approach.

- (d) the cost of avoiding such a waste would be minimal;
- (e) the state is and has always been involved in matters concerning the unlawful occupation of Modderklip’s farm; the state gave notice to Modderklip, in terms of section 6(4) of the Act, to institute eviction proceedings and Modderklip made various requests for assistance from various organs of state; and
- (f) the responses of the state were consistently negative and unhelpful.

[55] There is no doubt that some of the above factors have relevance in the determination of what constitutes appropriate relief in this case. Of importance also would be the general tone and purpose of legislation enacted to govern evictions, read with the relevant constitutional provisions. The preamble to the Act states, for instance, that no one may be evicted from their home, or have their home demolished without an order of court made after considering all the relevant circumstances.⁵⁷ The underlying philosophy of the Act is described by Sachs J in *Port Elizabeth Municipality v Various Occupiers* as follows:

“[The Act] expressly requires the court to infuse elements of grace and compassion into the formal structures of the law. It is called upon to balance competing interests in a principled way and promote the constitutional vision of a caring society based on good neighbourliness and shared concern.”⁵⁸

⁵⁷ See also section 8(1) of the Act.

⁵⁸ *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC); 2004 (12) BCLR 1268 (CC) at para 37.

This echoes the provisions of section 26(3) of the Constitution⁵⁹ which then goes on to proscribe legislation that permits arbitrary evictions. This is not surprising in a constitutional order committed to the establishment of a society that is not only based on democratic values and fundamental human rights, but also on social justice.⁶⁰

[56] Factors (a) and (b) above are in line with the remarks in *Port Elizabeth Municipality v Various Occupiers*⁶¹ where it was stated that

“a court should be reluctant to grant an eviction against relatively settled occupiers unless it is satisfied that a reasonable alternative is available, even if only as an interim measure pending ultimate access to housing in the formal housing programme.” [footnote omitted]

[57] The type of relief given by the Supreme Court of Appeal was foreshadowed in *Fose*,⁶² where Ackermann J stated:

“[I]t seems to me that there is no reason in principle why ‘appropriate relief’ should not include an award of damages, where such an award is necessary to protect and enforce chap 3 rights. Such awards are made to compensate persons who have suffered loss as a result of the breach of a statutory right if, on a proper construction of the statute in question, it was the Legislature's intention that such damages should be payable, and it would be strange if damages could not be claimed for, at least, loss occasioned by the breach of a right vested in the claimant by the supreme law. When it would be appropriate to do so, and what the measure of damages should be will

⁵⁹ Above n 4.

⁶⁰ See the preamble to the Constitution.

⁶¹ Above n 58 at para 28.

⁶² Above n 31 at para 60.

depend on the circumstances of each case and the particular right which has been infringed.” [footnotes omitted]

This comment is also relevant to this case where we are concerned with compensation in terms of section 12(1) of the Expropriation Act 63 of 1975.

[58] Appropriate relief must necessarily be effective. Again as pointed out in *Fose*,⁶³

“without effective remedies for breach [of rights entrenched in the Constitution], the values underlying and the right entrenched in the Constitution cannot properly be upheld or enhanced. Particularly in a country where so few have the means to enforce their rights through the courts, it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated. The courts have a particular responsibility in this regard and are obliged to ‘forge new tools’ and shape innovative remedies, if needs be, to achieve this goal.”

[59] In deciding that the type of compensation awarded to Modderklip was the most appropriate remedy in the circumstances, the Supreme Court of Appeal referred to a number of advantages which other forms of relief did not have. It compensates Modderklip for the unlawful occupation of its property in violation of its rights; it ensures the unlawful occupiers will continue to have accommodation until suitable alternatives are found and it relieves the state of the urgent task of having to find such alternatives. The difficulty of quantifying the compensation is met by resorting to the

⁶³ Id at para 69.

mechanism provided in section 12 of the Expropriation Act, thus obviating the need for Modderklip to institute new proceedings.

[60] The state however suggested that a declaratory order would have been sufficient to vindicate Modderklip's rights. It is true that a declaratory order would go some way towards assisting Modderklip by way of clarifying its rights. It could even be open to Modderklip to bring a separate delictual action against the state. What Modderklip required at that stage, however, having regard to the long history of its efforts to relieve its property from unlawful occupation, was something more effective than the suggested clarification of its rights.

[61] The question however remains whether, and under what circumstances, compensation ought to be awarded as the Supreme Court of Appeal has done. Before venturing to answer the question, it will be convenient to consider whether another alternative that was suggested, that is, ordering the state to expropriate a portion of Modderklip's farm, would be more appropriate as relief.

An order for the state to expropriate

[62] The propriety of an order by this Court that the state should expropriate Modderklip's property, instead of an award for compensation, was debated during the hearing. Strictly speaking, what is at issue is not the compulsory acquisition of property by the state irrespective of the will of the owner. In the present matter, the owner has indicated willingness, indeed eagerness, to sell the land to the state. By

awarding compensation on the basis of a fair market value, the Supreme Court of Appeal indirectly set out to achieve purchase by the state.

[63] It was suggested with some force that ordering the state to expropriate land from Modderklip would amount to this Court not only ordering the state to fulfil its obligations but also telling it how to do so and that this would be a breach of the rule on separation of powers. The Expropriation Act, in particular section 2 thereof, seems to reserve the decision to expropriate for the Minister of Public Works.

[64] It is not necessary to decide, in this case, whether or not a court can order the expropriation of property. We have no information whether or not the state has other land available to it which it could use to relocate the occupiers and at the same time enable its obligations to Modderklip to be fulfilled. That possibility cannot be ruled out. If indeed such alternative land is available, it would not be just and equitable to order the state to acquire specific land on Modderklip's farm.

[65] I consider that in all the circumstances the award of compensation made by the Supreme Court of Appeal was the most appropriate remedy for this case. It follows that should the state decide to expropriate the land on Modderklip's farm, the sum to be awarded as compensation will be set off against compensation to be given for the expropriation.

Conclusion

[66] I have found that the relief ordered by the Supreme Court of Appeal is the most appropriate in the circumstances. This is notwithstanding the fact that this judgment is based on a different basis to that of the Supreme Court of Appeal. Although the state's appeal to this Court has not been successful, it is nevertheless necessary, for the sake of clarity, to set aside the order of the Supreme Court of Appeal and to replace it with the order set out below.

[67] The state has not been successful in this Court and it is accordingly appropriate to make a costs order against it and in favour of Modderklip. In the Supreme Court of Appeal, costs were also awarded to Modderklip, the successful party in that Court. The Court also refused to interfere with the order for costs made by the Pretoria High Court and which is contained in paragraphs 6 and 7 of the High Court's order.⁶⁴ Paragraph 7 of that order awarded certain costs to Agri SA, which was admitted as *amicus curiae* in the High Court proceedings, subsequently also in the Supreme Court of Appeal. It was admitted in this Court as the first *amicus curiae*. Even though it is unusual and indeed it will rarely be appropriate for costs to be awarded in favour of an *amicus curiae*, the state expressly stated in this Court that it was not seeking to

⁶⁴ Above n 14. Paragraphs 6 and 7 of the order read:

“6. Die 1ste, 2de, 3de en 5de respondente word gelas om gesamentlik en afsonderlik die applikant se koste te betaal met betrekking tot die aansoek om deurhaling sowel as die hoofaansoek, insluitende die koste van twee advokate in albei gevalle. Dit word noteer dat die betoog ten opsigte van die aansoek om deurhaling sowat 'n half dag in beslag geneem het en die betoog in die hofaansoek sowat drie en 'n half dae.

7. Die 1ste, 2de, 3de en 5de respondente word gelas om gesamentlik en afsonderlik die *amicus curiae* se koste te betaal met betrekking tot die aansoek om deurhaling, insluitend die koste van twee advokate.”

overturn the order of the High Court awarding those costs to Agri SA. There is accordingly no basis for this Court to interfere with those costs orders.

Order

[68] The following order is made:

1. The application by the state for leave to appeal is granted;
2. Save to the extent indicated in paragraph (3) below, the appeal against the judgment of the Supreme Court of Appeal is dismissed;
3. Save for the costs order made in sub-paragraph (c) of the order of the Supreme Court of Appeal, the order of that Court is set aside and replaced with the following order:

(a) Declaring that the state, by failing to provide an appropriate mechanism to give effect to the eviction order of the Johannesburg High Court, infringed the right of Modderklip Boerdery (Pty) Ltd which is entrenched in section 34 read with section 1(c) of the Constitution.

(b) Declaring that Modderklip Boerdery (Pty) Ltd is entitled to payment of compensation by the Department of Agriculture and Land Affairs in respect of the land occupied by the Gabon Informal Settlement from 31 May 2000.

(c) Declaring that the residents are entitled to occupy the land until alternative land has been made available to them by the state or the provincial or local authority.

(d) The compensation is to be calculated in terms of section 12(1) of the Expropriation Act 63 of 1975.

(e) If, in relation to the investigation and determination of the compensation to be awarded, the parties are unable to reach agreement regarding the pleadings to be filed, and discovery, inspection, and other matters of procedure relating thereto, leave is granted to any of the parties to make application to a High Court having jurisdiction in terms of Rule 33(5) of the Uniform Rules of the High Court⁶⁵ for directions.

4. The Minister of Agriculture and Land Affairs (second applicant) is to pay the costs of the appeal of the respondent, including the costs of two counsel.

Madala J, Mokgoro J, Moseneke J, Ngcobo J, O'Regan J, Sachs J, Skweyiya J, Van der Westhuizen J and Yacoob J concur in the judgment of Langa ACJ.

⁶⁵ Rule 33(5) of the Uniform Rules of the High Court provides that:

“When giving its decision upon any question in terms of this rule the court may give such judgment as may upon such decision be appropriate and may give any direction with regard to the hearing of any other issues in the proceeding which may be necessary for the final disposal thereof.”

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