IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CC no. 24/07

SCA no.:253/2006

In the matter between –

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

FIRST RESPONDENT'S WRITTEN ARGUMENT

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INTRODUCTION

1. The first respondent ("the City") is the local authority for South Africa's largest city, reconstituted following 1994. The essence of what Kriegler J has described as the magnitude of that transition[1] appears from the applicant's ("the occupiers")[2] heads of argument, outlining the legislative control of urban housing and freedom of movement under apartheid.

2. This case highlights an unfortunate legal conflict. On the one hand the City has specific duties, rooted in statutes supported (we submit) by the Constitution, relating to the health and safety of its residents. On the other, residents have socio-economic rights, and rights to administrative justice, affected by what the City does in taking steps directed at the health and safety not only of the occupiers, but others whose lives are at risk.

3. Appeals lie only against orders.[3] It is not disputed that the application for leave to appeal raises constitutional questions. The issue now between the parties is whether the occupiers, not challenging paragraph

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[1] **Executive Council, Western Cape Legislature v President of the RSA 1995 (4) SA 877 (CC) at para [164].**

[2] The applicant will be referred to as "the occupiers". The applicant purports to act for the occupiers of the two buildings that were the subject of the eviction applications that were brought to the Supreme Court of Appeal, and for a class of people in similar circumstances to those of the occupiers. This class is defined in the occupiers' heads as "approximately 67 000 people who live in so-called 'bad buildings' in the inner city of Johannesburg and who stand to be displaced by the first respondent's Inner City Regeneration Strategy" (Applicant Heads p1, par.1)

[3] **Administrator, Cape v Nshwaqela 1990 (1) SA 705 (A) at 715D-F.**

2.1 of the SCA order, are correct in contending that the SCA otherwise was wrong to make the orders it did.

The factual background

4. Every year, particularly in winter, people die in South Africa as a result of living in buildings which are fire hazards. A fire in a high-rise urban building where the means of escape have been blocked or obstructed often results in death or mutilation of many more than those in the immediate living unit in which the fire started.[4] This is so for all South Africa's urban areas: this case clearly has enormous implications.

5. This case arises from the circumstances in two buildings in the Johannesburg inner city. The first is the multi-storey San Jose building. The second is the double-storey Zinns building. We shall refer to the collective applicant as "the occupiers" and to the first respondent as "the City".

6. The San Jose building was inspected on 20 August 2003 by a multi-disciplinary task team comprising officials of various departments of the City comprising one member from the Town Planning and Building Control Department, a building control inspector from the Town planning Department and an official of the Fire and Emergency Services

[4] See the exposition in the founding papers in the San Jose application, in particular pars. 110 to 113, R1, p36-37. [References to the record will employ the convention "R1, p36:10" means Record, Volume 1, page 36, line 10.]

Department.[5] The founding affidavit contains a detailed description of the conditions in the building.[6] The inspection was repeated on 31 March 2004 when it was found that the conditions of the building were substantially the same as at the previous inspection.[7] The summary of the task team's findings reads as follows:

> ***"The building comprises multiple stories. It is apparent that the fire safety regime within the building is completely inadequate: there are no fire extinguishers and the hose reels and hydrants are unusable. There is inadequate escape signage and there are no emergency lights. There are also no fire doors to slow the spread of a fire. Similarly, smoke and draught doors have been broken. The lack of fire safety measures is exacerbated by unsafe electrical wiring. The Applicant fears that the building is a potential death-trap: fires occur even without illegal or poorly maintained electrical conditions and in the event of a fire, particularly late at night when people are sleeping, the possibility of substantial loss of life is high. The emergency breathing apparatus employed by fire fighters permits a maximum usage of 30 minutes. Getting to the upper floors of a building of this size would take all of the 30 minutes. Accordingly in the event of a fire and if adequate escape mechanisms are not available, the prospect of rescue is zero… waste water flows freely and stagnant water is evident in the building. Waste water of this nature flowing through a building is extremely damaging to the structure of the building and has the effect of leeching lime from the concrete structure of the building. Furthermore, standing water provides a breading grounding for disease."***[8]

[5] R1, p 34: 14-20
[6] R1, p 34: 22-p 37: 15
[7] R1, p37: 15-18
[8] R1, p38: 1-24

7. In the answering affidavit these conditions are not denied. The occupiers only point out that the property has been ***"in the condition referred to by the applicant in its founding affidavit for many years."***[9]

8. The Zinns building was inspected by a multi-disciplinary task team on 28 January 2003. Its observations are recorded as follows:

> ***"(That) the property … has been gutted by fire to the extent that the first floor has no roof. They observed a number of individuals on the property who appeared to reside on the property and who advised that they did indeed reside on the ground floor of the building. The officials observed that there is no provision of water or electricity on the property, no provision for ventilation or fire fighting equipment and that large quantities of combustible material were present in the area used by the occupiers."***[10]

9. The task team also found that the extensive previous fire damage created peculiar dangers of recurrence and that open fires were made for the purpose of cooking and lighting.

10. The condition of the Zinns building is also substantially admitted. It is denied that there is no ventilation and it is denied that the fires are made for lighting purposes.[11]

11. The court of first instance, after an inspection of the properties, referred to the buildings as "unsafe",[12] entailing "fire and health risks" of such an

[9] R2, p 108: 1-5
[10] R12, p 863:15 – p 864: 5
[11] R12, p884: 17- 885: 13

order as to place the occupiers in an "emergency situation".[13] The SCA described the recorded condition of the buildings (as found at the inspection by the High Court) as "***appalling, abysmal and at times disgraceful…the occupants were in an emergency situation…there existed fire and health hazards***".[14]

The legal proceedings

12. The City, acting under health and safety laws and its constitutional and public obligations, brought applications to evict various occupiers of buildings determined by the City to be unsafe – where the evacuation of the building was determined to be necessary for the sake of safety.

13. The eviction applications were opposed on various grounds, and the occupiers brought various counter-applications. The counter-applications included a declarator about the alleged failure by the City sufficiently, within the available resources of the City, to have brought about the progressive realisation of the right of the occupiers to access to adequate housing. This was then tied to an application for a mandamus that the City take steps to bring about such progressive realisation and an interdict against any eviction of the occupiers until adequate alternative accommodation was provided for to the occupiers.

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[12] Paragraph [57], R15, p1068:24.
[13] Paragraph [18], R15, p1047:15,19.
[14] R 17, p 67, para [2] (SCA judgment).

14. Central to the case presented by the occupiers were two basic logical premises –

14.1 the City's alleged failure sufficiently to have complied with its obligations progressively to realise, within its available resources, the occupiers' right to access to adequate housing conferred an immunity upon the occupiers against eviction (whether on the basis of the health and safety laws or any other basis) for as long as such failure endured; and

14.2 the adequate alternative accommodation to which the occupiers were entitled had to be within the inner city, within close proximity to where the applicants wished to obtain employment opportunities.

15. It was these two basic premises that lay at the heart of what the City resisted, and represented the basis of its appeal to the Supreme Court of Appeal ('SCA'). They formed the foundation of the orders and reasoning at first instance. These two premises are also the main focus of the attention and concern given to the matter by the SCA. Both of these premises, whilst still (we shall show) essential to the logic of the occupiers' written argument, are, to varying degrees now disavowed by the occupiers.

The premises for what the occupiers seek

16. The eviction applications were dismissed at first instance, and an interdict, declarator and mandamus issued on terms that left little doubt of their import and logical implication. We submit those orders, and what the occupiers ask this court now to restore, entail these drastic propositions:

16.1 the City has failed, to an unspecified degree and measured against an unspecified standard, sufficiently to achieve the progressive realisation, within its available resources, of the right of the occupiers and others like them to access to adequate housing within the inner city;

16.2 the City must set about remedying this failure;

16.3 evictions for health and safety reasons are unlawful until such failure is sufficiently addressed (to an unspecified standard).

17. There is only one specific standard that is suggested in this regard. It is a standard that is at no stage sought in any way to be founded on any analysis of any budgetary allocation or any evidence of practical achievability. It is that the realisation of the right in question, for those currently voicing the demand, (the occupiers and 67 000 others in their

situation in Johannesburg), namely the right to access to adequate housing, must occur within the inner city, proximate to the employment opportunities offered by such location, and that before this is attained, evictions on health and safety grounds are to be restrained by interdict.

18. On the one hand, there is now in this court an ostensible disavowal of any demand to be housed in the inner city. This disavowal extends to charging[15] the (unanimous) SCA with misstating the insistence by the occupiers at all stages - to the last in argument - of inner city housing as the only means by which their constitutional rights may be adequately (and hence lawfully) met.[16]

19. On the other hand, there is the constant focus on the integral extent to which location, and hence proximity to the opportunities of the inner city, form part and parcel of the right being asserted. This focus was undeniably present in the answering affidavits filed at first instance (which were at pains to point out why relocation to the periphery of the City would be unacceptable), in the way such case was understood at first instance, in the reasoning and orders of the court at first instance, in the attitude adopted by the occupiers in the SCA, and in the understanding of such attitude expressly stated by the (unanimous) SCA. It is also undeniably central to the reasoning of the written argument

[15] This is done tentatively in the affidavit in the application for leave to appeal at pars. 20.8 to 20.11 (R17, p1196) and less tentatively in the heads of argument par. 8, p3.

[16] "They ask for nothing less than that the City should provide adequate housing for the poor in the inner city and they seek structural relief only if it is directed towards that end. Even at the end of argument in the present appeal the respondents remained steadfast in that stance." Paragraph [74], R17, P1278.

filed in this Court, which simultaneously disavows any claim to (any) accommodation in the inner city "as of right".[17]

20. This simultaneous assertion, of the content of a constitutional right as necessarily entailing proximity to the inner city, and of a disavowal of asserting such proximity "as of right", is echoed in the framing of the relief insisted upon, not as an entitlement to any particular locality, nor an obligation with respect to any particular locality, but as having locality feature as one of the aspects that must be covered in consultation with the occupiers.[18] Either the occupiers have such a right, or they do not. If proximity to the inner city is integral to the right to access to adequate housing, and this right is being asserted, then such proximity is being claimed "as of right".[19]

21. The hedging leaves the City and this court in a difficult position in dealing with the application for leave to appeal. On the one hand, there is

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[17] The contradiction is best illustrated by the juxtaposition of paragraphs 136 and 137 in the Applicant's Heads of Argument, p68.

[18] See the reiteration of this suggested order in the Heads, par. 4.c.ii (p126), and the point raised by the City in opposing leave to appeal (AA par. 13, R17, p1290) that there is nothing in the order actually granted by the SCA that is inconsistent with raising such matter in consultation: SCA order 2.3 [there is no 2.2]: "In order to implement the foregoing, the City of Johannesburg must open within seven days a register of persons who qualify and the respondents' [occupiers'] attorneys of record shall provide the City with a list of those respondents who wish to avail themselves of this order and the City shall after consultation (if requested by any respondent) determine the location of the alternative accommodation" (R17; p1280).

[19] Compare the warning by Ackermann J with respect to assertions about conduct that is alleged to be "constitutionally problematic" whilst not necessarily going far enough to amount to constitutional violations:

> "The process of determining whether a statutory provision is constitutionally invalid, involving as it does a two-stage process of determining whether there has been a limitation of a chap 2 right and, if so, whether such limitation is justified under s36, is inherently a complex process. To introduce concepts relating to a provision being constitutionally 'fragile' or 'problematic', but still falling short of constitutional invalidity, is, in my view, to make of constitutional jurisprudence something unacceptably abstract and over-subtle."

S v Dzukuda; S v Tshilo 2000 (4) SA 1078 (CC), par. [28].

an attempt to assert that the right to access to adequate housing entails, as an integral component, an element of proximity entitlement, and that means here living within the inner city. On the other hand, there is no express demand for any variation of the orders granted by the SCA to achieve this – only the demand that the consultation decreed by the SCA must also cover this topic.

22. The other basic premise identified above, namely that a failure to achieve sufficient realisation of the right to adequate housing translates into an immunity from eviction for safety reasons, falls subject to similar hedging.

23. The occupiers steadfastly insist that failure on the part of the State to comply sufficiently with its obligations progressively to realise the right to adequate housing must be decisive (at least in the evictions at issue) to the State's ability to secure evictions based on health and safety laws. Indeed, they argue that it is "**mutually contradictory**" to hold that "**the powers of the City to order the vacation of unsafe buildings are not dependent upon its being able to offer alternative accommodation to the occupants**" and then to hold that "**the eviction of the occupants triggers a constitutional obligation on the City to provide at least minimum shelter to those occupants who have no access to alternative housing**".[20]

[20] Applicant's Heads p68-69, par. 138.

24. Yet, at the same time, the occupiers state emphatically that it was "**never their case**" that "**until such time as the City has complied with its positive obligations towards all in the position of the occupants, the occupants must remain indefinitely in the dangerous buildings**."[21]

The hard questions

25. Hard questions arise:

25.1 Were it to be found that the City has been shown on the evidence to have failed sufficiently to achieve within its available resources the progressive realisation of the right of access to adequate housing for some people, does this confer on these people, or others like them, or on all residents within City limits, an immunity from being evicted from unsafe or dangerous buildings?

25.2 If an immunity is conferred in some cases, what precise degree of failure, with respect to what precise relationship between the failure and the available resources, is required before such an immunity arises?

[21] Application for leave to Appeal; RA par. 8, R17; p1296.

25.3 If no immunity is conferred by such identified failure, how precisely is the power to act under health and safety laws in individual identified instances of dangerous living curtailed by such failure? How much failure must there be, for how long, with respect to which individuals, as to how much misallocated money, for this to translate in any particular case into a decisive reason to refuse to allow the City to act under its health and safety laws?

25.4 Is the City not entitled to determine that danger to life and health in identified instances requires the evacuation of a building irrespective of any other considerations?

25.5 Do the right to access to adequate housing and the obligation on the City within its available resources progressively to realise this right entail a right to any form of housing within the inner city? When, if ever, is this right sufficiently pressing to translate into an immunity from being evicted from dangerous buildings? Who precisely is entitled to the benefit of this right?

25.6 If such a right is entailed, is it a claim-right that may be enforced by any particular individual at any particular time against any particular City?

25.7 As to the assertion that the City has failed sufficiently within its available resources progressively to realise the right to access to adequate housing, what are alleged to be those available resources? How precisely is it asserted which of those available resources should have been applied differently, at the cost of which precise alternative allocation? Which standard of compliance would have been sufficient not to have constituted a violation, with respect to these particular occupiers, and then with respect to the other 67 000 said to be like them? How exactly does all of this relate to the fate of the immediate occupiers and the order granted by the SCA with respect to them?

PRECIS OF CITY ARGUMENT

26. The City contends that the SCA recognised the problems raised by the hard questions and approached those problems properly. The argument for the occupiers seeks to fudge the hard questions. The City submits that the dispute, and consequential position of the occupiers, have been properly determined by the mandamus of the SCA, the main operative part of which the occupiers are not seeking to appeal.[22]

[22] Order 2.1 (R17, p1280) is the order that is exempted from the application for leave to appeal: *"The City of Johannesburg is ordered to offer and provide to those respondents who are evicted and are desperately in need of housing assistance with relocation to a temporary settlement area as described in Chapter 12 of the National Housing Code (April 2004) within its municipal area. The temporary accommodation is to consist of at least the following elements: a place where they may live secure against eviction; a structure that is waterproof and secure against the elements; and with access to*

27. As to the case sought to be made out for a failure to satisfy second generation rights to a satisfactory standard, the City asserts that no proper case was sought to be made out in this regard. The most obvious absence from any such case for a violation was any assertion, let alone evidence, of the available resources that ought to have been allocated differently, as the SCA recognised.

28. The City is not appealing the orders. (As appears from the application to introduce new evidence, the City has sought to act without delay on the SCA's order; its offer of shelter has however been refused on behalf of the occupiers, because it is not within the inner city)..

29. What follows is a summary of the City's case, which also introduces the structure of the reasoning to follow in this submission. The exposition will then be elaborated upon in the sections that follow.

30. The City has constitutional obligations to seek to eradicate instances of dangerous living within its area of jurisdiction. It is the organ of state, in the municipal sphere, clothed with this function, which includes the function of making the determination whether safety requires that certain buildings be evacuated. That function entails administrative action. It is

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basic sanitation, water and refuse services." Order 2.3 is sought to be appealed, ostensibly on the basis merely that the consultation that must take place must take into account certain specified factors: *"In order to implement the foregoing, the City of Johannesburg must open within seven days a register of persons who qualify and the respondents' [occupiers'] attorneys of record shall provide the City with a list of those respondents who wish to avail themselves of this order and the City shall after consultation (if requested by any respondent) determine the location of the alternative accommodation."*

a difficult function. It is not subject to appeal, but it is subject to judicial review and, as an exercise of public power, the Constitution, with its test of rationality.[23]

31. The City employs its powers under the health and safety laws to identify and eradicate instances where the evacuation of a building is "necessary for the safety of any person".

32. In doing so, it is seeking to act as the administrator to which the courts owe the margin of appreciation, or deference, previously identified by this court.[24] It decided, however, to interpret and exercise its statutory powers congruent with section 26(3) of the Constitution, which requires any eviction to occur only by means of court orders. It therefore affords the affected persons a "pre-review" of the administrative conduct intended to be applied to them before such conduct has the intended effect on them.

33. To this application the High Court had to apply a review standard (or residual constitutional test of rationality), and not any free-floating judicial "discretion", nor its own assessment of the desirability of the evacuation of the buildings (as if it sat on appeal from the Council). The fact that it is being asked to pre-review the administrative conduct before it takes effect can hardly serve as a basis for employing a lesser degree of deference.

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[23] **Ex parte President; in re Pharmaceutical Manufacturers at para [85].**
[24] See especially now the citations and discussion by **Hoexter Administrative Law (2007) 138 et seq**.

34. Hence the importation of a "discretion" into the court's assessment, such as conferred upon a court by the Prevention of Illegal Eviction and Unlawful Occupation of Land Act (PIE),[25] is a fundamental misconstruction of the proper approach.

35. The applicants now say that they are *not* asserting the existence of a "discretion" when it comes to the proper approach of the court in the event that PIE were held not to apply.[26] Yet such a discretion, based on the jurisprudence of PIE - despite the absence of a finding that PIE applied - was the lynchpin of the reasoning of the court at first instance.[27] The occupiers still assert that PIE was, after all, applicable to the evictions in question.

36. This is incorrect. PIE is aimed at a very particular constitutional and ideological tension, that between the right and will of an owner of land, on the one hand, and the plight of those who occupy his or her land against his or her will, on the other hand. It is not applicable to the exercise by the City of its powers to eradicate instances of danger in circumstances where the question whether the person in danger has title or lacks title, and whether he or she is present with or without the consent of the owner, are entirely irrelevant.

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[25] Act 19 of 1998.
[26] Applicant's Heads par. 180, p88.
[27] Judgment par. [29], R15, p1053:3-6.

37. In the instant case, the City, acting upon expert advice, determined that it was necessary for the safety of people that the buildings in issue be evacuated. The City therefore pertinently identified specific instances of a horror that it had the obligation to eradicate. It could rely only on the expert advice it did rely upon that these buildings were time-bombs. The length of the fuse of necessity was uncertain.. But the existence of the time-bomb was identified, by those whose task it is to do so.

38. The fire and disease hazards are real. Nobody seriously disputes them. The court ought to have asked itself, employing the appropriate review standard, whether the determination that it was necessary for the buildings to be evacuated was lawful – the merits of which may be tested on the basis of rationality.

39. It cannot seriously be suggested that it was irrational to determine that these buildings were unsafe. No attack of that kind featured in the resistance to the evictions. No attack of that kind featured at all in the judgment at first instance. In argument the occupiers now suggest various forms of irrationality based on a ground that was advanced in the applications, namely an alleged ulterior purpose essentially amounting to an allegation of selective enforcement.

40. The fact remains – if it were irrational to determine that these instances set out above were unsafe, then the City could never succeed in any

determination that any building is unsafe. Waiting for the fire to occur before acting is not the solution.

41. The various grounds for review suggested by the occupiers were, we submit, unsound.

42. The charge of ulterior purpose ignores the fact that a legitimate and lawful purpose may lawfully form part of a greater, equally legitimate and lawful strategy without falling prey to reviewability for "**ulterior purpose**". The related charge of selective enforcement is oblivious to the fact that selection is critical when scarce resources must be applied to a problem that is larger than the reach of those resources. It amounts to an argument that, because you cannot achieve everything everywhere, you are not allowed to achieve something somewhere.

43. The charge that there was no heed paid to the audi alteram partem principle ignored the fact that the City approached a court to ask that it be allowed to exercise its power and gave full opportunity, in the form of a pre-review, for all bases of resistance to be raised in a meaningful hearing before the power was to be exercised. That, in the circumstances, was a meaningful and appropriate method of paying heed to the principle. This practice has now evolved, to include a preliminary application to court to serve a notice to consult even before the court is approached for leave to exercise the powers.

44. The City's intended exercise of constitutional obligations through administrative conduct was therefore not subject to cogent objection and ought to have been allowed.

45. Section 26 of the Constitution did not create a basis for altering this conclusion.

46. First, it is important to analyse the interplay between and among the various subsections of section 26. It is important to afford the proper scope to the "negative" component of section 26(1) in particular to avoid thereby to create an implied prohibition against evictions in that subsection that is more onerous than the express qualified prohibition against arbitrary evictions without court process stipulated in the subsection that actually regulated the prohibition, namely 26(3). Here, is it particularly important to scrutinise the untenable suggestion that a right to access to adequate housing is violated or detracted from when the state acts to remove instances of dangerously inadequate housing.

47. Then it is important to consider that the court assessment of "**relevant circumstances**" required by section 26(3) relates to the legally relevant circumstances, which in the instant case entail applying the review standard exhaustively regulated by the Promotion of Administrative Justice Act 2 of 2000 (PAJA). The fact that constitutional rights may be affected, as pointed out above, does not lift the assessment out of the

review paradigm or alter the appropriate balance demanded by the separation of powers.

48. Then the proper role that may be played by section 26(2) in the assessment of the evictions is to be considered. Here it is vital to recognise the normative confusion that is entailed by translating a progressive, forward-looking, collective and positive right (the corollary duty of which is enshrined in section 26(2)) into an individual, specific, instantaneous immunity. This normative confusion is necessary for the proposition that a degree of failure to fulfil section 26(2) duties may render unlawful the exercise of powers to evacuate buildings that would, absent such failure, otherwise be lawful.

49. The argument that certain sections of the NBRA are unconstitutional for decreeing, or making possible, "arbitrary" evictions, is then considered. Such an argument seeks to construct a monster in order to kill it, and in the process would do away with the essential need for a power to be placed in the hands of the administration to make assessments of safety and to address them, subject to the court's powers of review.

50. Finally, the "positive" case of an alleged violation of section 26(2), with an order that it be rectified, is assessed. As alluded to above, the fundamental problem with this challenge is that it is brought without any foundation with respect to an essential component of the right being asserted, namely that what was done was not sufficient "**within the**

available resources" of the City. The case demands an open-ended inquiry into the precise manner in which the City has gone about applying its available resources without even attempting to make out any case that there has been such a degree of deviation, with the available resources, from a proper allocation of such resources, as to justify the interference of the court in the enforcement of second generation rights. This is not the appropriate way of enforcing second-generation rights.

51. We now elaborate upon the above submissions where appropriate, and in the order of the précis set out above.

THE CITY'S CONSTITUTIONAL OBJECTS AND ITS DUTIES WITH REGARD TO HEALTH AND SAFETY

52. Section 152(1)(d) of the Constitution declares one of the objects of local government to be "**to promote a safe and healthy environment**."

53. This is an object that a municipality must strive, within its financial and administrative capacity, to achieve.[28]

54. Schedule 4, Part B of the Constitution lists *"Building regulations"*, *"Firefighting services"* and *"Municipal health services"* as local government matters over which a municipality has executive authority and the right to administer, *inter alia*, by making by-laws.[29]

[28] Section 152(2) of the Constitution.
[29] Section 156(1)(a) of the Constitution.

55. The City's Standard By-laws Relating to Fire Brigade Services[30] and section 20 of the Health Act[31] vest in the City the same power in the case of dangerous situations, namely to do what is necessary to eliminate the danger. Where two or more empowering sections give the same power it makes no difference which is used in a particular case.[32]

56. The Housing Act[33] provides that the City must inter alia "ensure" that "**conditions not conducive to the health and safety of the inhabitants of its area of jurisdiction are prevented or removed**."[34] It is, when doing so, charged inter alia with doing so "**within the framework of national and provincial housing legislation and policy.**"[35]

57. Its problem in seeking to do so is immense. It does so by integrating its efforts into a unifying strategy that harmonises socio-economic goals of betterment in a holistic and sustainable way. This it does through the Johannesburg Inner City Regeneration Strategy (JICRS).[36]

58. This strategy was founded on a vision, which was launched by the President in July 1997, "**following an intensive process involving**

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[30] R1, p31:21 – p 33:23
[31] R1, p 33:24 – p 34:13
[32] **Klerkdorpse Stadsraad v Renswyk Slaghuis (Edms) Bpk 1988 (3) SA 850 (A) at 864B.**
[33] Act 107 of 1997.
[34] Section 9(1)(a)(ii).
[35] Section 9(1).
[36] The strategy is found at R4, p231 to 284.

provincial and local government, the private sector, community and organised labour".[37]

59. The vision is therefore policy of the highest order directing the economics that must drive the programme of implementation by the City of its duties with respect to the conditions it addresses within its domain. The features demanded of this vision are set out in the JICRS. The City is faced with developing its own practical policy to implement the vision of the national and provincial government, as one of its central constitutional functions, as set out in section 153 of the Constitution:

> "**A municipality must-**
>
> **(a) structure and manage its administration and budgeting and planning processes to give priority to the basic needs of the community, and to promote the social and economic development of the community; and**
>
> **(b) participate in national and provincial development programmes."**

60. The above requires the municipality to interpret the national and provincial policy and programme in question, and a particular choice by it of the mode of practical implementation it considers may best achieve these objects. This is a matter of policy and determination by an elected instrument of government.

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[37] R4, p240.

61. The City, in exercising the autonomous power conferred upon it by the Constitution and legislation to operate within this framework of policy, has determined a specific socio-economic approach:

> **"No one element of this Vision can be realized without significant economic progress in the Inner City. Currently, the CoJ and its partners expend much time and energy in reactive efforts. With sustained economic growth in the Inner City they will be able to build on the present solid foundations to sustain a more strategically positive process of regeneration and development. Taking into account the importance of economic development as a precondition for realising the Vision, the CoJ recently formulated a Strategic Framework and rationale for development of the Inner City.**"[38]

62. This is the City's choice, and it is answerable for it to its electorate. It could have made other socio-economic choices. As little as the Constitution of the United States has been said to have entrenched the economics of Adam Smith, so does our Constitution (it is submitted) compel a single policy choice – or makes it justiciable by a court.[39]

63. The strategy, in relevant respects, entails the maximised employment of the results of the necessary "**reactive efforts**" (thus eradicating identified instances of danger to life and health) as part of "**a more strategically positive process of regeneration and development**." Hence the linking of the eradication of dangerous living reactive efforts to the regeneration

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[38] JICRS R4, p240.

[39] This debate in American jurisprudence, which characterises the discredited tendency to hold the Constitution to demand adherence to a particular economic ideology as "Lochnerism", due to its epitome in the decision of **Lochner v New York 198 US 45 (1905)**, is referred to in the judgment of Ackermann J in **Ferreira v Levin NO; Vryenhoek v Powell NO 1996 (1) SA 984 (CC), par. [65]**.

of those same buildings as part of the "Better Buildings Programme" attacked by the occupiers.[40] This is addressed further below when dealing with the argument on ulterior purpose and selective enforcement.

THE ADMINISTRATIVE ACTION FRAMEWORK

64. The City is a creature of statute and an organ of state. When it acts to exercise its powers and obligations to eradicate dangerous living conditions in particular cases, it performs administrative action.

65. It is common cause that the City's intended exercise of statutory powers in the instant case was to be viewed by the High Court as administrative action as understood by section 1 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA)[41] – after all, it is sought to be reviewed as such by the occupiers.

66. This classification is clearly correct, as the conduct in question lies at the core of the definition of administrative action in PAJA. This is not a case which raises the kind of difficulties of inclusion that arise at the boundaries between policy-making, legislative conduct, executive action and administrative conduct.[42]

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[40] See Applicant's Heads par. 78ff p37ff.
[41] See San Jose Answering Affidavit par. 177, R2, p100.
[42] See, for example, the discussions in **Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others 1999 (1) SA 374 (CC), par 27; President of the Republic of South Africa and Others v South African Rugby Football Union and Others 2000 (1) SA 1 (CC) particularly at par. [142]; Permanent Secretary of the Department of Education and Welfare, Eastern Cape & another v Ed-U-College (PE) (Section 21) Inc 2001 (2) SA (1) (CC), par. [18]**, and the recent treatment in **Minister of Health NO v New Clicks SA (Pty) Ltd (Treatment Action Campaign as Amici Curiae) 2006 (2) SA 311 (CC), pars. [114] to [135].**

67. While the action of the City in terms of the NBRA, determining that a building is unsafe and must be evacuated, is clearly administrative action at the core of the definition, the same is much less readily said of the implementation by the City of a programme of progressive realisation of the right to access to adequate housing, conduct that moves more closely on the legislative and executive than the administrative sphere. This distinction further underscores the conceptual danger of holding that failure in the one sphere entails prohibition of conduct in the other.

68. The JICRS operates at the policy level. Action in individual cases to seek to eradicate identified instances of danger operates at the level of administrative conduct.

69. The mere fact that constitutional rights are affected by administrative conduct does not mean that adjudication thereby ceases to be one of judicial review – indeed, PAJA, grounded in the Constitution,[43] defines administrative action with reference precisely to its adverse effect on 'the rights of any person.' After all, the question has been posed whether, for state action to be administrative conduct subject to PAJA review, it must adversely affect constitutional rights, or whether it can only be administrative action when it adversely affects other rights.[44] It is clear,

[43] **Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & Others 2004 (4) SA 490 (CC) at par. [25]; Minister of Health NO v New Clicks SA (Pty) Ltd (Treatment Action Campaign as Amici Curiae) 2006 (2) SA 311 (CC) at par. [431]**.

[44] PAJA section 1. See for example the discussion in ***The AJA Benchbook*** **Currie & Klaaren at 79-81**, about the question whether the 'rights' that must be adversely affected for conduct to be administrative action *must* be fundamental rights, or whether an adverse effect on other rights can also

we submit, that there is no basis to assert that when constitutional rights are adversely affected by administrative action, the matter ceases to be one of judicial review of administrative action under PAJA, but becomes an assessment of a different order.

70. In **Minister of Health NO v New Clicks SA (Pty) Ltd (TAC as Amici Curiae)**[45] regulations were reviewed under PAJA as administrative action, inter alia for 'reasonableness'.[46] A discussion of the applicability of this standard where "**the fundamental rights of the people who are most disadvantaged are affected**"[47] did not thereby in any way suggest to Sachs J that such effect would lift the inquiry out of the review paradigm with its PAJA standards for the assessment of the merits of the administrative action in question.

71. Therefore, once the occupiers reject, as they properly do in their heads of argument, the court of first instance's invocation of a "discretion" in its purported application of section 26(3) to the conduct of the City (as mentioned above), their argument that the mere fact that constitutional rights are affected by the administrative conduct in question requires

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be at issue. Similarly, **Jonathan Klaaren and Glenn Penfold in Chaskalson et al (eds) *Constitutional Law of South Africa* [2nd Edition OS 63-21]** argue that the term 'rights' in the definition of administrative action, namely that which *must be adversely affected* for administrative action to exist in the first place, "should not be restricted to constitutional rights but should include all forms of legal rights, including statutory and common-law rights". For this proposition the authors invoke the analogy of the case law dealing with the constitutional right of access to information which was triggered where necessary to protect a "right" (at 63-21 fn6, referring to the discussion in Chapter 62.7, with reference to the debate reflected in cases such as **Van Niekerk v City Council of Pretoria 1997 (3) SA 839 (T), The Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC & Others 2001 (3) SA 1013 (SCA), par. [27] and Directory Advertising Cost Cutters v Minister for Posts, Telecommunications and Broadcasting & Others 1996 (3) SA 800 (T)**.

[45] 2006 (2) SA 311 (CC).

[46] Administrative action that is "so unreasonable that no reasonable person could have so exercised the power or performed the function" – the review standard laid down in section 6(2)(h) of PAJA.

[47] Par. [653].

something other than a judicial review standard on the part of the court does not withstand scrutiny. Administrative conduct, this court has established, is to be assessed only through PAJA.[48] Beyond that there is the residual constitutional test of rationality in the exercise of public power, imposed by the principle of legality.[49] There is no basis, we submit, to circumvent the requirements of both.

72. The power conferred upon the judiciary by the new constitutional dispensation, namely to act as ultimate guardians of the Constitution and to subject the conduct of all branches of government to the substantive scrutiny of the judiciary, far from rendering less important the separation of functions between the judiciary and the administration, has made it a matter of the democratic legitimacy of the judicial function to accord to the administrative branch the deference in its domain demanded by the separation of powers.[50]

73. The proper standard to employ in assessing the City's conduct was therefore the review standard (or beyond that, the residual Pharmaceutical rationality standard) with its constitutionally mandated deference decreed by the separation of powers.

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[48] This difficult question has now been comprehensively settled by the treatment of the issue by the Constitutional Court in **Minister of Health NO v New Clicks SA (Pty) Ltd (Treatment Action Campaign as Amici Curiae) 2006 (2) SA 311 (CC), in particular pars. [95], [426] and [431]**, with reference also to **Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & Others 2004 (4) SA 490 (CC) at par. [25]** in particular.

[49] **Pharmaceutical Manufacturers of SA: in re ex parte President of RSA 2002 (2) SA 674 (CC), especially at [85]**.

[50] See the discussion in **Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & Tourism 2004 (4) SA 490 (CC) at pars. [46] to [48]** and, in the sphere of socio-economic rights, ***Minister of Health v Treatment Action Campaign (No 2)* 2002 (5) SA 721 (CC), particularly at pars. [34] to [38]**.

PIE AND ITS JURISPRUDENCE AND ASSESSMENTS ARE NOT APPLICABLE

74. We submit:

74.1 PIE, its procedures and "just and equitable" discretionary standard, did not apply to the instant evictions; and

74.2 The jurisprudence of PIE, which is directed at developing principles for the exercise of its discretion, addresses the constitutional clash that PIE itself addresses, namely that between ownership rights and access to housing rights, and is not applicable to the instant case.

75. As already noted, the occupiers concede that, in the absence of the applicability of PIE, the assessment of the City's conduct cannot be the exercise of a judicial "discretion".

76. But the occupiers still invoke the jurisprudence of PIE in their contentions about the demands of section 26(3). Furthermore, they assert that PIE was indeed applicable. We submit that both propositions are incorrect.

77. Two lines of inquiry must be distinguished:

77.1 Would PIE apply to these cases, even if it does not (as is contended) impliedly repeal the NBRA?

77.2 Do the provisions of PIE repeal or somehow oust the NBRA powers in the instant case?

78. Because of the clear negative answer to the first question, one need not even reach the second question. We shall however address each in turn.

<u>Does PIE apply</u> ?

79. PIE applies its protection only to a certain kind of "unlawful occupier". It is essential to an understanding of the purpose of PIE to have regard to the way in which it was decided to define such unlawful occupier. The subject of PIE is defined in terms of title relative to the will of the owner:

> "**'unlawful occupier' means a person who occupies land without the express or tacit consent of the owner or person in charge, or without any other right in law to occupy such land…**".

80. This definition neatly captures the constitutional clash at the heart of PIE, declared to be its concern in its preamble - "***AND WHEREAS it is desirable that the law should regulate the eviction of unlawful occupiers from land in a fair manner, while recognising the right of land owners to apply to a court for an eviction order in appropriate circumstances***".

81. The concept is defined specifically and exclusively with reference to the rights of the owner, making it clear that its focus and subject-matter are the clash between, on the one hand, ownership rights and the incidence of ownership rights (the absolute ability to determine the entitlement of others to be present on one's land) and, on the other hand, the housing rights and tenure realities of those whose presence on the property is in conflict with the owner's will.[51]

82. In the instant case, the clash between the right of an owner to assert dominion over his or her land, and the housing rights of an occupier defying the will of the owner as to his or her presence – that which PIE is about – is entirely absent.

83. The buildings in question manifestly entailed complete abandonment of any interest and responsibility for their fates by their owners[52] – leaving a trail of debts owing in respect of the buildings to the applicant. The owner has in each case abandoned any desire or intention to claim any rights of ownership over the buildings concerned, and indeed if anything is only too anxious to have nothing further to do with the building and the liability that it has become.[53]

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[51] See **Port Elizabeth Municipality v Various Occupiers 2005 (1) SA 217 (CC), in particular pars. [18] to [23] and par. [33]**, with reference to **Port Elizabeth Municipality v Peoples Dialogue on Land and Shelter and Others 2000 (2) SA 1074 (SE)**.

[52] Save in the few instances in San Jose where the occupier is alleged to be the owner, or to be paying rent to the owner, or ultimately to the owner, in which case PIE is in any event not applicable. See 34th Respondent's AA par. 3, R9, p645; AA of Bheka Gumede par. 3, R9, p650; 51st Respondent's AA par. 3, R9, p655. As to San Jose, the history set out by the occupiers is that the gradual retreat of the owners and the eventual collapse of the body corporate in 2000 created a situation where the owners abandoned the building and its liabilities to the occupiers. San Jose AA pars. 123 to 129, R2, p88-89. As to the Building on 197 Main Street, its abandoned status is common cause – Zinns AA par. 14, R12, p882-883, particularly p883:1.

[53] See San Jose RA par. 22, R3, p194-5; 197 Main Street RA pars. 10 and 13, R13, p964-5.

None of the acts of occupation in question is said to have occurred by stealth or violence or in any meaningful sense contrary to the wishes of the owner.

84. The SCA correctly held this to put paid to any potential applicability of PIE.[54]

85. The occupiers submit that this is an "extraordinary interpretation of the term tacit consent".[55] What is "extraordinary" is that submission. It is founded on the non sequitur that the finding "**suggests the conclusion of tacit lease agreements between the absentee owners and the occupiers of the buildings**", yet, as the occupiers have not paid any rent, and the population of the buildings is shifting, there can be no "tacit lease agreements".[56]

86. The argument seeks both to invoke an inaccurate paraphrase of the SCA ruling, and to raise the statutory test. The SCA did not construe any tacit lease. It in fact drew attention to the fact that the statutory test is consent to occupation. The notion of a tacit lease agreement, with its essentialia of determinable rental and the like, is an entirely superfluous construction on the part of the occupiers to create a syllogism that does not exist in the SCA's finding.

87. The question is whether an owner who abandons his or her property to the world, abandons any interest in it and wants nothing further to do with it, should meaningfully be said to give "tacit consent" to whoever happens to possess such property. The answer to this is clearly in the affirmative. The

[54] R17, p1273, par. [59].
[55] Heads p105, par. 215.
[56] Heads p105, par. 215.

owner could not care less if it is occupied. Leases do not enter the analysis. It is also an answer most consistent with giving purposive and meaningful content to the definition by PIE of its own subjects. Where the interests of the owner are zero, the clash PIE seeks to regulate does not exist.

88. Theft, for example, which requires an intention to take against the will of the owner, does not exist when the owner has abandoned the property, or the property is thought to have been abandoned.[57]

89. The occupiers also seek to ascribe to a portion of the definition of "**unlawful occupier**" a wholly distorted interpretation to contend that, once the administration had issued a notice in terms of the NBRA, the occupiers became persons "**without any other right in law to occupy**", even if their occupation could be said to be with the consent of the owners.[58]

90. There are two reasons why this proposition is untenable.

91. The first reason is that the definition of "unlawful occupier" is clear: it relates to all people who lack one of two sources of title to be present – title derived either from the consent of the owner, or from another source in the law (even where the owner does not consent). The qualification "**without any other right to occupy**" is clearly stated as an alternative condition to consider only in the event that there is no consent present as the relevant "**right to occupy**".

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[57] ***Mdung v Minister of Police 1988 (2) SA 809 (N) at 813F-G; S v Randen and Another 1981 (2) SA 324 (ZA)***.
[58] Heads p105-6, par. 216.

92. The occupiers assert the startling proposition that the definition of "**unlawful occupier**", crafted so specifically with reference to two potential sources of a "**right to occupy**", must actually be read as simply meaning "**unlawful for any reason**". Had this been anything like the intention of the legislature, it would have been absurd to have crafted the definition in the way it did; the legislature need then not have defined "unlawful" at all.

93. The second reason is that the notification under the NBRA on which the occupiers rely makes it clear that the City is demanding evacuation, but will apply to court for leave to have that evacuation ordered, and that the occupiers are invited to participate in the process that will decide whether they are to evacuate or not.[59] It is quite clear from this procedure that the occupiers will not be required to evacuate until a court tells them to do so.

94. The relevant provisions of section 12 of the NBRA are set out here for convenience:

> **"(4) If the local authority in question deems it necessary for the safety of any person, it may by notice in writing, served by post or deliver**ed-
>
> **(a) order the owner of any building to remove, within the period specified in such notice, all persons occupying or working or being for any other purpose in such building therefrom, and to take care that any person not authorized by such local authority does not enter such building;**

[59] The process is set out in par. 10, R3, p190-192 and par. 66, R3, p209-212.

(b) order any person occupying or working or being for any other purpose in any building, to vacate such building immediately or within a period specified in such notice.

(5) No person shall occupy or use or permit the occupation or use of any building in respect of which a notice was served or delivered in terms of this section or steps were taken by the local authority in question in terms of subsection (1), unless such local authority has granted permission in writing that such building may again be occupied or used.

(6) Any person who contravenes or fails to comply with any provision of this section or any notice issued thereunder, shall be guilty of an offence and, in the case of a contravention of the provisions of subsection (5), liable on conviction to a fine not exceeding R100 for each day on which he so contravened."

95. The unlawfulness and criminal liability created by subsections (5) and (6) arise only if the terms of a notification given in terms of section 12(4) are disobeyed. The instant notice, however, is a qualified one: it tells the occupier that an application to court will be made for relief directing the occupiers to vacate, and indicates that this will be on the basis of opposed proceedings with the filing of affidavits and a court hearing. It is clear that, on the strength of such a notice, the City would not be able to rely on subsections (5) and (6) in the absence of the court order to which the notice made itself subject.

96. The above is also important in the assessment of the complaint regarding audi alteram partem considered below.

97. The occupiers are therefore plainly not the subjects of PIE.

Does PIE repeal or oust the NBRA ?

98. Even if the occupiers, or some of them, could have been regarded as the subjects of PIE, it is clear that PIE was not intended to oust the operation of the provisions of the NBRA.

99. This is clear both when considering the central theme at which PIE is directed – the clash between ownership rights and housing rights – and when considering the text of PIE. Both bases correctly informed the SCA's finding that PIE was not applicable.[60]

100. As pointed out above, the clash between ownership and housing rights is at the heart of PIE. PIE addresses a particular history. It is the history of dispossession and privilege, a history of systematic state-sponsored and enforced entrenchment of private property rights of the white minority at the expense of the housing needs and realities of tenure of the black majority. In so doing PIE is intended to regulate the ideological tension in the Constitution between protection of property and advancement of the right to access to housing.[61]

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[60] R17, p1273, par. [58]: "PIE must be seen in the light of its history and purpose, which is to resolve a clash between proprietary rights and the plight of the poor". Paragraph [60] (R17, p1273-1274) deals with one aspect of the textual basis that the SCA found decisive.

[61] See the discussion in **Port Elizabeth Municipality v Various Occupiers 2005 (1) SA 217 (CC), pars. [8] to [23]**.

101. Indeed, where the State, in circumstances governed by PIE (i.e. there is a clash between the occupier's lack of title and the will of the owner) acts in terms of section 6, it is acting "**on the owner's behalf**".[62]

102. When it comes to the exercise by the State of powers extraneous to the question of title or the absence of title, such as in the instant case, the central concern of PIE, and indeed its very triggering definition, do not feature. It would be wholly anomalous to apply PIE to override other statutory powers, depending on whether one is dealing with a person who lacks title, in circumstances where the question of title and of the rights of ownership is immaterial. It simply cannot be the law that the provisions of the health and safety laws apply to those who occupy property lawfully but not to those who are in occupation against the wishes of the owner, whether those wishes and that fact have anything at all to do with the matter or not.[63]

103. It is important to pause to reflect on the different conflicts at stake. The injury that is done when an unlawful occupier is allowed to assert occupation rights against the rights of the owner is an injury to the right of ownership. That is an injury our legal order accommodates with more sanguinity than many others.

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[62] See **Port Elizabeth Municipality** at par. [5]. Note that action in terms of PIE requires a situation where the very occupation of the property in question is unlawful – lacks title – as defined in the Act, as recognised in **Port Elizabeth Municipality** at paragraph [25], and section 6 applies where there is such unlawful occupation *and* the occupiers are erecting structures illegally or the public interest, including safety, is such that they ought to be evicted. The reasoning of the court is premised on the fact that PIE deals with cases where the basis for the eviction is the unlawfulness of the very presence of the occupier on the property – which but for the provisions of PIE would have been a sufficient basis for eviction: "This is precisely why, even though unlawfulness is established, the eviction process is not automatic and why the courts are called upon to exercise a broad judicial discretion on a case by case basis" (par. [31])

[63] This absurdity was recognised by the SCA R17, p1272, par. [57].

The injury done when a person is allowed to assert occupation rights against a determination by the City that she is living in a death-trap, - not only for her, but many others - however, is of an entirely different order. What is at stake is her own gruesome death, the death of children and dependants whom she has consigned to this fate, and the death or exposure to disease or danger of those in the immediate vicinity. This has nothing to do with the ideological contours of property rights.

104. The textual support for this conclusion is compelling.

105. First, PIE expressly repeals a number of statutory provisions and does not expressly repeal the powers or provisions in question.

106. Second, section 4 of PIE, which relates to an application for eviction of an unlawful occupier brought by the owner or the person in charge of the property makes it clear that its provisions apply to all such evictions '**notwithstanding anything to the contrary contained in any law or the common law.**'

107. As pointed out in **Cape Killarney Property Investments (Pty) Ltd v Mahamba and Others** [64] the section makes it clear that its provisions are peremptory. In a nutshell, its effect is exhaustively to codify evictions by private persons of unlawful occupiers.

[64] 2001 (4) SA 1222 (SCA) at par [11].

108. Section 6, however, makes provision for a power on the part of the State to intervene in the clash between ownership rights and the right to access to housing and to apply for the eviction of unlawful occupiers as defined, in the public interest. This is an empowering provision. It does not purport to oust any other powers, even those that may have a similar effect (i.e. the eviction of persons in terms of NBRA).

109. It is vital to note the recognition, noted above, of the fact that, when the State intervenes in the clash and acts in terms of section 6, it does so "**on the owner's behalf**".

110. Unlike section 4, section 6 does not purport to repeal statutory powers, and the conditions for their exercise, upon which the State may rely merely because such exercise of powers may affect the unlawful occupation of a building. It does not contain an overriding provision such as that in section 4 making it clear that it applies to all evictions by the State '**notwithstanding anything to the contrary contained in any law or the common law**.'

111. The legislature expressly directed its mind to the existence of other bases upon which an owner may apply for the eviction of an unlawful occupier, and specifically made it clear that all evictions of unlawful occupiers by owners and those in charge of the property must be effected in accordance with section 4 of PIE, whatever the law may say elsewhere. It specifically did not provide similarly when it came to the exercise by the state of other statutory

powers that may also have an effect on the occupation of buildings, such as the powers of the City under NBRA.

112. Furthermore, a consideration of the subject-matter of section 6 confirms that it could not possibly have been intended exhaustively to govern the state's power to procure evictions.

113. It is noteworthy that the empowerment conferred upon the state by section 6 applies only to certain "**unlawful occupiers**": "**An organ of state may institute proceedings for the eviction of an unlawful occupier from land which falls within its area of jurisdiction, except where the unlawful occupier is a mortgagor and the land in question is sold in a sale of execution pursuant to a mortgage….**".

114. This must be decisive of the question whether it could possibly be said that Parliament intended the empowering provision exhaustively to define and regulate the power of the state to procure evictions of unlawful occupiers from land. If it did, the surprising conclusion would be that no unlawful occupier who is a mortgagor of land sold in a sale of execution pursuant to a mortgage may *ever* be evicted at the instance of the state, no matter what the circumstances and irrespective of any statutory power of the state to evacuate such person from a building.

115. We accordingly submit that the matter should be approached –

115.1 as entailing judicial review of administrative action (or residually, the public power rationality test) employing due deference required by the standard of review;

115.2 not as some other inquiry, with a free-floating curial discretion to intervene because constitutional rights may be affected by the administrative action in question;

115.3 without inappropriate borrowings from PIE case law, expounding the appropriate exercise of the discretion applicable to PIE.

REVIEWING THE DETERMINATION THAT THE BUILDINGS REQUIRED EVACUATION FOR THE SAFETY OF PERSONS

So irrational or unreasonable ?

116. Had the court of first instance approached the exercise of the administrative powers before it by way of the appropriate review standard, it would have asked whether the determination that the conditions were sufficiently unsafe to require evacuation, was irrational, or so unreasonable that no reasonable person could have come to this conclusion. These are the substantive review standards stipulated in

PAJA, and fall to be meaningfully differentiated from the kind of intrusion entailed by an appeal standard.[65]

117. The conditions and reasoning as to fire and health safety have been set out above. These were the findings of the experts to whom the legislature accorded the function to make these kinds of determinations. The court at first instance, as pointed out above, described the conditions "unsafe",[66] entailing "fire and health risks" of such an order as to place the occupiers in an "emergency situation".[67] None of this is effectively or seriously disputed.

118. In these circumstances, it cannot, we submit, responsibly be contended that it was irrational to determine that evacuation was necessary for the safety of any person, or that such a determination is unreasonable that no reasonable person would make it. Particularly where, as here, one of the buildings in question had already partially destroyed by fire.

119. There was no such finding made at any time. Nor was there any such attack launched by the occupiers in their efforts to resist eviction.

120. There was, instead, accompanied by a rather striking absence of any detailed assessment of the degree of danger involved, a determination at

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[65] See in particular **Carephone (Pty) Ltd v Marcus NO and Others 1999 (3) SA 304 (LAC) at 315C; Bel Porto School Governing Body and Others v Premier, Western Cape, and Another 2002 (3) SA 265 (CC) pars. [85] to [90]; Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others 2004 (4) SA 490 (CC), pars. [44] to [57].**

[66] Paragraph [29], R15, p1053:3-6.

[67] Paragraph [18], R15, p1047:15,19. See also the SCA's emphasis of these findings at R17, p1250, par. [2].

first instance that similar dangers tended to exist in informal settlements,[68] and that evacuating the buildings would leave the occupiers "**far worse off**" than risking their exposure to the fire hazards of the buildings.[69] This kind of reasoning is echoed in the arguments presented to this Court by the occupiers. This was a function of a failure firstly to employ the current standard and secondly to do so with any deference in relation to the questions at issue.[70]

Ulterior purpose, et al ?

121. The review attack rested, not on the rationality or reasonableness of the assessment that there was a degree of danger that required evacuation, but on the assertion that there was ulterior purpose, selective enforcement and a failure to take into account the failings on the part of the City to have given the persons affected access to adequate housing. There is also normative confusion: that the degree to which the City has to date acted reasonably in its efforts to provide housing rendered unreasonable the determination that the particular buildings had to be

[68] Paragraph [64], R15, p1072:20-23.
[69] Paragraph [57], R15, p1068:24.
[70] See, for example, Froneman DJP concerning review powers under the constitutional dispensation, in **Carephone (Pty) Ltd v Marcus NO & Others 1999 (3) SA 304 (LAC), par. [36]**: "In determining whether administrative action is justifiable in terms of the reasons given for it, value judgments will have to be made which will, almost inevitably, involve the consideration of the 'merits' of the matter in some way or another. As long as the Judge determining this issue is aware that he or she enters the merits not in order to substitute his or her own opinion on the correctness thereof, but to determine whether the outcome is rationally justifiable, the process will be in order."

evacuated. This reasoning was integral to the approach adopted, in error, by the court at first instance.[71]

122. The SCA recognised that the questions whether there was an ulterior purpose, whether there were other similar instances that the City was not addressing, and whether there was selective enforcement, did not affect the merits of the determination that it was necessary to vacate these buildings for the sake of the safety of the occupiers and others.[72]

123. There are very grave implications among the hard questions that any determination of irrationality would necessarily entail. Strikingly absent from the assessment of the City's determination and powers in the court of first instance and in the argument presented by the occupiers, is an answer to the hard questions:

123.1 Is the City never entitled to make a determination that it is necessary for the safety of people that a building be evacuated *irrespective of any other concerns*?

123.2 If it be conceded that there must be occasions when such a determination ought to be allowed, what degree of fire hazard is required before the City is allowed to make such a determination?

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[71] See the invocation of the "reasonableness" of the extent to which second generation rights have been fulfilled, based on **Government of the Republic of South Africa v Grootboom 2001 (1) SA 46 (CC), in par. [27],** R15, p1052.
[72] Par. [65], R17, p1275.

124. There must be no illusions about the fact that, if the conditions at issue in these buildings are not bad enough for an affirmative answer to the questions posed above, then for all practical purposes, conditions will never be bad enough. We stress again that fires come with no warning. Their advent can be judged only on the basis of potential. Such potential is a function of the presence of known indicia of their likelihood and of the extent of harm to be expected should they eventuate – the matters the experts of the City were at pains to identify in the buildings in question.

125. The occupiers seek to have declared the "practice" of the City to apply for evictions "on the basis of" the NBRA and health and safety laws to be unconstitutional, without qualification.[73] The order sought would therefore have it declared unlawful to evict people for health and safety reasons. There is, in this order sought, no particularisation at all of that which is unlawful in the practice. So, when it comes to the occupiers themselves, and their individual cases, the case is moot on this issue, and when it comes to the potential application of "the practice" to others, the case is framed in impossibly broad and absolute terms.

126. As regards the contention of selectiveness, the JICRS must by nature be selective, given the fact that the City cannot address the massive problem, all at once.

[73] Paragraph e, R17, p1203.

127. The argument based on selectivity and ulterior purpose is premised on an unwarranted proposition that the JICRS is at odds with, or serves different ends to, the purposes to be served by the NBRA and health and safety laws invoked by the City.

128. The relevant conditions addressed by the NBRA, the Health Act and the fire by-laws are degradation, squalor, deterioration and danger in living conditions. These are manifestly at issue in the instant case.

129. Where conditions cannot all be addressed simultaneously, targeting is essential to any intervention strategy. Ironically, the absence of a co-ordinated approach in circumstances where only limited success is possible would itself be a less than rational manner of enforcing laws.

130. The component of the JICRS that authorises this and the priority of promoting public safety tie in harmoniously with the relevant provisions of the NBRA, the Health Act and the Fire By-Laws that the City has invoked for the exercise of its powers.

131. The JICRS is aimed at turning the fruits of its "reactive efforts" into instances of development and betterment – using the buildings evacuated for safety as vehicles for upliftment, on the economic premise that the conditions themselves must be tapped for the creation of circumstances in which the direction of the flow of development

would be towards betterment and away from blight, incrementally and gradually reducing the need to act on the worst instances of blight.

132. The mere fact that a problem within the powers of an authority to address is addressed within a broader policy or strategic framework does not render the addressing of the problem unlawful or brand it as serving an ulterior purpose, where the broader policy framework is also legitimate and the purposes of the empowering legislation being employed (i.e. such as the NBRA in this case) are served by the specific impugned action in question.[74]

133. The nub of the complaint is really one of selective enforcement (hence the implied invocation of section 9 of the Constitution,[75] on the ostensible basis of entailing unfair discrimination without "rational justification").[76]

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[74] See **Safe Investments (Pty) Ltd v The Administrator 1946 TPD 302; L F Boshoff Investments (Pty) Ltd v Cape Town Municipality; Cape Town Municipality v L F Boshoff Investments (Pty) Ltd 1969 (2) SA 256 (C) at 268A-270C; AECI Ltd and Another v Strand Municipality and Others 1991 (4) SA 688 (C)** particularly at 698I-700E about the difference between purpose and ultimate motivation, where the latter is legitimate and not so alien to the purpose as to vitiate it for being *ultra vires*.

[75] "(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
(2) 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.
(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair."

[76] Applicant's Heads par.252, p122.

134. The degree to which the state may discriminate in applying its laws depends on the grounds upon which such discrimination occurs, and in particular whether such discrimination is based on one of the listed (suspect) grounds set out in section 9 of the Constitution. Where it is not, the settled jurisprudence in this area is that such differentiation is lawful as long as it is rationally related to the purpose it seeks to serve.[77]

135. No suspect ground of discrimination is entailed by the application of the law in eradicating intolerable living conditions and in furthering the policy of the regeneration of the inner city. The occupiers recognise this by contending for "irrational" discrimination. As considered above, the distinction between urban high-rise buildings and open areas cannot be branded "irrational". Furthermore, the JICRS cannot by any stretch of the imagination be labelled irrational, and the selections it makes in seeking to integrate the achievement of many goals into a driving vision and strategy are meaningfully tailored to employ the available resources optimally and to respond to resistance and other hurdles prudently.

136. The attack amounts to an argument analogous to one that would hold that, because the police, or the prosecuting authorities, are failing to

[77] See the discussion in the seminal decision on selective enforcement, namely **Pretoria City Council v Walker 1998 (2) SA 363 (CC)**, where the authorities and principles are set out (*Walker* was a case where the differentiation was indeed based on a suspect enumerated ground, which meant that the Council was obliged to demonstrate that the discrimination in question was not unfair.)

address all instances of violent crime that occur, they should be barred from addressing any of them.

137. The substantive bases for the review were therefore without merit.

***Audi alteram partem*?**

138. As pointed out above, the complaint regarding audi alteram partem has been superseded by a different modus operandi entailed by the application for leave to serve a notice to consult, as to the rest of the people for whom the occupiers purport to speak.

139. The complaint fails to address the most important, if curious, feature of the administrative conduct intended to be applied to the occupiers, namely the fact that it has not yet been applied. This is because the administrator in question, the City, approached a court for a pre-review of the exercise of the power and allowed the question whether the power should be applied at all to be the subject of opposed judicial determination, which has resulted in the intended action never eventuating, as the court process to which it rendered itself subject, and upon the outcome of which it made itself contingent, has yet to be finalised.

140. The occupiers complain that there was no hearing of any sort afforded them before the decision to evacuate the buildings was taken.[78]

141. This way of conceptualising the question of administrative fairness misses the point. The City did not decide "to evacuate the buildings". It made a decision to ask a court to allow it to evacuate the buildings. It gave an opportunity to have this intention opposed in court. The event it determined as a prerequisite for evacuation – a court order allowing it – never eventuated.

142. The occupiers' argument is like arguing that a summons or warrant – devices to place a matter in court – themselves require *audi*. Of course they do not; the decision is of a preliminary nature, has no direct and external effect in the sense required by PAJA, and founds no entitlement to *audi*.[79]

143. The operative question is where was the relevant adverse effect on the occupiers' rights and the direct external legal effect that characterise administrative conduct[80] visited upon the occupiers by the decision itself?

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[78] Judgment par. [20.5], R15, p1049.
[79] **Cf. Wiseman v Borneman [1969] 3 All ER 275 (HL) at 277I-278B; Park-Ross v Director: OSEO 1998 (1) SA 108 (C) at para 18; Hoexter Administrative Law (2007) 207-8.**
[80] PAJA section 1.

144. An analogy is the case of **Registrar of Banks v Regal Treasury Private Bank Ltd (under Curatorship) and Another (Regal Treasury Bank Holdings Ltd Intervening)**.[81]

145. The Banks Act 94 of 1990 *inter alia* empowered the Registrar to approach a court on application for the winding up of a bank.[82] The applicant sought to review this decision on the part of the Registrar. The court held that the decision to approach the court on application for liquidation was not the decision that had the "**direct external legal effect"**; rather, it was the decision of the court to order the winding-up that would have such effect.[83]

146. In the present circumstances, the analogy is entirely apposite. It is precisely to allow for eviction by means of due process, and to outlaw arbitrary actions the direct external legal effect of which is the eviction of persons from their homes, that section 26(3) requires a court hearing to occur before an eviction may occur.

147. The precise form and occasion for respecting *audi alteram partem* are matters of flexibility and sensibility, and ought to conform maximally to the exigencies and practicalities of the circumstances.[84]

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[81] 2004 (3) SA 560 (W).
[82] Section 68(1)(a).
[83] At 567G-I.
[84] See, for example, **Chairman, Board on Tariffs and Trade, and Others v Brenco Inc and Others 2001 (4) SA 511 (SCA) para [14] at 521, and Modise v Steve's Spar, Blackheath 2001 (2) SA 406**

148. The circumstances addressed by the NBRA – an expert determination by the City that danger exists, inspections, notifications and ultimately evacuation – are such that individualised consultations with all potentially affected individuals would not be practicable or realistic to expect as a prerequisite to affording everyone an opportunity to be heard prior to being faced with eviction;[85] the process adopted, on the other hand, achieves this. Given the often volatile atmosphere in these matters, it cannot be said to be unreasonable to determine the forum of court proceedings as the appropriate forum and occasion for respect for the principles of *audi alteram partem*.

149. The new procedure, discussed above, goes further and provides for an application to consult first – which puts paid to all the audi objections raised by the occupiers even on their own terms.

150. Accordingly, there were no cogent review grounds to impugn the City's conduct.

SECTION 26 OF THE CONSTITUTION – ITS LOGIC

151. The question then arises whether section 26 of the Constitution compels a different conclusion.

(LAC); see also *Minister of Health NO v New Clicks SA (Pty) Ltd (Treatment Action Campaign as Amici Curiae)* 2006 (2) SA 311 (CC), pars. [147] to [155].

[85] This was the basis upon which the SCA found there not to have been any violation of the principle audi alteram partem – par. [63], R17, p1274-1275.

152. We repeat that the mere fact that even if administrative action adversely affects constitutional rights, it does not take the inquiry out of the ambit of PAJA, and give rise to some more indulgent test for judicial intervention.

153. This is consonant with section 26(3), which requires any eviction to occur only by court order, after the court has taken into account the "**relevant circumstances**".[86]

154. It has already been indicated that the occupiers accept that the court at first instance was wrong to regard this as importing a "discretion".

155. What the section does, is to make all evictions subject to due process of law, as enforced by a court.

156. The relevant circumstances are then all the legally relevant circumstances, which, in the instant case, are the NBRA and the review standards of PAJA. This is the important effect of the decision in **Brisley v Drotskey**.[87] The section does not import the "just and equitable" jurisprudence of PIE into all evictions.

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[86] 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.

[87] 2002 (4) SA 1 (SCA). This was endorsed, although the immediate context was PIE, in **Wormald NO & Others v Kambule 2006 (3) SA 562 (SCA). Par. [11]**. The SCA re-affirmed the **Brisley** insight (R17, p1266, par. [40]) and pointed out it was not asked by the occupiers to revisit or to overrule **Brisley** and that there was nothing in the jurisprudence of this Court to suggest that it was wrongly decided (R17, p1270, par. [49]).

157. This requirement of due process to avoid arbitrariness is familiar in constitutional jurisprudence relating to the content of due process entailed by the concept of non-arbitrary deprivation in the sphere of property rights.[88]

158. In this instant case, the legally relevant circumstances were that the City had approached a court for leave to exercise its statutory powers to procure the evacuation of buildings it, with its expertise and jurisdiction conferred upon it by the legislature, had determined were unsafe and required evacuation, and the review standards to be applied by a court in overseeing such exercise of powers. The degree to which the City may or may not have complied with its constitutional obligations under section 26(2) was not a legally relevant circumstance. This is considered further below.

159. There is nothing in section 26(3) of the Constitution that mandates or allows the court to ignore the deference principle and to jettison the separation of powers to embark on its own assessment of the desirability of an evacuation.

160. The occupiers, however, seek to turn alleged violations of section 26(1) and 26(2) into legally relevant circumstances affecting the due process assessment under section 26(3).

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[88] **First National Bank of SA Ltd t/a Wesbank v Commissioner, SA Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance 2002 (4) SA 768 (CC) at pars. [65]ff**.

161. Before the specific bases upon which this is sought to be done are assessed, it must be emphasised that such an approach introduces a lack of rigour into section 26 analysis that renders the interplay among the three subsections incoherent.

162. The section reads:

> **"(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".**

163. Subsection (1) states the basic principle. There is created a second-generation right, the content of which is "access to adequate housing". Everyone has this right.

164. The Constitution, however, recognises that the section that creates such a second-generation right must at the same time give it content, lest it be interpreted as conferring absolute claims in individualised cases, rendering it nothing other than a solemn affirmation of the impossible.

165. Hence sections 26(2) and 26(3). Section 26(2) indicates that the right in question entails an entitlement to insist that the state take reasonable

steps within its available resources to achieve the progressive realisation of this right.

166. This immediately makes it clear that the right is collective, and something that is progressively realised through a state obligation.

167. Section 26(3) regulates the ways in which the enjoyment of the right may be curtailed. Eviction is the most obvious type of interference with the right. Hence it must be regulated in the same section that creates the right. It is regulated. Evictions are not rendered violations of the right. Arbitrary evictions are violations of the right. All evictions must occur subject to due process, enforced by a court. Should an eviction be arbitrary, or should it not occur through due process, enforced by a court, the right is violated and such violation must be justified in terms of section 36.

168. The above structure makes sense, and allows for the development of a jurisprudence of the justiciability of the positive right enshrined in section 26(2) – when and how should individuals or groups be allowed to demonstrate that the state has not, within its available resources, taken reasonable steps, and to demonstrate what other resource allocation ought to have been done? It also allows for the development of a jurisprudence around arbitrariness in relation to the deprivation of housing through eviction.

169. Yet this Court has recognised that, despite the above, section 26(1) also contains a "negative" element.

170. When existing access to adequate housing is interfered with, the "negative" element of section 26(1) is affected.[89]

171. The occupiers seek to elevate this possibility into the negation of the qualified prohibition contained in section 26(3).

172. Whatever the boundaries of the negative aspect of section 26(1) may be, no sensible construction of section 26 can entail an implied absolute prohibition against evictions in subsection (1) and an express qualified prohibition against evictions in subsection (3).

173. If it were so that any eviction was a violation of section 26, and was unconstitutional unless justified in terms of section 36, then the precise and qualified prohibition of evictions legislated in section 26(3) would be entirely otiose. Why seek to demonstrate that an eviction was "arbitrary" or occurred without a court order, - in demonstrating a limitation of the section for section 36 justification - when one may invoke the implied absolute prohibition in section 26(1) without more, and shift the whole burden to the evicting party?

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[89] **Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others particularly pars. [29], [31] to [33]**.

174. The other fallacy that is to be addressed is the normative confusion of asserting failures to fulfil section 26(2) obligations as immunities against eviction under section 26(3), ostensibly through constituting legally relevant circumstances that may bar an eviction.

SECTION 26(1) AND ADVANCING THE ACHIEVEMENT OF ADEQUACY

175. Our argument in this regard may be tested by analogy.

176. A familiar ideological debate in political philosophy relates to the promotion of respect for a decent wage through the prohibition of low wages.

177. A State may adopt the attitude that it wishes to promote "**the right to a decent wage**". It is faced with many contending ways of promoting this right. What it decides to do, is to adopt a two-fold strategy. It will first declare that instances of exploitative wages are unacceptable. It will place an absolute prohibition on any contract of work for less than a minimum wage. It will render criminal such contracts. It will also seek to embark on programmes that create work at decent wage levels and are also aimed at creating the conditions that may reduce the demand for exploitative wages, and the dependency of the desperate on such wages.

178. This hypothetical state encounters resistance from various quarters. A group of desperate workers, whose contracts at exploitative wages below the minimum have now been put to an end by this legislation, are up in arms. They are now unemployed. The state, in its quest to promote "**the right to a decent wage**", has taken away the only wage they had. It has also failed to make them the beneficiaries of its work programmes. These workers say that, until such time as the state provides work to them at a wage that is at least equal to the exploitative wage earned by them, it cannot deprive them of the only wage they have. Such deprivation will condemn them to a worse position than is entailed by their exploitation. Wagelessness must, they say, by definition be worse than bad wages. The workers also complain that countless others, who are also working at the exploitative wage, have not had their contracts terminated, as the state has not got around to them yet. This, they say, discriminates against them. They also say that, where wage-earners have no adequate alternatives available to them, even horribly exploitative wages must be regarded as "decent" and their protection demanded by a "**right to a decent wage**".

179. Much may be said in favour of the workers' arguments. But it cannot be said that the hypothetical State's attitude of eradicating identified instances of exploitative wages in the name of promoting a right to a decent wage is incoherent or contradictory. And it certainly cannot be

said that, in order to promote a "**right of access to a decent wage**", you must respect existing access to an exploitative wage.

180. Here, the court at first instance said precisely that, when it came to the promotion of the right to access to adequate housing:[90]

> **"The right of access to adequate housing includes a duty on the State as well as other relevant players (such as the [City]) to respect the access to housing (albeit inadequate) of those who presently enjoy it".**

181. This the SCA rightly resisted. It referred twice to the above finding by the court at first instance.[91] The occupiers found themselves able to state that "**the High Court did not make such a finding**".[92] The SCA recognised that, in the instant case, the inadequacy at issue was not mere inadequacy, but life-threatening danger. It employed the entirely apposite analogy:[93]

> "**In my view, the contention that to deprive a person of unsafe housing denies him or her access to adequate housing is not correct. The corollary would be that to deny someone poisonous food is to deny that person food.**"

182. The occupiers evade this logic by altering the analogy to one relating to food that is "**not sufficiently nutritious**", as opposed to poisonous:

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[90] Paragraph [54], R15, p1067.
[91] The proposition is first stated in par. [31c], R17, p1262, with reference to the judgment at first instance and then again in par. [46], R17, p1268-1269.
[92] Applicant's Heads par. 130, p65.
[93] Par. [46], R17, p1269.

> **"We submit, with respect, that the corollary… is that the State may deprive a person of the little food she has which keeps her from starving. The State does not thereby [not] violate any constitutional right because the food is not sufficiently nutritious."**[94]

183. Misstating the terms of the debate and re-reading the logic of the court at first instance do not bring clarity to the issues.

184. The simple point, illustrated through the analogy of the decent wage elaborated above, and that of the poisonous food, is whether the proper promotion of the value a right seeks to serve is enhanced by prohibiting conduct that aims to eradicate instances of the negation or the perversion of the right in question.

185. Promotion of a right of access to a decent wage is not achieved by prohibiting conduct aimed at avoiding identified instances of indecent wages. Promotion of a right of access to adequate food is not achieved by prohibiting conduct aimed at avoiding identified instances of the eating of poisonous food. Promotion of a right of access to adequate housing is not achieved by prohibiting conduct aimed at avoiding identified instances of unsafe housing.

186. The occupiers fudge the relevant hard question essentially by implicitly disputing that the conditions in the instant cases were truly unsafe. There

[94] Applicant's Heads par. 129, p65.

is no basis for this with respect to the particular. The particular, has, however, become moot. As to the general, that which ostensibly remains to be adjudicated with respect to the demand that it be declared unlawful to procure evictions for health and safety reasons, the hypothesis must be assumed that one is dealing with those cases where it is indeed necessary for the safety of persons that the buildings in question be evacuated. The court at first instance and the occupiers somehow manage to avoid addressing this problem. It is not a problem that disappears through a refusal to confront it. The reasoning of the court at first instance and of the occupiers implies an absolute answer to the question – if the conditions are bad enough, can the state not say "**the danger of death demands that this building be evacuated, quite apart from any other consideration**"? The occupiers would imply that the answer must be "no", yet retreat from stating it forthrightly.

187. The occupiers, faced with such logic, now seek to argue that the housing determined by the City to be so unsafe that its evacuation is necessary for the safety of persons, and described by the court at first instance, not only as "**inadequate**"[95] and as "**appalling and at times disgraceful**"[96] but as concededly "**unsafe**",[97] with "**fire and health risks**" of such order that the occupiers live in an "**emergency situation**",[98] must in fact be regarded as "**adequate**".[99]

[95] Paragraph [54], R15, p1067:9.
[96] Paragraph [18], p1047:13.
[97] Paragraph [57], R15, p1068:24.
[98] Paragraph [18], R15, p1047:15, 19.
[99] Applicant's Heads par. 120, p61.

188. The reason for this contortion is the clear difficulty of seeking to rely on the negative aspect of section 26(1) as containing a protection for "inadequate housing".

189. The danger of turning the recognition of a "**negative**" component in section 26(1) into an obliteration of the purpose of s26(3) has led to the need to state clearly what such recognition in the **Jaftha** decision[100] entailed:

> "**[15] In our view the way the Court below interpreted the decision in *Jaftha* was misplaced. What was in issue in *Jaftha* was not s26(3) of the Constitution but rather s26(1) - which enshrines a right of access to adequate housing - and the impact of that right on execution against residential property…Nor did the Constitutional Court decide that s 26(1) is compromised in every case where execution is levied against residential property. It decided only that a writ of execution that would deprive a person of 'adequate housing' would compromise his or her s26(1) rights and would therefore need to be justified as contemplated by s36(1)…**
>
> **[16] It must be borne in mind that s 26(1) does not confer a right of access to housing per se but only a right of access to 'adequate' housing; and this concept of necessity is relative….In *Jaftha* it seems never to have been disputed, and was indeed accepted as self-evident by both the High Court and the Constitutional Court, that the forfeiture in question entailed a deprivation of 'adequate housing'. The facts before the Constitutional Court show why this was so."[101]**

190. In **President of the RSA v Modderklip Boerdery (Pty) Ltd (Agri SA (Pty) Ltd, Amici Curiae)** Langa ACJ stressed the imperative that state

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[100] **Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others 2005 (2) SA 140 (CC), particularly pars. [29], [31] to [33].**

[101] **Standard Bank of South Africa Ltd v Saunderson And Others 2006 (2) SA 264 (SCA), pars. [15] and [16].**

action in response to section 26 rights actually should be measured by the extent to which it may be said to *"**advance the interests at stake**"*. [102]

191. One must, in other words, take a step back and ask whether a certain remedy advances the interests at stake or not. It cannot be said that cutting the City off at its knees when it comes to efforts to eradicate identified instances of unsafe and inadequate housing, and compelling it to allow such instances to proliferate, advances the interests of promoting progressive realisation of the right to access to adequate housing. On the contrary, it would go a long way towards violating the admonition by Langa ACJ voiced in that same passage, that, when advancing the interests at stake, "**land invasions should always be discouraged**."

192. It goes without saying that an effective paralysis of the City's ability to evacuate dangerous buildings would encourage the desperate to occupy dangerous buildings on a large scale – by removing the deterrence to such invasion of a likely evacuation in the context of a world where health and safety laws are enforced and known to be enforced.

NORMATIVE CONFUSION – PROGRESSIVE POSITIVE RIGHTS OR INDIVIDUAL IMMUNITIES ?

193. This court – particularly in **Grootboom** and TAC – has grappled with the difficulties raised by second-generation rights. The courts have

[102] 2005 (5) SA 3 (CC), par. [49].

grappled with the fact that any judicial approach to these rights must at once recognise the progressive and collective nature of the rights in question, develop guiding principles about its application in the individual stances, and in so doing, have regard both to the separation of powers and the problems of polycentricity.

194. In the process, and in particular in the sphere of housing, it was important to stress, and so this court did stress, that one is not dealing with Hohfeldian claim-rights[103] on the part of individuals to any particularised conception of the realisation of housing access here and now.[104] Instead, one is faced with a collective, progressively realised right to which the State's response would necessarily entail a high content of matters of policy with great scope for reasonable differences of approach and prioritisation. This, in turn, requires a circumspect intervention by the courts.[105]

195. The SCA was alive to this and held it significant that the **Grootbom** decision is specifically inimical to the High Court's order that certain accommodation be provided to the applicants within a particular time-frame, because section 26 did not "**entitle the applicants to claim shelter or housing immediately upon demand**".[106]

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[103] See **WN Hohfeld *Fundamental Legal Conceptions* (ed WW Cook) at 38-50**, as cited by Corbett JA in **Goldberg v Minister of Prisons 1979 (1) SA 17 (A) at 39C-D (diss.)**, and again in **Slims (Pty) Ltd v Morris NO 1988 (1) SA 715 (A) at 743C**.

[104] See the discussion in **Government of the Republic of South Africa and Others v Grootboom & Others 2001 (1) SA 46 (CC) particularly at par. [95]**.

[105] See the important discussion in **Minister of Health v Treatment Action Campaign (No 2) 2002 (5) SA 721 (CC) particularly pars. [34] to [38]**.

[106] **Government of the Republic of South Africa and Others v Grootbom and Others 2001 (1) SA 46 (CC), para. [16], SCA judgment R17, p 1269, par. [46].**

196. So the settled authority establishes the important insight that a progressive collective second-generation right cannot be translated into an individualised specific claim-right to a particular instance of housing of a particular kind at a particular place. This is considered again below when dealing with the occupier's demand for a structural interdict.

197. For present purposes, however, to address the problem of normative confusion, it is important to recognise that there is even less reason in logic or law to turn a progressively realised collective right to access to adequate housing into an individually asserted immunity against specific exercises of state power, than there is to convert it into a claim-right in the individual specific instance.

198. The weakness of normative non sequiturs was exposed by this court in **Pretoria City Council v Walker**.[107]

199. The *Walker* decision concerned the selective enforcement by the Pretoria City Council of its rates levies against affluent and predominantly white neighbourhoods. Because this involved discrimination on the basis of race, which was a ground specified in section 8 of the Interim Constitution that protected equality, and because there was insufficient justification for the resulting unfair discrimination, it was held that the council had violated the relevant rights.

[107] 1998 (2) SA 363 (CC).

200. But, the court pointed out, the reality of a violation of the right to equality and against unfair discrimination did not alter the reality of the proper existence of the debts and the proper enforcement of the laws by the council in seeking to recover them. Hence a remedy that granted the affected individual absolution from the instance in an action brought to recover the debt was singularly inappropriate.[108] Instead, a structural interdict combined with a declaratory order was issued to address the violation of the right to equality – but the debt was allowed to be enforced, as its denial, upon the invocation of the rights violation that its enforcement entailed, would amount to normative confusion and be a constitutional *non sequitur*.

201. The occupiers respond by citing a passage in **Brisley**[109] which, according to the occupiers, suggests that section 26(2) failures could be legally relevant circumstances in respect of s26(3) scrutiny.[110]

> **"Regtens is 'n eienaar geregtig op besit van sy eiendom en op 'n uitsettingsbevel teen 'n persoon wat sy eiendom onregmatiglik okkupeer behalwe indien daardie reg beperk word deur die Grondwet, 'n ander Wet, 'n kontrak of op een of ander regsbasis. 'n Voorbeeld van sodanige beperking is te vinde in die Wet op die Voorkoming van Onwettige Uitsetting en Onregmatige Besetting wat, soos hierbo aangetoon, 'n uitsettingsbevel in die omstandighede genoem in daardie Wet onderhewig maak aan die uitoefening van 'n diskresie deur die hof. Artikel 26(2), wat sekere behuisingsverpligtinge op die Staat plaas, mag moontlik in bepaalde gevalle so 'n beperking op die Staat se eiendomsreg plaas. Vir doeleindes van hierdie saak is dit egter nie nodig om te beslis of dit wel die geval is nie.**"

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[108] Par. [94].
[109] **Brisley v Drotsky 2002 (4) SA 1 (SCA), par. [43].**
[110] Applicant's Heads par. 178, p86-88.

202. The penultimate sentence is the sentence the occupiers invoke.

203. This passage is no support for endorsement of the normative confusion. The court was explaining that, where PIE was not applicable, the "**relevant circumstances**" in section 26(3) were the legally relevant circumstances without regard to PIE. Given that it had been decided that PIE did not apply to cases of holding over, it was held that in the case at issue, the legally relevant circumstances were those that related to the law of ownership and its incidents. Hence the existence or absence of alternative accommodation was not part of such circumstances.

204. The incidents of ownership were then considered. That is the context of the passage. The court indicated that there were often legally relevant hurdles to untrammelled exercise of the incident of ownership that entails dominion over the fate of the property. It then remarked that, *where the State was the owner, and it desired to exercise its rights as owner,* it might be that, in certain cases, ("bepaalde gevalle") its obligations under section 26(1) and 26(2) could affect its ability to do so.

205. What the court would have had in mind, for example, would be cases where the State had made certain State land available in the discharge of its section 26(2) obligations, and then sought to act as the owner and to evict persons from such land. Or, perhaps even, where the State sought to evict persons from State land to be used for other purposes, and those

persons protested that the State land in question could be utilised for fulfilling section 26(2) rights and obligations. This is a far cry from saying that some unspecified degree to which the state may have failed in its section 26(2) obligations, unrelated to the land at issue, may become a "legally relevant" circumstance in a review of a determination by the state that a building on land the state does not own is so dangerous that it is necessary for it to be evacuated for the sake of safety.

206. Any attempt to develop a coherent jurisprudence in terms of which some degree of failure in the collective, positive sphere results in an immunity from eviction must, we submit, fail. It seeks to attach positive, collective and progressive rights that do not even have corollary individuated claim rights to individualised immunities. The hard questions posed at the beginning of this argument would be answered in a chaotic and arbitrary fashion, guided by no coherent principle.

Olga Tellis

207. It may be instructive, at this point, to consider the 1985 Indian decision in *Olga Tellis* on which the occupiers place much reliance in their argument.[111] Despite elevating the interest in housing proximate to work opportunity to an integral part of the "**right to life**" itself, it did not thereby transform such an interest into an immunity against evictions from public land required for other purposes. These evictions were

[111] **Olga Tellis v Bombay Municipal Corporation (1985) 3 SCC 545**; Applicant's Heads p55ff.

countenanced as long as these occurred in accordance with due process of law. The "**right to life**", manifested through the interest in occupying a place close to work opportunity, yielded to the State's interest in avoiding a "**source of nuisance to the public**."[112] And, despite recognition of an obligation on the State to provide accommodation to the affected persons, the Supreme Court made it clear that the provision of alternative accommodation was not a "condition precedent" to eviction.[113]

208. This court has previously warned that *dicta* in **Olga Tellis** and related cases are not, without more, to be transposed to South African constitutional law.[114] That warning was not considered by the court in **Victoria & Alfred Waterfront v Police Commissioner**,[115] upon which the occupiers rely. **Olga Tellis** was not followed by the Court of Appeal in Lesotho, in a claim by informal traders to the right to life as a basis to avoid eviction.[116]

209. Our constitutional jurisprudence does not require the creation of an apparent constitutional paradox – first making the right to housing equal to the right to life itself, then allowing it to be trumped by the state's interest in securing public land for public purposes. Our Constitution, unlike the Indian, does regulate the right to housing, and, as pointed out

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[112] (1985) 3 SCC p579.
[113] [alarm ref SCC].
[114] **Soobramoney v Minister of Health, KZN 1998 (1) SA 765 (CC) at 773E-774A.**
[115] **2004 (4) SA 444 (C) per Desai J (at 448F).**
[116] **Khathang Tema Baitsokoli v Maseru City Council (Court of Appeal (Civ) 4/05; 20 April 2004).**

above, our courts have articulated its collective and progressive character, and pointed to the fallacy of translating this into an individualised claim-right.

210. The degree to which such jurisprudence may assist in guiding a proper approach to ours is therefore severely attenuated. It may be observed, however, that the notion that *Olga Tellis* represents the last word on the clash between the state's interests and those of the urban poor in India would be very misleading indeed. On the contrary, it represented the zenith of recognition of the interests of the urban poor, which has since yielded a considerable judicial backlash, the strength of which should give sober pause for thought.

211. A critical and instructive perspective on this backlash is offered by Usha Ramanathan.[117]

212. Ramanathan laments a shift in focus, from the days of *Olga Tellis*, to an emphasis upon the illegality of occupation of public land, and on the obligation of the state urgently to do something to stop this. A watershed moment in this shift is said to be the decision of the Indian Supreme Court in **Almitra Patel v Union of India**,[118] in which the legal conditions that were seen to encourage the creation of slums on public

[117] "Illegality and the Urban Poor" *Economic and Political Weekly* 22 July 2006, 3193.
[118] (2000) 2 SCC 679.

land were decried as "**slum creation**" instead of "**slum clearance**". Ramanathan discusses this aspect of the decision thus:[119]

> **"[A] three-judge bench of the Supreme Court spoke words that have had a dramatic impact on the lives of the poor in Delhi. Delhi as the capital of the country, the court exclaimed, 'should be its showpiece', and yet 'no effective initiative of any kind' has been taken for 'cleaning up the city' (pp684-85). 'When a large number of inhabitants live in unauthorised colonies, with no proper means of dealing with the domestic effluents, or in slums with no care for hygiene, the problem seems more complex.'**
>
> **Slums were also perceived to be 'good business' and 'well organised', multiplying 'in the last few years by geometrical proportion.' To the court, slums represented 'large areas of public land… usurped for private use free of cost' (p685). The 'promise of free land, at the taxpayers' cost, in place of a jhuggi' was depicted as 'a proposal which attracts more land grabbers. Rewarding an encroacher on public land with an alternative free site is like giving a reward to a pickpocket.' In fact, it was 'slum creation' and not 'slum clearance' that was occurring in Delhi. This gave 'rise to domestic waste being strewn on open land in and around the slums' which needed to be dealt with 'most expeditiously and on the basis of priority'. Creation of slums, which increased the density of the population beyond the sustainable limit, needed to be prevented.**"

213. Ramanathan discusses[120] also the decision of the Delhi High Court in **Okhla Factory Owners' Association v GNCTD**[121] which issued a peremptory direction reading:

> "**7. No alternative sites are to be provided in future for removal of persons who are squatting on public land.**
>
> **8. Encroachers and squatters on public land should be removed expeditiously without prerequisite requirement of**

[119] Ramanathan at 3194-3195.
[120] At 3195-3196.
[121] 2003 (108) DLT 517.

> **providing them alternative sites before such encroachment is removed or cleared.**"

214. The decree was informed by the reasoning that '**an arbitrary system of providing alternative sites and land to encroachers on public land**' would '**encourage dishonesty and violation of law**'.[122]

215. The pendulum-swing appears to reach its one pole when Supreme Court justices are quoted as follows:

> **"In dealing with the impending demolition in Nagla Machi, justices Ruma Pal and Markandey Katju in the Supreme Court are reported[123] to have remarked, irately: 'If you are occupying public land, you have no legal right, what to talk of fundamental right, to stay there a minute longer.' And: 'Nobody forced you to come to Delhi… If encroachments on public land are to be allowed, there will be anarchy.' These comments from the bench are symptomatic of legality supplanting constitutionality in current discourse. This has been urged on by a range of threat perceptions, where the urban poor are seen as overrunning cities; their encroachment of public land as bordering on criminality; the occupation of public lands as being synonymous with slumlordism and profiteering; their numbers as placing an intolerable burden on infrastructure; and, the impossibility of their legal existence in cities as providing a prescription for anarchy.**"

216. It is, conceptually speaking, difficult enough to consider why those affected by State action with respect to housing necessarily benefit from a more pressing triggering of their section 26(2) rights – such as would yield and justify SCA Order 2.1. But this, at least, has the benefit of coherence and may be applied without normative confusion: where the State has acted, for whatever reason, and however lawfully, to create a

[122] Ramanathan at 3196.
[123] Ramanathan cites Dhananjay Mahapatra 'SC: Encroachers Have no Right over Public Land: Court Rules Poverty Cannot be and Excuse for Squatting', *Times of India*, Delhi Edition 10 May 2006.

state of homelessness, those affected may have privileged claims to the benefit of the progressive realisation of s26(2) rights. This does not affect the lawfulness of the action in question; but it creates a peculiar proximity relationship between these individuals and the state when it comes to section 26(2).

217. The City has accepted SCA order 2.1. So, as we have been at pains to point out, have the occupiers. Its correctness is therefore not brought to this court for reconsideration.

218. The City submits that the SCA struck an appropriate balance in its orders 2.1 and 2.3. It afforded the appropriate weight to the contesting interests, and avoiding the pitfalls of fallacy, and of implying unacceptable answers to the hard questions. This is an appropriate foundation upon which the jurisprudence of section 26, and the City's obligation to foster a safe and healthy environment, can be built, and to which other cities and organs of state can look.

THE CONSTITUTIONALITY OF THE NBRA

219. Two bases of unconstitutionality are suggested, in both cases entailing violations of section 26(3):

219.1 The Act "allows" evictions without a court order;[124] and

219.2 The Act "permits"[125] "arbitrary evictions" by creating "a very real risk of"[126] such evictions.

220. Before these propositions are considered with reference to the provisions of the Act, it may be noted that they have an odd resonance in circumstances where the City had itself interpreted the Act as subject to a constitutional imperative of obtaining a prior court order before securing eviction, and had acted accordingly – such that, as a result of the legal process to which the City subjected its powers, no evictions were achieved.

221. What the occupiers seek to do is a familiar forensic tactic: to propound the most extreme interpretation of a statute (not one implemented or advanced by the defendant); thereby knock down an easy Aunt Sally; and consequentially remove the source of any statutory authority from the administrative action in issue.

222. It is important to recognise the overriding mootness (or "unripeness"[127]) of this constitutional attack inherent in the simple fact that there has

[124] Applicant's Heads p91ff.
[125] Applicant's Heads p93.
[126] Applicant's Heads p95, par. 195.
[127] "While the concept of ripeness is not precisely defined, it embraces a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed" **National Coalition for Gay & Lesbian Equality v Minister of**

simply been no threat at any time of State action that would entail evictions without court orders, given the manner in which the legislative powers have been interpreted and applied by the City.

223. Otherwise viewed, if a power is to be read into the NBRA that allows for evictions without a court order, then the City has not invoked such a power. Its hypothesised existence in the statute would be as irrelevant to these proceedings as would the hypothesised existence of search and seizure powers in the same statute which equally the City has not invoked.

224. The debate between the occupiers and the SCA whether the terms of the NBRA do in fact provide for an eviction at all, is similarly beside the point. The SCA held that the provisions, properly construed, did not allow the City to evict – they allow merely for a notice to vacate, non-compliance with which entails criminal liability, but an eviction would need to be obtained through a court; there was no power of 'self-help' in the statute.[128]

Home Affairs 2000 (2) SA 1 (CC), par. [21], citing as follows in the footnote (19): "**S v Mhlungu and Others 1995 (3) SA 867 (CC) (1995 (2) SACR 277; 1995 (7) BCLR 793) at para [59]; Zantsi v Council of State, Ciskei, and Others 1995 (4) SA 615 (CC) (1995 (10) BCLR 1424) at paras [2] - [5]; Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others 1996 (1) SA 984 (CC) (1996 (1) BCLR 1) at para [199] and S v Bequinot 1997 (2) SA 887 (CC) (1997 (1) SACR 369; 1996 (12) BCLR 1588) at paras [12] - [13]**. As Chaskalson et al, above n 18 at 8 - 15, aptly put it,

> '(w)hile the "ripeness" doctrine is concerned with cases which are brought too early, the "mootness" doctrine is relevant to cases which are brought, or reach the hearing stage, too late, at a time when the issues are no longer "live" '.

[128] R17, p1271, par. [53].

225. There being nothing peculiarly 'constitutional' in the merits of this reading, the construction given to the statute by the SCA ought to be decisive. It is consistent with the rule that where a statute is reasonably capable of being interpreted in a way which avoids constitutionality, it should be so construed.[129] The City, the court at first instance, and the SCA had no difficulty reading the provisions of the statute as subject to, and therefore consistent with, constitutional requirements.[130]

226. It is useful to compare the most apposite illustration of the reading-down principle, namely **Lawyers for Human Rights and Another v Minister of Home Affairs and Another**[131] with the decision in **Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others 2005 (2) SA 140 (CC)**.

227. In *LHR*, the interposition of a court application to obtain a further detention in terms of section 34 of the Immigration Act 13 of 2002 was read into the statute to make it consonant with the Bill of Rights.

228. In **Jaftha**, the provisions of section 66 of the Magistrates' Courts Act 32 of 1944, which contained no principle by which sales in execution to satisfy debts were governed, were held to be overbroad and in violation of section 26(3).

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[129] See for instance, **Investigating Directorate: SEO v Hyundai Motor Distributors 2001 (1) SA 545 (CC) at [26]; S v Dzukuda; S v Tshilo 2000 (4) SA 1078 (CC), pars. [37], [38] and [40].**
[130] Judgment at first instance par. [36], R15, p1056:19; SCA pars. [53] to [56], R17, p1271.
[131] 2004 (4) SA 125 (CC).

229. The most important difference between the **Jaftha** situation and the instant is that the NBRA specifies a non-arbitrary criterion, the application of which is open to judicial review, for the eviction. It is the fact that such eviction be "**necessary for the safety of any person**." There is no reason to read the statute as allowing arbitrariness and as being unable to accommodate the mechanism adopted by the City to make it consonant with section 26(3). The occupiers' argument that the power is too broad for being unbridled by criteria[132] founders upon its disregard for the fact that a very particular criterion, namely that it be necessary for the safety of any person, is indeed specified. It is also oblivious to the fact that the applicability of the criterion will always be subject to judicial scrutiny before the eviction is ordered by the court – given that the court will, and must, be approached first to give leave for the power to be exercised. The "second" argument for arbitrariness, therefore, begs the question addressed by the first argument – whether the statute allows an eviction without a court order in the first place.

230. Invocation of the admonitions of the United Nations Committee on Economic, Social and Cultural Rights[133] to the effect that legislation governing evictions must specify guidelines and criteria is similarly oblivious to the fact that, if the statute properly construed does not authorise evictions without a court order, it is pointless to argue for the presence of guidelines that assume the absence of court supervision.

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[132] Applicant's Heads pars. 188 to 205, p93 to 100.
[133] Applicant's Heads par. 197, p96.

231. There was a suggestion in the SCA by the *amici* that reading in the requirements of procedural fairness or of section 26(3) would require extensive re-writing of the provisions of the NBRA.

232. The point is that making section 12(4) of the NBRA "subject" to a constitutional qualification (whether that be the requirements of section 33(1) and of PAJA or those of section 26(3)) does not require any "surgery" or even re-writing of the section, nor does it require any attention to be paid to the nuances of the constitutional provision to which it is recognised as being subject. It simply requires that the court recognise that the unqualified empowering provision, silent about the applicability of the constitutional safeguard in question (be it PAJA or section 26(3)), be read as subordinated to the constitutional safeguard.

233. It would be as unnecessary and senseless to seek to re-write section 12(4) to add words importing all the requirements of administrative fairness with their different nuances in different cases, as it would be to seek to re-write it by adding "**but subject to the provisions of section 26(3) of the Constitution**." Precisely where and how section 26(3) and the requirements of PAJA are to be applied in this case is a matter of interpretation and application of section 26(3) and of the requirements of PAJA, not of interpretation and application of the NBRA.

234. In **Jaftha**, for example, it was held that the section was unconstitutionally overbroad, and that the appropriate remedy for this was to "read in" judicial supervision.

235. In the instant case, "reading down" makes far more sense. The empowering provision is simply read as subject to section 26(3) and to PAJA. It is not first declared unconstitutional for not stating itself to be so read, and then "remedied" by stating itself to be so read.

236. In **Jaftha** the statute in question stated liability to execution as a mechanical and automatic consequence of the non-satisfaction of a judgment debt and the absence of the relevant assets. No individual was empowered to make a decision to take action that evicts someone – there was a legal liability to execution created as attaching to the affected property. In the instant case, the statute empowers an official body to act to evict, and also specifies the criterion upon which this is to occur – there must be a deeming that this be necessary for the safety of any person. This is very different from the provision in **Jaftha**. The occupiers argue that there is no criterion specified. This misses the point. The statute empowers the administrative official to act only if deemed necessary for the safety of any person – thereby clearly creating an act and an objectively reviewable basis for the act that is easily capable of being adjudicated upon by a court of law – applying the appropriate degree of deference when doing so.

THE CASE FOR A VIOLATION OF SECTION 26(2)

237. In resisting the application for eviction, the occupiers from the outset asked for a declarator that the City had violated its obligations in terms of section 26(2) of the Constitution. This charge is also the foundation upon which the claim for a structural interdict in this Court is founded.

238. Section 26(2) creates a second generation right to positive action on the part of the State. The right is framed in the form of an obligation on the part of the State:

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

239. The creation of justiciable second-generation rights that render subject to court scrutiny the allocations made by the state of its budgetary resources immediately gives rise to concern that what is not readily justiciable and intensely political – the proper allocation of state resources – be rendered not only justiciable but enforceable at the hands of individual litigants.

240. Hence the great degree of deference allowed to the state in dealing with allegations that it has violated such rights, such as expressed in the

judgment in **Soobramoney v Minister of Health, KwaZulu-Natal**, invoked, quoted and relied upon by the SCA.[134]

241. Our Constitution does, however, make it possible for a litigant to demonstrate, in any given case, that the right in question has been violated – by demonstrating that, within the available resources of the state, the allocations that had been performed and steps that had been taken were sufficiently unreasonable as to warrant interference by the court despite the deference to policy in budgetary allocation. This was what happened in **Minister of Health v Treatment Action Campaign (No 2)**, in the context of an exhaustive discussion of the deference principle discussed in **Soobramoney** and in particular of the general inappropriateness of demanding socio-economic budgetary allocation to be adjudicated through the courts.[135]

242. In the **Grootboom** decision, which gave birth to Chapter 12 of the Housing Code, it was pointed out that, as the obligation created in section 26(2) was dependent upon available resources, so the corresponding right in section 26(2) was itself limited by the availability of resources; this was in the context of re-affirming the recognition of this structure in second-generation rights laid down in **Soobramoney**.[136]

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[134] 1998 (1) SA 765 (CC); SCA judgment par. [45], R17, p1267-1268.
[135] 2002 (5) SA 721 (CC).
[136] *Government of the Republic of South Africa & Others v Grootboom & Others* 2001 (1) SA 46 (CC), par. [46], citing *Soobramoney* par. [11].

243. Similarly, in **Treatment Action Campaign**, after re-affirming this principle,[137] it was pointed out that the right in question was tied to the boundaries of what could be achieved within the available resources. There was no general self-standing right with absolute application that was violated whenever it was shown not to be fulfilled in any individual case.[138] Hence, with respect to the particular second-generation right in question there (s27),

> **"The question is *whether the applicants have shown* that the measures adopted by the government to provide access to health care services for HIV-positive mothers and their newborn babies *fall short* of its obligations under the Constitution."**[139]

244. In the present case, the occupiers did not seek to make out any case for the proposition that the City had the available resources to provide them with the accommodation they demanded – adequate accommodation in the inner city.[140] The fact that this was the demand (as pointed out above) was understood as such by the City throughout, by the court at first instance and by the (unanimous) SCA – based expressly on such demand being advanced steadfastly to the last in argument and the all-or-nothing approach with which the demand was pursued up to the last in argument in the SCA:[141]

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[137] Pars. [31] and [32].
[138] Par. [34].
[139] Par. [25].
[140] See San Jose AA par. 29, R2, p67:17-18; par. 178, R2, p100:14-15; par. 185.3, p102.
[141] R17, p1277-1278, par. [74].

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

245. Indeed, the attack, first contained in the affidavits, on the idea of resettlement to the periphery of the city,[142] and the constant focus, articulated at length in the occupiers' written argument before this Court, on the assertion that the right to access to adequate housing included a right to proximity to the inner city, are entirely incoherent once voiced with a disavowal of any such actual demand.

246. So too is the refusal on the part of the occupiers of the tender referred to by the SCA:[143]

> **"The [occupiers'] insistence on nothing short of permanent accommodation in the inner city has meant that we have had little assistance in devising what the extent of those obligations might be and we have been compelled to rely in this regard largely upon the tender that has been made by the City… [of] emergency shelter for two weeks at no cost."**

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[142] RA par. 26.12; R7, p449:13-18: "Having regard to all of the above, the conclusion is inescapable that the occupiers of the inner city's bad buildings will be forced onto the periphery of Johannesburg in the event of their eviction. We point out further that the housing projects set out in the applicant's Housing Implementation Plan are without exception located on the urban periphery."

[143] SCA par. [77], R17, p1278. The tender was contained in the affidavit filed in the SCA: R16, p1143, with respect to accommodation in Protea South.

247. In response to such demands, the City specifically averred that it "**has no financial resources to enable it to provide alternative accommodation, even on a temporary basis, *as required by the respondents***."[144]

248. This evidence was not controverted by any evidence at all of any available resources on the part of the City to cater for the demand in question, or for any other demand. This the SCA rightly regarded as significant, when it criticised the failure on the part of the court at first instance to take account of "**the uncontradicted evidence of the City that it did not have the means to provide the [occupiers] with inner city accommodation**".[145]

249. In reply to the above, and to the City's response that the funding for emergency housing emanates from the Province, the occupiers appeared to argue that the provision in Chapter 12 of the Housing Code that envisaged applications by the City for emergency funding from the Province should be regarded as "**available resources**":[146]

> **"The funding available from the Provincial Department of Housing may be used for the provision of temporary shelter to persons who qualify for emergency housing."**

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[144] RA par. 29, R3, p200.
[145] SCA par. [45], R17, p1267.
[146] RA par. 30.6, p459.

250. This, with respect, is sleight of hand: applications from the City to the Province for funding can hardly be characterised as "**the funding available from the Provincial Department of Housing**".

251. Evidence placed before the SCA established that such requests as had been submitted by the City for provincial funding for emergency housing to cater for evictions had been ignored notwithstanding regular follow-ups[147] – the only evidence, therefore, buttressed the allegation that the City did not possess the funds to do that which was demanded.

252. At no stage, despite the fact that the Housing Code, the sufficiency or lawfulness of which the occupiers at no stage sought to attack, stipulates that the Province is to be the source of the relevant funds, have the occupiers sought to impugn the efforts of the Province, join it, or in any way seek to assert or establish that the Province had available the funds that could be made available upon application by the City.

253. In **Treatment Action Campaign** (TAC), the question of available resources for the specific second-generation demand at issue was settled by agreement – it was important to record that it was common cause that the resources in question were indeed available to the relevant State authority.

[147] SCA par. [29], R17, p1260; see Brits affidavit pars. 4 and 5, R16, p1144.

254. The occupiers have now moved to reliance on the references to specific instances of available accommodation in the latest affidavits filed by the City for the proposition that "**the City has funds available to provide temporary accommodation to people in crisis**".[148]

255. This statement goes nowhere towards asserting or proving that the City has the funds available –

255.1 to provide any accommodation at all to the 67 000 people occupying bad buildings in the inner city of Johannesburg for whom the occupiers purport to speak; or

255.2 to provide "adequate" accommodation such as argued by the occupiers to be integral to the right to access to adequate housing (i.e. not merely temporary, and close to the employment opportunities of the inner city), to any particular number of these 67 000 people.

256. The COHRE report on which the occupiers rely highlights the difficulties of the provision of ultra low cost housing to the desperately poor in the inner city where it can cost up to R80 000,00 to upgrade a living unit. The institutional housing subsidy is limited to R28 000,00 per beneficiary.[149]

[148] Affidavit of Sandra Liebenberg R16, p1173, par. 7.1.
[149] R8, 552: 11-17

257. The essence of the complaint against being provided with accommodation on the periphery of the city is really a problem of employment (and indirectly of transport), not of housing. It is because of the employment opportunities that exist in the inner city, and the cost of transport to them, that there is a problem of proximity even if the problem of housing were to be solved. There is nothing in Chapter 12, the Housing Act or the constitutional right of access to adequate housing that creates a right of employment or of transport to employment opportunities. These deprivations are as real as are the deprivations of housing, and felt as keenly, if not more so. But it does not aid in the development of a jurisprudence of housing rights to infuse such rights with employment and transport elements.

258. As stated above, the SCA order to which the parties have committed themselves is premised on the notion that those against whom the State has acted in its efforts to eradicate instances of dangerous living enjoy a privileged claim to the attention of the State in respect to the provision of temporary emergency housing in terms of Chapter 12. The occupiers therefore enjoy this attention ahead of others, such as the 67 000 for whom they purport to speak. As to the occupiers, therefore, their approximation of a second generation claim right has been addressed, and to their satisfaction (save that they insist that their proximity interests be included as a topic of the decreed consultation, an insistence that makes little sense given the meaning of consultation and its necessary propensity to include that about which the consulted feel most

strongly). The occupiers have committed themselves to SCA Order 2.1 as to their access to emergency housing.

259. An assertion that failure to provide them and to the other 67 000 similarly situated adequate accommodation in the inner city amounts to a violation of their section 26(2) rights, simply neglects to address the affordability of such a demand. An assertion of the violation of second generation rights on such a grand scale must at least be accompanied by some sort of indication of what precise budgetary allocation, of what resource, obtained from where, ought to be committed to the demand, and at the cost of what alternatives. The occupiers offered no element of such indication at any point.

CONCLUSION

260. We submit that the application for leave to appeal should not be allowed, alternatively that the appeal should not be upheld, because it has not been shown that the SCA erred in the orders it substituted for those of the High Court.

261. It is submitted (in what, it submitted, is ultimately the most appropriate sequence of issues) that it has not been shown that:

(a) the statute on which the City relies for its authority (and duty) to carry out evictions, the NBRA, is unconstitutional;

(b) The City's administrative action related to securing eviction orders from the court (pursuant to its constitutional and statutory duties) is vitiated, as a matter of administrative or constitutional law;

(c) the City has, on the evidence, failed to discharge its constitutional and statutory duties within the limits of proven available resources;

(d) that any such failure in any event raises an immunity, on the part either of the occupiers or the wider class on whose behalf they seek to act, against otherwise lawful evictions (in the event of submissions (a) to (c) being upheld)

(e) that any right to housing or shelter on the part either of the occupiers or the wider class is to housing or shelter in the inner city.

262. It is submitted that on the established test, an order as to costs is inappropriate in this matter.

J.J. GAUNTLETT SC

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30 July 2007