IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION CAPE TOWN)

Case number: 12553/2020

In the matter between:

SOHCO PROPERTY INVESTMENTS NPC	Applicant

and

MANFRED STEMMETT	First respondent
TASNEEM STEMMETT	Second respondent
MPHUMZI MAGOBIANE	Third respondent
LINDEKA MKHIZWANA	Fourth respondent
JOSEPH FOUTIE	Fifth respondent
NATALIE FOUTIE	Sixth respondent
CHRISTOPHER VAN DER WESTHUIZEN	Seventh respondent
MECAYLA LUCRICIA KRUGER	Eighth respondent
RAEES HENDRICKS	Ninth respondent
KICO DORCAS MANEEDI	Tenth respondent
DANIELLE PHILANDER	Eleventh respondent
TIMOTHY ISAACS	Twelfth respondent
THEMBEKA PRINCESS DINGILE	Thirteenth respondent
NOLUTHANDO DINGILE	Fourteenth respondent
LINDENI MSOMI	Fifteenth respondent
LUMKA NDLELA	Sixteenth respondent
DEBORAH MULLINS	Seventeenth respondent
MORNE MINTOOR	Eighteenth respondent
LINDSAY MINTOOR	Nineteenth respondent
RICARDO JACOBS	Twentieth respondent
CARMEN JACOBS	Twenty-first respondent
KATRIENA KROTZ	Twenty-second respondent
LEISHA TITUS	Twenty-third respondent
ANICA LAMBERT	Twenty-fourth respondent

PEDRO LOPES NOTA	Twenty-fifth respondent
SHANE JOBE	Twenty-sixth respondent
ASHLENE JOBE	Twenty-seventh respondent
TRACEY-LEE McLAGLEN	Twenty-eighth respondent
TASNEEM RYLANDS	Twenty-ninth respondent
MOGAMAT TAARIQ EDRIES	Thirtieth respondent
LIONEL COTTLE	Thirty-first respondent
RACHEL NEETHLING	Thirty-second respondent
ROZELLE GABRIEL	Thirty-third respondent
MITSIE ASAKUMA	Thirty-fourth respondent
SHIRLEY VAN WICHT	Thirty-fifth respondent
THE CITY OF CAPE TOWN	Thirty-sixth respondent

REASONS DELIVERED ON 16 MAY 2023

VAN ZYL AJ:

Introduction

1. On 21 September 2022 I granted an order for the eviction of the Respondents from the rental units established on the premises known as Erven 123335 and 123343, Cape Town, constituting the development at the Steenberg Project, Military Road, Steenberg, Western Cape ("the Steenberg Project" or "the project").

2. The order directed as follows:

3. The first to seventh, tenth to fifteenth, seventeenth to twenty-eighth, and thirty-first to thirty-fifth respondents, together with all other persons holding under them (collectively "the respondents"), are to vacate any and all, and in particular but not limited to the following units situated on the immovable property known as Erven 123335 and 123343,

Cape Town, constituting the development at the Steenberg Project, Military Road, Steenberg, Western Cape ("the Steenberg Project"):

3.1. MANFRED STEMMETT, the first respondent, from unit 112;
3.2. TASNEEM STEMMETT, the second respondent, from unit 112;
3.3. MPHUMZI MAGOBIANE, the third respondent, from unit 293;
3.4. LIDEKA MKHIZWANA, the fourth respondent, from unit 293;
3.5. JOSEPH FOUTIE, the fifth respondent, from unit 404;
3.6. NATALIE FOUTIE, the sixth respondent, from unit 404;
3.7. CHRISTOPHER VAN DER WESTHUIZEN, the seventh respondent, from unit 410;
3.8. KICO DORCAS MANEEDI, the tenth respondent, from unit 352;
3.9. DANIELLE PHILANDER, the eleventh respondent, from unit 168;
3.10. TIMOTHY ISAACS, the twelfth respondent, from unit 168;
3.11. THEMBEKA PRINCESS DINGILE, the thirteenth respondent, from unit 504;
3.12. NOLUTHANDO DINGILE, the fourteenth respondent, from unit 452;
3.13. LINDENI MSOMI, the fifteenth respondent, from unit 153;
3.14. DEBORAH MULLINS, the seventeenth respondent, from unit 25;
3.15. MORNE MINTOOR, the eighteenth respondent, from unit 11;
3.16. LINDSAY MINTOOR, the nineteenth respondent, from unit 11;
3.17. RICARDO JACOBS, the twentieth respondent, from unit 136;
3.18. CARMEN JACOBS, the twenty-first respondent, from unit 136;
3.19. KATRIENA KROTZ, the twenty-second respondent, from unit 117;
3.20. LEISHA TITUS, the twenty-third respondent, from unit 77;
3.21. ANICA LAMBERT, the twenty-fourth respondent, from unit 578;
3.22. PEDRO LOPES NOTA, the twenty-fifth respondent, from unit 440;
3.23. SHANE JOBE, the twenty-sixth respondent, from unit 38;
3.24. ASHLENE JOBE, the twenty-seventh respondent, from unit 38;
3.25. TRACEY-LEE McLAGLEN, the twenty-eighth respondent, from unit 365;
3.26. LIONEL COTTLE, the thirty-first respondent, from unit 46;
3.27. RACHEL NEETHLING, the thirty-second respondent, from unit 165;
3.28. ROZELLE GABRIEL, the thirty-third respondent, from unit 165;

3.29. MITSIE ASAKUMA, the thirty-fourth respondent, from unit 492; and

3.30. SHIRLEY VAN WICHT, the thirty-fifth respondent, from unit 645.

4. The respondents are to vacate the Steenberg Project by no later than 17:00 on Friday, 21 October 2022.

5. In the event of the respondents failing to vacate the Steenberg Project on Friday, 21 October 2022, the Sheriff of this Court is directed and authorized:

5.1. to evict the respondents from the Steenberg Project within 5 (five) days after such date, and

5.2. to deliver all the keys of the relevant units to the applicant's attorneys, Foxcroft & Associates, care of Springer-Nel Attorneys, 3rd Floor, 71 Loop Street, Cape Town.

6. The Sheriff is authorized and directed to employ the services of the South African Police Service to assist him, if it is necessary to do so, to evict the respondents from the Steenberg Project.

7. Those respondents who vacate the Steenberg Project in terms of paragraphs 1 and 2 above, or who are evicted in terms of paragraph 3 above, are directed to remove any of their possessions, materials and/or structures from the verge or road reserve in Military Road, Steenberg, adjacent to the Steenberg Project, on or before Friday, 4 November 2022, failing which the respondents will be deemed to have abandoned such possessions, materials and/or structures, and the Sheriff is directed thereafter to remove them and dispose of them as he deems fit.

8. The thirty-sixth respondent ("the City") is directed:

8.1. to make emergency housing available at the emergency housing settlement situated at Bosasa, Mfuleni, to any of the respondents who request access

thereto and who have in writing accepted the written offer made therefor to them by the City, such accommodation to be provided by no later than 5 October 2022,

8.2. *alternatively*, and at the relevant respondents' election, to provide them with emergency housing kits on the City's standard conditions.

9. The respondents are to pay the costs of this application (including the costs consequent upon the employment of two counsel) jointly and severally, the one paying, the other to be absolved.

10. The order was granted pursuant to an application brought by the Applicant ("SOHCO") under section 4(1) of the Prevention of Illegal Eviction and Unlawful Occupation of Land Act 19 of 1998 ("PIE"). The application was brought under section 4(6) of PIE in relation to certain of the Respondents, and in terms of section 4(7) in relation to others, depending on whether the relevant Respondent had resided in the unit on an unlawful basis for more than 6 months.

11. The provisions of section 4(2) of PIE were duly complied with.

12. I proceed to set out the reasons for the grant of the order. For the sake of convenience, when reference is made to the "Respondents", reference is made to the Respondents other than the City of Cape Town. The latter will be referred to as "the City".

Background

13. SOHCO is a company registered not for gain in terms of section 21 of the Companies Act, 1973. The Steenberg Project, in which the Respondents occupy units, is a social housing project of approximately 700 dwellings. SOHCO is a tenant of the City pursuant to a long-term notarial lease agreement concluded in relation to the land upon which the project has been established.

14. SOHCO contends that the Respondents are in unlawful occupation of the premises, and that it would be just and equitable that they be ejected therefrom.

15. The application has been opposed by all but one of the respondents, and a number of different attorneys of record have, throughout the convoluted history of the litigation, been appointed by them. For the sake of clarity in the discussion that follows on the merits of the application, the representation of the various respondents as at the outset of the hearing is summarized as follows:

    15.1. The First, Second, Fifth, Sixth, Seventh, Tenth, Eleventh, Twelfth, Thirteenth, Fourteenth, Fifteenth, Eighteenth, Nineteenth, TwentySecond, Thirty-Second and Thirty-Third Respondents are represented by Marlon Shevelew & Associates.

    15.2. The Twenty-Fourth Respondent is represented by September & Associates.

    15.3. The Third, Fourth, Seventeenth, Twentieth, Twenty-First, TwentyThird, Twenty-Fifth, Twenty-Sixth, Twenty-Seventh, Thirty-First and Thirty-Fourth Respondents are represented by PA Mdanjelwa Attorneys.

    15.4. The Thirty-Fifth Respondent initially represented herself, but is now represented by Sylvester Vogel Attorneys.

    15.5. The Twenty-Eighth Respondent appears not to have opposed the application, and is not represented.

    15.6. The Eighth, Ninth, Sixteenth, Twenty-Ninth and Thirtieth Respondents have moved out of the units previously occupied by them subsequent to the launch of the application. The application has thus been withdrawn as against them.

    15.7. The Court was advised at the hearing of the application that the Fifth Respondent has also vacated the relevant unit.

15.8. The City has not appointed attorneys of record.

16. At the hearing of the application, it was indicated that some of the Respondents were no longer represented. I shall nevertheless continue to categorise the Respondents by the attorneys who had represented them in the course of the litigation up to the date of the hearing, and particularly at the time of the delivery of their answering affidavits, so as to ensure that their defences are properly set out.

17. I have mentioned that this application has a convoluted history, and eventually required seven judicial case management meetings to progress it to a hearing. Various interlocutory applications were brought and finalised in the period leading up to the hearing. The detail is set out in SOHCO's heads of argument. I do not intend to repeat it.

18. When considering whether to grant an eviction order, the rights of both the applicant and the occupant must be taken into account, and a balance achieved. The Constitutional Court[1] stated the matter as follows: *"Of course* a *property owner cannot be expected to provide free housing for the homeless on its property for an indefinite period. But in certain circumstances an owner may have to be somewhat patient, and accept that the right to occupation may be temporarily restricted,* as *Blue Moonlight's situation in this* case *has already illustrated. An owner's right to use and enjoy property at common law can be limited in the process of the justice and equity enquiry mandated by PIE."*

19. The grant or refusal of an application for eviction in terms of PIE (once the applicant's *locus standi* has been determined) is predicated on a threefold enquiry:

19.1. First, it is determined whether the occupier has any extant right in law to occupy the property, that is, is the occupier an unlawful occupier? If he or she has such a right, then the application must be refused.

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[1] *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and another* 2012 (2) SA 104 (CC) at para [40].

19.2. Second, it is determined whether it is just and equitable that the occupier be evicted.

19.3. Third, and if it is held that it is just and equitable that the occupier be evicted, the terms and conditions of such eviction must be determined.[2]

SOHCO's case for the eviction of the Respondents

SOHCO's *locus standi*

20. The onus to prove *locus standi* for the institution of these proceedings is on SOHCO.[3]

21. Section 4(1) of PIE provides that "*[n]otwithstanding anything to the contrary contained in any law or the common law, the provisions of this section apply to proceedings by an owner or person in charge of land for the eviction of an unlawful occupier*".

22. "Owner", insofar as is relevant, is defined in PIE as "*the registered owner of land*". "Person in charge", in turn, means "*a person who has or at the relevant time had legal authority to give permission to a person to enter or reside upon the land in question*".

23. SOHCO's primary purpose is the development of quality affordable residential property (for rental) for lower income households. Steenberg Project is one such development. SOHCO was accredited as a social housing institution pursuant to the provisions of the Social Housing Act 16 2008.

24. SOHCO had concluded a Lease Agreement with the City (the registered owner of the land upon which the project has been built), at a time when the land was undeveloped. Funding for the construction of the immovable properties on the land was provided from

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2 *Transcend Residential Property Fund Ltd v Mati and Others* 2018 (4) SA 515 (WCC) at para [3].

3 *Kommissaris van Binnelandse Inkomste v Van der Heever* 1999 (3) SA 1051 (SCA) at para [10].

National Government, with a provincial top-up, as well as significant loan funding sourced and utilised by SOHCO itself.

25. SOHCO was thus entitled to launch the application, by reason of it being the person in charge of the Steenberg Project, as envisaged in section 1 of PIE. In addition, by reason of the Lease Agreement concluded between SOHCO and the City, SOHCO is the person who at all relevant times had the necessary legal authority to give permission to persons to enter upon or reside upon the land in question.

The Respondents are in unlawful occupation

26. The question arises whether the respondents are in fact "unlawful occupiers" in terms of PIE, in other words, persons "*who occup[y] 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, …"*

27. In *Wormald NO and others v Kambule*[4] the Supreme Court of Appeal held[5] that an "*owner is in law entitled to possession of his or her property and to an ejectment order against a person who unlawfully occupies the property except if that right is limited by the Constitution, another statute, a contract or on some or other legal basis ... In terms of s 26(3) of the Constitution, from which PIE partly derives ..., 'no one may be evicted from their home without an order of court made after consideration of all the relevant circumstances'. PIE therefore requires a party seeking to evict another from land to prove not only that he or she owns such land and that the other party occupies it unlawfully, but also that he or she has complied with the procedural provisions and that on a consideration of all the relevant circumstances (and, according to the Brisley case, to qualify as relevant the circumstances must be legally relevant), an eviction order is 'just and equitable*'."

28. Each of the First to Thirty-Fifth Respondents concluded, at various times, a Lease Agreement with SOHCO in respect of the relevant units in the Steenberg Project.

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4 2006 (3) SA 563 (SCA).

5 At para [11].

29. The Respondents subsequently fell into arrears with the payment of rentals, and in each instance, as provided for in the individual written Lease Agreements, SOHCO (as landlord) dispatched a letter of demand (or Breach Notice) to the relevant Respondents (as tenants), demanding that the arrear rental be settled within a period of 20 business days, and warning that if the arrear rental was not paid, SOHCO would terminate the lease without further notice.

30. Thereafter SOHCO sent a Notice of Cancellation to the relevant Respondents on the ground that they had not settled the arrear rentals. SOHCO informed each respondent in question that the Lease Agreement had been terminated as a result of such breach, and that they were required to vacate the relevant unit.

31. Despite this correspondence, each of the Respondents failed to vacate the unit occupied by them, and remained in occupation. In the circumstances, so SOHCO contended, each of the Respondents was in unlawful occupation.

32. Given the number of Respondents, SOHCO usefully set out the particulars regarding the lease concluded between with each tenant, the breach by reason of failure to pay rental, the Breach Notice and failure to rectify the breach, and the subsequent cancellation in a schedule attached hereto as annexure "**A**".

33. The schedule sets out the personal particulars of each of the Respondents, insofar as SOHCO is aware thereof (and which is dealt with individually in respect of each Respondent in the founding affidavit), as also any additional information or allegations regarding those persons as they appear either in the answering affidavits delivered or the City's questionnaires completed by the various occupants, and submitted to the City, insofar as those had been made available to SOHCO. The information set out on the questionnaires of the Respondents represented by Attorney PA Mdanjelwa is not reflected, as those Respondents initially refused to complete the questionnaires. They only did so at the eleventh hour. It is clear from the schedule that the Respondents are a group of persons, including children, with varying levels of income and assets.

34. Against this background, the various defences raised by the Respondents are considered.

The defences by the Respondents represented by Marlon Shevelew & Associates

35. The defences raised by these Respondents are, briefly, as follows:

    35.1. The matter should be referred to mediation pursuant to the provisions of section 7 of PIE, such mediation to be undertaken by the MEC for Human Settlements (Western Cape), and the proceedings should be stayed pending such mediation.

    35.2. SOHCO lacks the necessary *locus standi* for the launch of the application (the TwentyFourth Respondent relies on the same ground); and

    35.3. The Respondents are not in unlawful occupation of the units. In particular, they deny that the Notice of Breach and/or cancellation were delivered to the various Respondents, as alleged in the founding papers, and thus deny that a case has been made out for the eviction of the Respondents.

36. These defences have no merit.

37. The issue of SOHCO's *locus standi* has already been touched upon, but shall, together with the issue of mediation, be addressed in more detail below in relation to the defences raised by the Twenty-Fourth Respondent.

38. The allegation that the Lease Agreements were not lawfully cancelled because notice was not given of the breach, or of cancellation, is incorrect. It appears from a consideration of the affidavits filed of record that the notices in respect of these Respondents were delivered as follows:

    38.1. The First and Second Respondents received a Breach Notice on 24 April

2018, delivered by security personnel and by SMS. The Notice of Cancellation, in respect of both the First and Second Respondents, was served on them by the Sheriff and a Return of Service has been filed of record.

38.2. The Fifth and Sixth Respondents received the Breach Notice, which was delivered to them by security personnel (and followed up by an SMS) on 12 June 2019. The Notice of Cancellation was, on 19 August 2019, hand-delivered by SOHCO's security personnel, but the Fifth and Sixth Respondents refused to sign acknowledgement of receipt.

38.3. The Seventh Respondent received delivery of a Breach Notice in person and by hand, on 20 March 2019, by SOHCO's security personnel, and he signed for it. On 19 August 2019 the Notice of Cancellation was hand-delivered to him.

38.4. The Tenth Respondent received delivery of a Breach Notice on 10 May 2019, and a Notice of Cancellation on 15 July 2019.

38.5. The Eleventh and Twelfth Respondents received a Breach Notice, delivered by security personnel to those Respondents in person. The notice was signed for on 27 March 2019. On 15 May 2019 the Sheriff served a Notice of Cancellation on both the Eleventh and Twelfth Respondents, as appears from the Returns of Service filed of record.

38.6. The Thirteenth Respondent was handed a Breach Notice on 19 March 2019 by SOHCO's security personnel, but refused to sign for it. On 7 May 2019, the Sheriff served a Notice of Cancellation on her.

38.7. The Fourteenth Respondent received delivery of the Breach Notice on 12 June 2019 from SOHCO's security personnel, and the Notice of Cancellation was delivered to her by SOHCO's security personnel on 20 August 2019.

38.8. The Fifteenth Respondent received service of the Breach Notice from the Sheriff on 27 February 2020. On 22 May 2020 the Sheriff served the Notice of Cancellation on her.

38.9. The Eighteenth and Nineteenth Respondents received delivery of the Breach Notices from the Sheriff on 27 February 2020 and 30 June 2020 respectively, and Notices of Cancellation from the Sheriff on 22 May 2020 and 3 August 2020 respectively.

38.10. The Thirty-Second Respondent received the Breach Notice on 2 June 2020, served by the Sheriff. On 6 July 2020 the Sheriff served the Notice of Cancellation.

38.11. Similarly, the Thirty-Third Respondent's the Notice of Breach was served on her by the Sheriff, and the Notice of Cancellation was served by the Sheriff on 6 July 2020.

39. At the hearing, and in the course of argument, these Respondents again contended that the leases were not lawfully cancelled on the basis that the notices of breach were not received by them. The Respondents initially relied exclusively on the contention that there was a dispute of fact in respect of each of them, namely that they had not received the Notices of Breach (and in certain cases also not the Notices of Cancellation), and accordingly that the leases had not been validly cancelled. The schedule (annexure "**A**" hereto) handed up by SOHCO however show, on a case by case basis, that this contention was not sustainable.

40. A further argument raised in the course of the hearing was that the leases were not lawfully cancelled on the basis that the Notices of Breach only gave 20 business days' notice to remedy the breach, and not a period of one calendar month. The point was never raised in the papers. The Respondents sought to contend that SOHCO was required to comply with section 5(5) of the Rental Housing Act 50 of 1999.

SOHCO was required in the Notice of Breach to give one calendar month's written notice to remedy the breach, and not the 20 business days' notice that was referred to in the notices that were delivered to the Respondents. Accordingly, so they contended, the Notices of Cancellation were not effective in cancelling the lease agreements, and the Respondents are not in unlawful occupation of the premises.

41. In considering this issue, one must consider the nature of the leases in question. All are written leases, concluded for a period of 12 months with a fixed commencement and terminating date. The leases are all in one of two formats. The first is an earlier sample, drafted before the commencement of the Consumer Protection Act 68 of 2008. It contains the following relevant clauses:

    41.1. A clause 1.4 to the effect that: *"Should the lease be extended beyond the termination date referred to above by agreement between the parties, continued occupation of the premises by the lessee shall be on the basis of a monthly lease agreement; and subject otherwise to the same terms and conditions herein contained, and terminable by either party giving unto the other one calendar month's notice in writing and the said notice may only be given so as to reach the LESSOR or the LESSEE as the case may be, by not later than 12 NOON on the FIRST day of any calendar month, failing which such notice shall be null and void."*

    41.2. A clause 10.1 to the effect that should the rental not be paid on due date, the Lessor shall have right to cancel this lease without any notice whatsoever.

42. The second and later sample, amended to cater for the application of the provisions of the Consumer Protection Act, contains the following relevant clauses:

    42.1. A clause 1.4.1 that provides that: "… *On the expiry of the said period of 1 (one) year, if the LESSEE does not vacate the premises, the LEASE shall continue to operate on* a *month to month basis, both parties being obliged and*

entitled to give the other 1 (one) calendar month's notice of termination of the LEASE during the further period, unless the LEASE is extended by agreement between the parties."

42.2. To the existing clause 10.1 was added a clause that made provision for the Consumer Protection Act in the following terms: *"Should the Consumer Protection Act No 68 of 2008 apply to the LEASE, the LESSOR shall have the right to act in the case of* a *breach of the LEASE by the LESSEE as stipulated above in as far as such terms are consistent with the Act, or otherwise, if the Act applies and should the LESSEE fail to pay any rent on its due date,.....the LESSOR shall have the right to cancel this LEASE and to eject or have ejected from the premises the LESSEE or any other person occupying the premises, after having given the LESSEE due notice in terms of Section 14(2)(b)(ii) of Act 68 of 2008 and to claim such amounts from the LESSEE as provided for in Section 14(3) of the said Act."*

43. In relation to all of the Respondents, the initial period of one year had passed, and no further written agreement was concluded. Accordingly, all the leases continued to operate on a month-on-month basis, as provided for in the written lease agreements, and subject to the terms contained therein.

44. Section 14(2)(b)(ii) of the Consumer Protection Act provides that: *"(ii) the supplier may cancel the agreement 20 business days after giving written notice to the consumer of* a *material failure by the consumer to comply with the agreement, unless the consumer has rectified the failure within that time."*

45. SOPHCO gave 20 business days' notice to all the Respondents to remedy the breach, which is the notice period envisaged in section 14(2)(b)(ii)(bb) of the Consumer Protection Act

46. In *Makah v Magic Vending (Pty) Ltd*[6] the Full Court of this Division, in considering a breach clause similar to the first part of clause 10.1, concluded that the notice period in section 14(2)(b)(ii) did not apply to a month-on-month residential lease, and only applied to fixed-term agreements. In that matter the parties had entered into month-to-month lease agreements. The Court concluded that it would be disproportionate to invoke a 20 business-day notice to cancel a monthly lease.[7] To offer such protection in cases of a monthly and indefinite lease would be to offer protection in circumstances not envisaged by the Act.[8]

47. In the matter of *Transcend Residential Property Fund Ltd v Mati and others*[9] the Court dealt with a written lease that had been concluded for an initial period of one year, whereafter it would continue on a month-on-month basis, subject to termination by either party on one calendar month's written notice. The lease provided that if the lessee failed to pay any amount to the lessor during the initial period, and remain in default for 20 business days after dispatch of written notice calling upon her to remedy the breach, the lessor would be entitled forthwith to cancel the lease. The lessee fell into arrears during the initial period, notice of breach was given, and the lease was cancelled.

48. The Court therefore addressed the matter on the basis that this was a lease for a fixed term, and that the lessor was required to give notice in terms of section 14(2) of the Consumer Protection Act. The issue of the applicability of section 5(5) of the Rental Housing Act was not raised.

49. In *Magic Vending (Pty) Ltd v Tambwe and others*[10] the Court was required to consider a breach clause which contained terms identical to those in the second sample in the present application, which included provision for the application of the Consumer Protection Act. The lease that was concluded was a written month-on-month lease. The Court concluded, while following *Makah*, that section 14(2)(b)(ii) of the Consumer Protection Act applies, according to its tenor, only to fixed term

6 2018 (3) SA 241 (WCC).
7 At para [11].
8 At para [14].
9 2018 (4) SA 515 (WCC).
10 2021 (2) SA 512 (WCC).

consumer agreements, *"and arguably also to month-on-month agreements that have automatically come into being"* by virtue of section 14(2)(d) upon the expiry of a fixed term agreement.[11]

50. Section 14(2)(d) of the Consumer Protection Act provides that, upon expiry of the fixed term of the consumer agreement, it will be automatically continued on a month-on-month basis, subject to any material changes of which the supplier has given notice, unless the provisions of subsections (i) and (ii) apply.

51. In the present instance, SOHCO afforded each of the Respondents 20 business days' notice to remedy the default, and the 20 business-day period was mentioned in the Breach Notices. None of the Respondents remedied the default within the period of 20 business days. It is accordingly not necessary for this Court to consider whether the Breach Notices and subsequent cancellations were ineffective (on the assumption that section 14(2)(b)(ii) of the Consumer Protection Act was of application), by reason of a failure by SOHCO to comply with the provisions of the Consumer Protection Act.

52. Section 5(5) of the Rental Housing Act is clearly not appliable to the termination of leases on the grounds of breach. It was not required of SOHCO, when seeking to cancel the leases on the ground of a breach thereof, to give one month's notice to remedy the breach. The section provides as follows:

"If on the expiration of the lease the tenant remains in the dwelling with the express or tacit consent of the landlord, the parties are deemed, in the absence of a *further written lease, to have entered into* a *periodic lease, on the same terms and conditions as the expired lease, except that at least one month written notice must be given of the intention by either party to cancel the lease."*

53. Section 5(5) of the Rental Housing Act is not applicable to the present matter, because the written lease agreements in this matter expressly provide for what is to

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[11] At para [5].

happen after the termination of the initial period, namely that the lease will be a month-on-month lease subject to the terms of the written lease agreement.

54. The suggestion that section 5(5) applies to the cancellation of leases on the grounds of breach is in any event not supported by most of the relevant judgments in which a similar point has been raised.

55. In *Luanga v Perthpark Properties Ltd*[12] this Court considered the application of section 5(5) of the Rental Housing Act. The facts are important. The parties had entered into a lease for a period of 12 months, with the usual provision that if the lease was not cancelled by the lessor or the lessee before it expired, the lease would automatically continue on a month-on-month basis and might be cancelled by either party on at least 20 business days' notice to the other party. In due course the lessor notified the lessees in writing that the leases were cancelled. This was not by reason of any breach of the lease on the part of the lessee, but because the premises were being sold.

56. The lessees opposed an application in terms of PIE for their eviction from the premises, and contended that the lessor could not rely upon the 20 business-day clause in the lease, and that it had been necessary for the lessor to comply with the time period provided in section 5(5) of the Rental Housing Act. The Court held that the lessor was required, in those circumstances, to give one calendar month's notice, as provided for in section 5(5). Importantly, that case did not relate to a termination following upon a breach of the lease by the lessee, and is thus distinguishable from the present application.

57. The possible application of section 5(5) of the Rental Housing Act was also raised in *Magic Vending v Tambwe supra.* The facts in that matter were different to those in *Luanga,* in that the lessor relied upon a breach of the lease on the part of the lessee, and instead of giving notice to terminate the lease (as was the case in *Luanga),* the landlord gave notice to remedy the breach. The Court held[13] in relation to section 5(5):

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12 2019 (3) SA 214 (WCC).

"It is plain that the provision is applicable to the termination of a *periodic lease that is deemed to have come into being when the lessee remains in the property with the express or tacit consent of the lessor after the expiration of* a *pre-existing fixed term lease. It is not applicable in* a *situation in which a lease containing a forfeiture clause is terminated by the landlord by reason of the lessee's failure to pay the rent. The judgement in Luanga. which held that one month's notice referred to in section 5(5) denoted one calendar month's notice also has no bearing on a landlord's right to terminate a lease on account of a material breach of contract by the lessee."* [Emphasis added.]

58. The point was considered again in *Stevens v Chester and others.*[14] The lease was for a fixed term which, on expiry of the term, had been converted to a month-on-month lease. The lessees had breached the lease by failing to pay the rental, and they were given notice of breach and called upon to remedy the default. The issue raised was about the period which they were to be afforded to remedy the breach. It was argued for the Respondents in a PIE application that the lessor was required to give notice of cancellation in terms of section 5(5) of the Rental Housing Act.

59. The Court was referred to both the *Luanga* and the *Tambwe* judgments. The Court referred to the passage from *Tambwe* (quoted above), with which conclusion the Court stated that it agreed, on the grounds that that matter had dealt with a written lease, albeit that it operated on a month-on month basis, and the landlord in that matter was entitled to rely on the cancellation or breach clause.[15] Despite this conclusion, and for reasons that are not clearly apparent, the Court concluded that because the lessor had not complied with the provisions of section 5(5) of the Rental Housing Act, the application stood to be dismissed with costs.

60. Upon a consideration of *Tambwe* and *Hendricks* (referred to below), and on a proper interpretation of section 5(5) of the Rental Housing Act, I am of the view that *Stevens* is clearly wrong, and I decline to follow it.

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13 At para [14].
14 [2021] ZAWCHC 61 (16 March 2021).
15 At para [16].

61. The issue was considered again in *Hendricks N.O and another v Davids and 4 others*.[16] A written lease was concluded for a residential property for a period of one year, renewable at the option of the first respondent. The lease was never renewed, but the first respondent remained in occupation of the property. When the tenant fell into arrears, notice was given affording the tenant 7 days to remedy the default, failing which the lease would be cancelled. When no payment was forthcoming, the lessor gave notice of cancellation. A notice period of 7 days was provided for in the written lease agreement.

62. The lessee raised a point *in limine* in the magistrate's court to the effect that there had been non-compliance with the provisions of section 5(5) of the Rental Housing Act, and that the landlord was required to have afforded a month's notice of his intention to terminate the lease agreement. The magistrate upheld the point *in limine* and dismissed the application, and the matter accordingly came to this Court on appeal.

63. The Court defined the narrow point as being whether section 5(5) of the Rental Housing Act affects the rights of a landlord to cancel a lease agreement on account of a lessee's breach. The Court followed the decisions in *Tambwe* and *Trascend,* and concluded that section 5(5) of the Rental Housing Act did not override the provisions of the breach clause in so far as it concerned the right to cancel the lease on account of breach.

64. The purpose of section 5(5) of the Rental Housing Act is to preserve the rights of a tenant in a month-on-month lease, in circumstances where the written lease agreement does not make express provision for the tenancy that follows upon the termination of the initial period. Such an approach was adopted in *Sharma v Hirschowitz and others,*[17] in which the problem intended to be addressed by section 5(5) of the Rental Housing Act was considered. The Court stated:[18]

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16 An unreported decision under case number A221/2021 of the Full Court of this Division, delivered on 12 April 2022.

17 2020 (3) SA 285 (GJ).

18 At para [51].

"The legislature did not intend to preclude the conclusion of further lease agreements after the expiration of the lease agreement or to prohibit increased rentals after the expiry of initial leases. So *much is clear from the exclusion of written agreements from Section 5(5). The mischief the legislature intends addressing is quite clearly the resolution of disputes which quite often arise in oral or tacit agreements about the nature of the terms of the renewed lease. Thus the common situation where the terms of the renewed lease are open to dispute is addressed. Absent writing, the renewed lease is deemed to be the same as the previous one. This is* a *perfectly sensible statutory provision designed to provide* a *rule of thumb to resolve commonly encountered disputes."*

65. Section 5(5) could also not apply in a situation such as the present, because of the potential for conflict between the legislative provisions of section 14(2) of the Consumer Protection Act and section 5(5) of the Rental Housing Act. If a lease falls within the provisions of section 14(2)(b)(ii) of the Consumer Protection Act (as in the present case), then a notice period in the event of a breach of the lease agreement will be 20 business days. It would be absurd if, notwithstanding this, the Rental Housing Act required one calendar month's notice to remedy the same breach.

66. In all of these circumstances, I agree with the submission made by counsel for SOHCO that there is no basis to find that the notice period of 20 business days afforded to each of the Respondents to remedy the breach was inadequate or insufficient.

The defences raised by the Twenty-Fourth Respondent, represented by September & Associates

67. The defences raised by the Twenty-Fourth Respondent are the following:

    67.1. The Notarial Deed of Lease relied upon by SOHCO was concluded between the City and SOHCO. The TwentyFourth Respondent contends that the City ought (pursuant to a City resolution attached to the Twenty-Fourth Respondent's papers) to have concluded the Notarial Deed of Lease with a

different company, namely SOHCO Amalinda Housing NPC ("SOHCO Amalinda"). There was thus no authority for the City to conclude the Notarial Deed of Lease with SOHCO, and the wrong applicant was before the Court. Accordingly, so the Twenty-Fourth Respondent contends, SOHCO lacks the necessary *locus standi* to bring the application. In the alternative (if the Notarial Deed of Lease was found to be valid), the eviction application should be postponed *sine die* for the Twenty-Fourth Respondent to bring an application for judicial review based upon the principle of legality in order to have the Notarial Deed of Lease set aside.

67.2. This matter ought to be referred to mediation pursuant to the provisions of Rule 41A of the Uniform Rules of Court, alternatively, section 7 of PIE.

67.3. Should she be evicted, she would be rendered homeless and would require assistance with alternative accommodation. That, by reason of the fact (so it was alleged) that SOHCO as a social housing institution had “taken over” the role of national, provincial, and local government (and in particular the City) to provide low-cost housing to the poor and disadvantaged members of the community, a duty rested on SOHCO (alternatively, the City) to provide alternative housing to the Twenty-Fourth Respondent and her daughter. In the circumstances, and because neither SOHCO nor the City had provided this alternative accommodation, the application should be dismissed, alternatively they should be ordered to provide such alternative housing.

67.4. It would be unfair to the Twenty-Fourth Respondent were she to be evicted, because she was a beneficiary of Government's subsidized housing scheme, and might not qualify in the future for Government-subsidized housing.

67.5. She denies that the Lease Agreement between her and SOHCO was properly cancelled, and contends that no evidence was adduced in the founding papers other than the allegation that a Notice of Cancellation was *"slipped under my door'.* In the circumstances, the Twenty-Fourth Respondent denies

that she is in unlawful occupation.

68. Again, these defences do not have merit.

69. The Lease Agreement granting the right to use the land for the establishment of Steenberg Project was concluded between the City and SOHCO, and not between the City and SOHCO Amalinda. SOHCO explains that it was used as a special purpose vehicle, established by SOHCO Amalinda, for the purpose of this particular development, to ring-fence and separate the Steenberg Project from the general finances of SOHCO Amalinda. There was nothing unlawful or untoward about this. In the circumstances, it is not correct to argue that the lease was concluded with the incorrect party, or that the lease concluded between the City and SOHCO was not properly authorized. An application for judicial review has no prospects of success on the facts as they appear from the papers before this Court.

70. Even were SOHCO not the tenant of the City, it has developed and administered the project, and is the entity in charge thereof (with reference to section 1 of PIE). The Twenty-Fourth Respondent entered into a written Lease Agreement with SOHCO for the occupation of the unit in question. She paid rental to SOHCO.

71. The lease states that the lessor is SOHCO, but the lease is *"managed"* by SOHCO Amalinda. This does not indicate that it is not SOHCO, as lessor, that is in charge of the premises.

72. There is thus no basis to contend that SOHCO lacked the requisite *locus standi* for the institution of this application.

73. As regards mediation, there was no prospect of success in pursuing that option. As to Rule 41A(3)(b), SOHCO was not amenable to the dispute being referred to mediation, and filed a notice to that effect. In the absence of the parties being prepared to agree to refer the dispute to mediation, there is no provision for a judge, in terms of Rule 41A, to refer the dispute to mediation.

74. As regards the possible mediation in terms of section 7 of PIE, and because the land is owned by the City (and leased to SOHCO), the provisions of section 7(2) of PIE would be of application. The section provides as follows:

"*(2) If the municipality in whose area of jurisdiction the land in question is situated is the owner of the land in question, the member of the Executive Council designated by the Premier of the province concerned, or his or her nominee, may, on the conditions that he or she may determine, appoint one or more persons with expertise in dispute resolution to facilitate meetings of interested parties and to attempt to mediate and settle any dispute in terms of this Act: Provided that the parties may at any time, by agreement, appoint another person to facilitate meetings or mediate a dispute, on the conditions that the said member of the Executive Council may determine*.

75. Such mediation would be required to be conducted by the MEC for Housing, or his or her nominee, to attempt to mediate and settle any dispute in terms of PIE. The Twenty-Fourth Respondent has to date taken no steps to initiate any such mediation, and there is no indication that any request was made to the City in terms of section 7(3) of PIE ("*Any party may request the municipality to appoint one or more persons in terms of subsections (1) and (2), for the purposes of those subsections*"). There is thus no basis for the present matter to be stayed or postponed at this juncture for the purpose of such mediation. In any event, a stay pending mediation would require an application by the Twenty-Fourth Respondent, properly motivated. There is no such application before this Court.

76. A further reason why there is no prospect of mediation is because the Social Housing Model does not envisage persons remaining in a unit without the payment of any rental. In the present matter, the Twenty-Fourth Respondent has remained in occupation of the premises for a considerable time without paying for any rental or for water since 25 October 2018. She has only made one payment in the amount of R100.00 and nothing else. She has not tendered to pay any amount of rental (or for utilities), whether at present or in the future.

77. Mediation has in fact been attempted pursuant to SOHCO having handed over the matter to the Rental Housing Tribunal to accommodate possible mediation. The Tribunal advised, however, that the matter required to proceed to litigation – hence the institution of this application. SOHCO had also engaged with the Twenty-Fourth Respondent from January 2018 onwards, these interactions being recorded in notes filed of record.

78. The suggestion that SOHCO had a role to provide effective affordable housing to the poor on behalf of Government is incorrect. SOHCO is a social housing institution and a private entity. In terms of the National Housing Code, 2009, housing is made available to those who qualify therefor, and it is expected that rental be paid. SOHCO, being a private entity, does not hold any constitutional obligation to the public with regard to housing, and has no obligation to provide housing to the poor. Its position cannot be equated with that of a local authority or with provincial or national government. I shall return to this issue in more detail later, as it featured prominently in the Respondents' arguments.

79. SOHCO, as a social housing institution, cannot be required to provide *"suitable alternative accommodation"* to every tenant that it wishes to evict, failing which it is obliged to accommodate that person in the existing unit without charge. This is simply not possible, bearing in mind that SOHCO is expected to maintain the Steenberg Project and keep it in a proper state of repair, provide security guards, pay for water and sewage, and generally administer the project. All that is required to be paid for, and the only source of income available to SOHCO, is rentals.

80. It is thus incorrect, as the Twenty-Fourth Respondent contends, that SOHCO provides housing *"on behalf of Government"* or that it has accepted any constitutional obligation to provide housing. There is also no basis for the Court to order SOHCO to provide alternative housing to the Twenty-Fourth Respondent and her daughter. It is for the City, as local authority, to provide temporary emergency accommodation to those persons who may require it, so as to ensure that no persons are rendered homeless as

a result of an eviction.

81. The fact that the Twenty-Fourth Respondent took up occupation of a unit in the Steenberg Project, pursuant to a Lease Agreement, does not affect her position on the governmental housing list, and does not affect her right to qualify in future for Government-subsidized housing.

82. At the hearing of the application the Twenty-Fourth Respondent argued that she was not an unlawful occupier because the lease had not been properly cancelled. She argued that she had indeed, notwithstanding the manner in which she had dealt with the receipt (or non-receipt) of the Breach Notice and Notice of Cancellation, properly denied in her answering papers that she had received those notices. She contended that a genuine dispute of fact had been raised.

83. The Twenty-Fourth Respondent had answered to the allegations contained in the founding affidavit in relation to the Breach Notice and Notice of Cancellation merely by stating that: *"I deny that my lease was properly cancelled. SOHCO does not adduce and attach evidence in this regard other than alleging that a Notice of Cancellation was slipped under my door (by whom and how it is not clear)"* and *" in the premises, I deny that I* am *in unlawful occupation* as *alleged herein by SOHCO*."

84. In reply, SOHCO responded that it was denied that the lease had not been properly cancelled, and pointed out that: *"… the Twenty-Fourth Respondent does not deny that the Notice was placed under her door. This was done by* a *security guard on 19 August 2019."*

85. The reference to the notice being placed under the door was a reference to the Notice of Cancellation, and not the notice to remedy the breach. The Twenty-Fourth Respondent is silent as to the notice to remedy the breach. There was, furthermore, a *domicilium* clause in the Lease Agreement. The notices were delivered in terms of that clause. In any event, even had the Notice of Cancellation not been received or correctly delivered, service of the application would have operated as effective notice of the termination of

the contract.[19]

86. There is accordingly no genuine or real dispute of fact in this respect. There is no suggestion that the Twenty-Fourth Respondent was not in arrears at the time that the Breach Notice was delivered, nor was it disputed that she failed, within 20 business days of the notice (or at all), to settle the arrears. In the circumstances, the lease was lawfully cancelled and the Twenty-Fourth Respondent is in unlawful occupation of the unit.

The defences raised by the Respondents represented by PA Mdanjelwa Attorneys

87. No separate answering affidavits in the main application were deposed to and delivered on behalf of these Respondents. Instead, they relied upon affidavits previously deposed to by them, and in particular by Mr Lionel Cottle (the Thirty-First Respondent), in support of an unsuccessful joinder application that had been determined in the course of the judicial case management process. Insofar as various *"defences"* are raised in that affidavit, they can be summarised as follows:

87.1. If the Respondents were evicted from the Steenberg Project, they would have nowhere to go, as they could not even afford backyard accommodation, and would be rendered homeless.

87.2. Persons in need of emergency accommodation were only provided with 30m^2 structures in a place such as Kampies (which was described as a *"squatter camp"),* which accommodation the Respondents rejected as unsatisfactory and unacceptable.

87.3. They did not want emergency accommodation in a place such as Kampies, but sought an order from the Court directing the parties constitutionally responsible to provide housing constituting serviced plots, where they could

[19] *Magic Vending (Pty) Ltd v Tambwe and others* 2021 (2) SA 512 (WCC), which concerned an application in terms of PIE.

build their own homes.

87.4. In the circumstances, an interlocutory application was brought for the joinder of the Minister of Human Settlements, and the MEC for Human Settlements (Western Cape), requiring them to intervene and prevent the Respondents' eviction by SOHCO, which would result in them being sent to what is described as *"squalor camps"* as a result of their inability to continue paying rent. That application was unsuccessful.

88. SOHCO counters these allegations by pointing out that all of the Respondents applied to take up a lease in the Steenberg Project, after having completed an application form and meeting the financial qualification. There is no provision for tenants who can no longer afford to pay rental to remain in occupation of the leased unit without making payment. This is in accordance with the National Housing Code, to which reference has been made.

89. The Respondents do not dispute that the leases concluded by them were lawfully cancelled after they had defaulted on the payment of monthly rentals. The relief sought to the effect that the MEC for Human Settlements (Western Cape), alternatively, the Minister of Human Settlements, should provide permanent alternative accommodation, is not relief sought against SOHCO.

90. The defences raised by these Respondents can therefore not be sustained.

The defences raised by the Thirty-Fifth Respondent, represented by Sylvester Vogel Attorneys

91. The Thirty-Fifth Respondent opposes the application on the following bases:

91.1. She states that, due to the Covid-19 pandemic in March 2020, she could not afford to pay her rental in arrears, and raises a plea of *force majeure.*

91.2. She alleges that a promise had been made to her that, upon taking up the lease, the unit would become her own property after the expiry of a period of four years, and that she might only end up paying a small amount towards the purchase price thereof following the payment of rent for such period.

91.3. Her monthly rental payments, from 2017 onwards, have not been properly captured and that there are accounting errors in the amount that she allegedly owes.

91.4. She is willing to buy the premises, and if she is not afforded the opportunity to do so, she would be left with no other option but to pursue what she believed was her right to purchase the premises.

92. SOHCO points out, however, that the Thirty-Fifth Respondent was not, as she suggests, up to date with rentals until the commencement of the Covid-19 pandemic. She was in significant arrears long before then, already as at 1 December 2017. Her arrears were in the amount of R7 706.94. Only one payment was made for the whole of the calendar year 2018, in the amount of R500.00. As a result, by 31 December 2018 her arrears had increased to R44 861.73. No payments were made at all for the first six months of 2019, and rental payments recommenced only on 1 July 2019. They ceased in April 2020, and for the period May 2020 to 1 August 2021 no amount was paid at all. The arrears are accordingly not as a result of *vis major* allegedly caused by the Covid-19 pandemic.

93. The Thirty-Fifth Respondent was given notice of breach by the Sheriff, by personal service on 22 May 2020. The Notice of Cancellation, dated 3 July 2020, was served by the Sheriff on 7 July 2020**.** A copy of the Return of Service shows that personal service took place.

94. The Steenberg Project is not a 4-year rent-to-purchase scheme, and there was no such agreement to that effect. It cannot be said that the Thirty-Fifth Respondent was brought under the impression that her Lease Agreement with SOHCO would lead to the eventual purchase of her unit. If reference is had to the application form that the Thirty-Fifth

Respondent signed on 19 November 2013, it is clear that she confirmed that she understood that she was applying for a rental unit, and that she could not buy the unit. Her Lease Agreement itself contains nothing that could have brought her under such an impression.

95. It is also self-evident that SOHCO, itself a tenant under the Notarial Lease, could not sell and transfer ownership of any of the units to the occupants.

96. SOHCO, in any event, cannot be expected to provide free accommodation to persons in the position of the Thirty-Fifth Respondent, particularly where there is no indication that the tenant is at present, or in the near future, in a position to pay the rental as required in terms of the Lease Agreement. Substantial arrears in rentals accumulated over extended periods cannot be ignored and written off, as this will establish a dangerous precedent and be unfair to those tenants who do make the effort to pay their rentals.

97. In the course of argument at the hearing the Thirty-Fifth Respondent contended that the Notice of Breach was for some reason invalid, either because she was not in breach of the lease agreement, or because the National State of Disaster created a *vis major* situation. She accordingly contended that the lease had not been lawfully terminated.

98. I have referred to the personal service of the Breach Notice and the Notice of Cancellation upon this Respondent. There is no dispute that more than 20 business days expired between the two, and further that in the period between the delivery of the notices no rental was paid.

99. I have also referred to the fact that she had been in default long before the onset of the Covid-19 pandemic. The fact that she was able to make a single isolated payment on 3 July 2018 puts paid to the contention, raised in argument, that SOHCO had somehow prevented her from making rental payments. There is no proper explanation for the failure to pay the arrears, and the Thirty-Fifth Respondent does not state in her affidavit that they were written off by SOHCO or that she was excused from paying them. In any event, the Lease Agreement provides that, should the lessor

cancel the lease, and the lessee dispute the right to cancel and remain in occupation of the premises, then she is obliged to continue paying all amounts due under the lease.

100. In argument, it was suggested that the arrear rental had prescribed by 22 May 2020 when the Breach Notice was given. This cannot be the case, as the arrears as at 4 August 2017 were in the amount of R1 114.85, and all further arrears accrued after that date. Even the limited amount of R1 114.85 appears to be a shortfall in the July 2017 rental. In the circumstances, three years had not expired since when the Breach Notice was served on 22 May 2020 (nor when the Notice of Cancellation letter was served on 7 July 2020). This application was instituted in 2020. The prescription point is therefore devoid of any merit.

101. It was suggested in argument on the Thirty-Fifth Respondent's behalf that a dispute of fact existed. It is not clear what this dispute of fact is, as it was not properly defined. In any event, any possible dispute of fact which would preclude the application from being determined on the papers, would have to be one that was legally relevant to the determination of the matter. No such dispute can be discerned from the papers.

102. As indicated earlier, the Thirty-Fifth Respondent seeks to rely upon *vis major.* It is not clear whether this is on the basis that the National State of Disaster precluded a Notice of Breach being served (either for past or current arears), or whether rental was not payable during the period of the State of Disaster. Either of these contentions are, in any event, devoid of merit. The Thirty-Fifth Respondent enjoyed occupation of the premises during the entire period, and her use and enjoyment thereof was not affected. The reciprocal obligation to pay rental remained in place. *Force majeure* is only applicable in limited instances in which the state of disaster prevents one of the parties from enjoying performance under the contract. The fact that the creche where she had worked may have been shut does not create a basis for reliance upon *vis major* in respect of non-payment of rental for the unit which she continued to occupy.

103. The general principles relating to *vis major,* and when it is of application, are

discussed by *Cooper: Landlord and Tenant***.**[20] Firstly, what is required for a remission of rental of leased premises is that the tenant is, through *vis major,* deprived wholly or partly of the use and enjoyment of the property let to him or her. In the present instance, the Thirty-Fifth Respondent continued to have the use and enjoyment of the property. Secondly, to be entitled to a remission of rental, the lessee's loss of beneficial occupation must be a direct result of the *vis major,* not merely an indirect result. In this instance, not only was the use and enjoyment not lost to the lessee, but the fact that she lost her income from the creche where she worked as a result of the national lockdown was unconnected to the use and enjoyment of the property.

104. The defence of *vis major* therefore has no merit.

105. The Thirty-Fifth Respondent's counsel contended at length that the City's approach to temporary emergency accommodation is not acceptable, and that on this ground it would not be just and equitable to grant an eviction order in respect of her.

106. However, the Thirty-Fifth Respondent has not, either in her initial answering affidavit deposed to on 19 July 2021, nor in a further affidavit deposed to on 7 September 2022, stated that she would be rendered homeless should she be evicted, or indicated that she required temporary emergency accommodation. On the contrary, her case in her original answering affidavit is that she wants to buy the unit.

107. The Thirty-Fifth Respondent also does not, in either affidavit, disclose her current income. She confirms that she is in receipt of income from a creche. She does not state that she cannot afford to pay rental on the open market. She also does not place any facts before the Court (or even allege) that she is indigent, or does not have the funds to secure other accommodation. Her case as set out in her affidavit of 7 September 2022 appears to be that she can afford to pay rental in the amount of some R4 000.00 per month, and she has shown that she made payments in that approximate amount for certain of the months since October 2021.

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[20] 2ed, 1974 at pages 200 to 205. See also *Freestone Property Investments (Pty) Ltd v Remake Consultants and another* 2021 (6) SA 470 (GJ) at para [23]; *Trustees, Bymyam Trust v Butcher Shop and Grill CC* 2022 (2) SA 99 (WCC) at para [94.1].

108. There is accordingly nothing to show that there is a risk that the Thirty-Fifth Respondent would be rendered homeless if evicted. Despite being legally represented by an attorney and counsel throughout the proceedings, the Thirty-Fifth Respondent has made no such claim, nor has she stated that she is in need of, or wishes to be furnished with, temporary emergency accommodation by the City.

109. In these circumstances, the defences raised by the Thirty-Fifth Respondent have no merit.

Conclusion on the lawfulness of the Respondents' occupation of the premises

110. In light of what is set out above I agree that SOHCO has established that the Lease Agreements concluded between it and each of the Respondents were lawfully terminated, and that each of the Respondents is in unlawful occupation of the units in which they continue to reside.

111. In *Malan v City of Cape Town*[21] the Constitutional Court held (in the context of notice of cancellation of a lease in respect of public housing given by an organ of State such as the City), that a Lease Agreement may be terminated by the landlord on the ground of the nonpayment of rentals, provided that proper notice was first given to the tenant to settle the arrears.

112. The contrary view would be untenable, in that it would mean that a poor tenant, once in occupation of public housing (although in the present matter the housing cannot be described as being *"public"* in nature), could decline to pay any rent, assured in the knowledge that any amount of arrears would not provide a reason for eviction.

Is it just and equitable that the Respondents be evicted?

113. Having established that the Respondents are in unlawful occupation, the next

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[21] 2014 (6) SA 315 (CC) at paras [69]-[70].

question is whether it is just and equitable that they be evicted from the Steenberg Project.

114. The Constitutional Court[22] has held that the enquiry to be conducted by a Court under section 4 of PIE is two-fold in nature in this regard, with two separate issues to be considered before granting an eviction order, namely (1) whether it is just and equitable to grant an eviction order having regard to all relevant factors; and (2) what justice and equity demand in relation to the date of implementation of that order, and what conditions must be attached to that order. This second enquiry includes a consideration of the impact of an eviction order on the occupiers and whether they will be rendered homeless, thereby or need emergency assistance to relocate elsewhere.

115. In *City of Johannesburg Metro Municipality v Blue Moonlight Properties 39 (Pty) Ltd*[23] the Supreme Court of Appeal held that, in the event that an applicant has complied with the provisions of PIE, then he or she is entitled to an eviction order: *"It is not in dispute that Blue Moonlight has complied with the requirements of PIE and that it is entitled to an eviction order. All that remains is for us to determine the timing of the eviction."*

116. The Constitutional Court in *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and another*[24] held that justice and equity may require the date of implementation of an eviction order to be delayed if alternative accommodation is not immediately available.

117. Properly applied, PIE should serve merely to delay or suspend the exercise of the landowner's full property rights until a determination has been made whether it is just and equitable to evict the unlawful occupiers, and under what conditions.[25]

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22 *Occupiers, Berea v De Wet and another* 2017 (5) SA 346 (CC) at paras [44] to [46]; and see *City of Johannesburg v Changing Tides 74 (Pty) Ltd and others* 2012 (6) SA 294 (SCA) at paras [11] to [16].

23 2011 (4) SA 337 (SCA) at para [74].

24 2012 (2) SA 104 (CC) at para [40].

25 *Berea supra* at 368H-369A; and *City of Johannesburg v Changing Tides 74 supra* at para [21].

Justice and equitability in the present matter

118. A social housing project such as that conducted by SOHCO is established on the model contained in the National Housing Code: occupants pay rental; this rental is escalated over time, and those who do not pay the rental must vacate. A failure to pay rental and utilities charges undermines the financial viability of the social housing project and places it in jeopardy.

119. A failure to evict those who become unlawful occupants of social housing initiatives frustrates the National Housing Initiatives, because it undermines the very basis thereof - that rental housing is provided to those who qualify, at rates less than commercial rentals. To allow persons to remain in occupation for long periods, without paying, will effectively convert the housing from rental-based social housing to "free" housing, which is not the intention underlying the initiatives. It is contrary to the National Housing Policy which requires that those who cannot afford to pay the rental vacate the social housing units so as to accommodate others who can pay. Having regard to the policy of National Government, namely that rentals must be paid by occupants of social housing units, and that occupants must continue to qualify, it cannot have been intended that persons could remain in occupation of the units indefinitely regardless of any change in their financial situations. This is in the context that each lease in the present matter was for a period of one year, and thereafter for an *"indeterminate period',* subject to notice.

120. Persons who prosper, and whose income increases beyond the upper financial limit to qualify, are required to vacate and obtain accommodation elsewhere at market-related rates, which they would then be in a position to afford. Persons whose financial position deteriorates, and who can no longer afford the rentals, are required to vacate.

121. Counsel for SOHCO provides the following illustration of the situation: Persons going onto pension, and who moved from earning an income to receipt of a SASSA pension insufficient to cover the rental. If those persons do not have other members of the

household who can contribute to the rental, they are required to vacate. If this was not the case then, as working people gradually become pensioners unable to pay rent, the median age of the occupants would theoretically increase over time until all the occupants were pensioners who cannot afford to pay any rental, effectively converting a social housing project to a retirement village providing free accommodation and utilities.

122. There are many other persons waiting on housing lists for social housing, who can afford to pay rental, and who are being denied access to a housing opportunity by reason of the Respondents remaining in unlawful occupation of units at no cost to them.

123. In addition to policy considerations, it is also obvious that to allow persons to remain in occupation for considerable periods without making payment, the steady increase in irrecoverable arrears will jeopardize the financial viability of social housing institutions such SOHCO, which relies upon payments of rental and for utilities to enable it to pay for costs and expenses that are not subsidized. The situation places entire projects such as the Steenberg Project at risk.

124. The approach adopted by certain of the Respondents as to the role, obligations and duties of SOHCO is entirely misplaced.[26] I have referred to this issue earlier. SOHCO does not owe citizens in general, or its tenants in particular, a constitutional or legal duty to provide adequate (or any) housing. The Social Housing Act does not create any such obligations and duties for SOHCO as a social housing institution and a private entity. The contract between SOHCO and the City expressly provides that the two entities are not in any form of partnership, but that SOHCO is an independent contractor.

125. SOHCO, being a social housing institution, and having received grants from the State to contribute to the cost of the construction of the Steenberg Project, is required to comply with its legal obligations in terms of the Social Housing Act. It is required to offer

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[26] See the discussion in *SOHCO Property Investments NPC v Ramona September and 23 others,* an unreported judgment of this Court under case number 18677/2016, an order being granted on 31 March 2017, and reasons provided on 2 October 2017. Leave to appeal to the Supreme Court of Appeal against the judgment was refused on 15 February 2018.

accommodation at rentals lower than market related, which is made possible by the State's contribution towards the cost of the construction. SOHCO is required to submit the annual rental increases for approval, and is contractually bound to the City and the organs of State that provided the contribution to the construction costs, to conduct the project in terms of its contractual obligations.

126. SOHCO has not received ownership of the land, nor the improvements, which remain the property of the City, and must return them to the City (without compensation) at the termination of the lease period. SOHCO is also entitled (and in fact obliged) to recover and pay back the capital that it raised as its contribution to the construction of the project. SOHCO is further obliged, by reason of its contractual obligations to the City, to provide services and maintain the buildings and infrastructure, at its own cost, which can only be recovered from rentals.

127. Various courts in this and other Divisions have considered the obligations and position of social housing institutions, and have not extended those obligations to the creation of constitutional and legal obligations to provide housing to the poor.

128. In *Sohco v Prudence Hlophe and 95 others,*[27] it was held that the fact that the National Department of Housing provided SOHCO with a subsidy did not give the Department a direct and substantial interest in a dispute between SOHCO and the Respondents as to the entitlement of the Respondents to remain in occupation of their respective rental units.

129. In *Sohco v Ramdass and 232 others*[28] the Court followed and approved the approach adopted in *Prudence Hlophe supra*.

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27 An unreported decision of the Kwazulu-Natal Division of the High Court under case number 14264/2010, delivered on 10 March 2011, at para [10]. Leave to appeal was subsequently refused by both the Supreme Court of Appeal and the Constitutional Court.

28 An unreported decision of the Kwazulu-Natal Division of the High Court under case number 11474/2010, delivered on 15 January 2013, at para [12]. Leave to appeal was subsequently refused by the Supreme Court of Appeal and the Constitutional Court.

130. In *Modula Moho Housing Association (Pty) Ltd v Masibi*[29] the Court held that the regulations pursuant to the Social Housing Act were irrelevant to the issues to be considered in a PIE application. The regulations dealt with the relationship between the Social Housing Regulatory Authority and social housing institutions, and related to governance issues. The Court held that neither the Social Housing Act nor the regulations had any impact on the private law relationship between the applicant in that case (a social housing institution) and its tenants, which was a relationship founded in contract. The Court was accordingly not required to consider whether the applicant had complied with certain regulations to enable the Court to determine whether it was just and equitable to grant an eviction order.

131. In *Sohco Property Investments v Thathakahle*[30] it was held that the relationship between SOHCO and the tenants, including the right to increase rentals and to cancel the lease agreements on breach for failure to pay rental, was governed by parties' consensus as evidenced by the lease agreements that had been concluded. Whilst accepting in favour of the Respondents that SOHCO had responsibilities beyond the limits of the common law and the lease agreements, SOHCO lost none of its common law and constitutional rights to its property. What the additional rights and responsibilities are were set out in the housing laws. As a social housing institution SOHCO was considered to be bound by the general principles applicable to social housing in section 2 of the Social Housing Act. The Court however emphasised that the obligations contained in subsection 2(1)(e) related to consultation during the development phase of social housing, not necessarily after the lease agreements were concluded. The consultation in subsection 2(1)(g) was aimed at empowering the tenants at the time the lease was concluded.

132. In the present application none of the Respondents have suggested that they did not understand what was required of them as tenants. All of them withheld rental, and have done so for years. Section 2 of the Social Housing Act does not provide a basis for

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29 An unreported decision of the North Gauteng High Court under case number 35151/2012, delivered on 19 March 2014. See pages 5 and 6 of the judgment. See also *City of Cape Town v Khaya Projects (Pty) Ltd* 2016 (5) SA 579 (SCA).

30 An unreported decision in the Kwazulu-Natal Division of the High Court delivered on 30 November 2012 (see 2012 JDR 2299 (KZD)).

contending that the leases were not lawfully cancelled, and none of the Respondents have so contended. Section 2 also does not provide a ground for refusing to recognize SOHCO's common law and constitutional rights in respect of the property.

133. In these circumstances I agree with the submission made by counsel for SOHCO that the Respondents' repeated failure to make payment of the rental and their continued unlawful occupation jeopardizes the viability of the Steenberg Project, and precludes SOHCO from receiving an income from the units by securing alternative tenants who are willing and able to pay the rent, and for utilities such as water and sewage, and security.

134. The extent of the arrears and the dates when the respective Respondents last made payment towards rental or utilities appear from the schedule that is annexed as "**A**". Rentals have remained unpaid for a considerable period of time, in some instances for some years. These arrears are irrecoverable, and will represent a loss to SOHCO. The arrears on annexure "**A**" are expressed as at 1 July 2021. In the period since that date, the arrears will have increased considerably.

135. It is clear from the papers that SOHCO has demonstrated patience for some years. It afforded the Respondents an opportunity to arrange their affairs, and either to obtain better employment or seek alternative accommodation. SOHCO cannot, however, be expected to continue to provide free accommodation and utilities to the Respondents. While SOHCO, as a private company, has no constitutional obligation to provide adequate housing or rights to housing in terms of section 26 of the Constitution, to persons in the position of the Respondents,[31] SOHCO has, by affording the Respondents an opportunity to make arrangements, and by accommodating the Respondents for a considerable period without receiving rental, acted in the spirit of ubuntu by recognizing the Respondents' right to dignity:[32]

"Thus, PIE expressly requires the court to infuse elements of grace and compassion into the formal structures of the law. It is called upon to balance competing interests

[31] See *SOHCO Property Investments NPC v Ramona September and 23 others supra.*

[32] *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) at para [37].

in a principled way and to promote the constitutional vision of a caring society based on good neighborliness and shared concern. The Constitution and PIE confirm that we are not islands unto ourselves. The spirit of ubuntu, part of the deep cultural heritage of the majority of the population, suffuses the whole constitutional order. It combines individual rights with a communitarian philosophy. It is a unifying motif of the Bill of Rights, which is nothing if not a structured, institutionalised and operational declaration in our evolving new society of the need for human interdependence, respect and concern."

136. I agree further that a failure to afford relief to the private owner, including an entity in the position of SOHCO, amounts to an effective expropriation or deprivation of its property rights in breach of section 25 of the Constitution.[33] There is no reason why, in these circumstances, it would not be just and equitable to grant the eviction order.

Temporary emergency accommodation

137. It is the obligation of the City, in the present instance, to provide temporary emergency accommodation to those of the Respondents who require it, and who would be rendered homeless should they be evicted from the units presently occupied by them.[34]

138. The constitutional obligation to provide housing is one of progressive realization. The Constitutional Court[35] was, for example, called upon to consider whether temporary accommodation offered by the City at Wolwerivier qualified as *"suitable"* alternative accommodation, to be provided by the City within its available resources. The Court concluded that it was. What was offered in that instance was a 26.5m^2 structure made of light gauge steel and corrugated iron, with each unit having an inside toilet and wash basin.

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33 See *Mainik CC v Ntuli and others* [2005] ZAKZHC 10 (25 August 2005).

34 *City of Johannesburg v Blue Moonlight supra* at para [93].

35 In *Baron and others v Claytile (Pty) Limited and another* 2017 (5) SA 329 (CC).

139. The Court also had to address the refusal of the evictees to accept the accommodation that the City offered to them. The question was posed[36] whether the City had an obligation to continue offering accommodation until the applicants were satisfied with such accommodation. The Court held that the City was obliged, in terms of section 26 of the Constitution, to take *"reasonable legislative and other measures, within its available resources"* to provide housing. The Court, having accepted that the housing units in question (at Wolwerivier) qualified as suitable alternative accommodation which is provided by the City within its available means, held that the occupiers could not delay their eviction each time by rejecting the alternative accommodation offered to them.[37]

140. The Constitutional Court has recently again confirmed that a private owner has no obligation to provide free housing and, although one has a constitutional right to housing, this right does not afford an unlawful occupier the right to choose where he or she wants to live.[38] I mention this because one of the objections raised to the accommodation offered by the City on this matter was that it would be too far from where some of the Respondents' children currently attended school.

141. On 10 February 2022 Mr Gregory Exford, on behalf of the City, deposed to an affidavit in this matter addressing the issue of the availability of temporary emergency accommodation. Mr Exford is in the employ of the City's Housing Settlements department. In that affidavit, the City indicated that it had received questionnaires dealing with personal circumstances from those Respondents represented by Marlon Shevelew & Associates, as also the Twenty-Fourth Respondent (represented by September & Associates), and the Thirty-Fifth Respondent (represented by Sylvester Vogel Attorneys).

142. As was indicated at one of the judicial case management meetings held during 2021, those Respondents represented by PA Mdanjelwa Attorneys had (on advice

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36 At para [40] of the judgment.
37 At para [50].
38 *Grobler v Phillips and others* 2023 (1) SA 321 (CC) at para [36].

received) refused to file such questionnaires with the City.[39] The City noted the personal circumstances of the seventeen Respondents who had completed the questionnaires, together with the affidavits deposed to by them, and indicated that it was in a position to provide those Respondents with temporary emergency accommodation, if they were not able to obtain it through their own means.

143. Should they accept the City's offer, the City indicated that they would be integrated into an emergency accommodation site, which was situated at Mfuleni, and a picture of the structure offered was annexed to the affidavit. The offer of a structure included water and sanitation facilities. The Respondents would be required to occupy the structures immediately once they had been made available to them. There were schools available in the area, as well as places of worship, a shopping mall, health care facilities, and other amenities within a 3km to 7km radius from the emergency accommodation site that was offered. A court and police station are 5km away from the site. The City was prepared to arrange a site viewing of the emergency accommodation site with the Respondents, which inspection could be arranged through the parties' respective legal representatives. The accommodation was available until the end of March 2022.

144. None of the Respondents accepted the City's offer of temporary emergency accommodation, and none attended a site viewing.

145. The City repeated the offer at the hearing of this application, indicating that it could accommodate all of the affected households (in other words, all of the Respondents who indicated that they required assistance, which included the Mdanjelwa Respondents who had, at long last, provided questionnaires) at Mfuleni, in an area otherwise known as Bosasa, which was Phase 1 of an incremental development area. Mr Exford gave oral evidence in relation to the various options open to the City and the Respondents, and was cross-examined by the parties' counsel. He explained the problems faced by

[39] It was the Third, Fourth, Seventeenth, Twentieth, Twenty-First, Twenty-Third, Twenty-Fifth, Twenty-Sixth, Twenty-Seventh, Thirty-First and Thirty-Fourth Respondents who did not deliver completed questionnaires to the City. These are all the Respondents represented by PA Mdanjelwa Attorneys. Those Respondents were advised by their legal representatives not to file such questionnaires.

the City given the increasing numbers of persons requiring accommodation, and the scarcity of land available for the establishment of temporary settlements. The City is in the process of negotiating with provincial government to obtain more land for this purpose.

146. The accommodation to be provided to the Respondents at Bosasa would be a small house consisting of a 26m² neotech structure with a cement floor on a 49m² plot, equipped with water, a toilet, and electricity. The Respondents could stay there for as long as they needed to, or until they could be moved into formal developments. They would have to pay only for electricity on a pay-as-you-go basis.

147. Bosasa is part of the greater Blue Downs, Eerste River area. It is 31km out of the city, towards Somerset-West on the N2. It is integrated into Mfuleni, which is well-established with a taxi network to Bellville Station and to the Cape Town City Centre. It is not a violent environment, and the City has security guards on duty overnight.

148. SOHCO submits that, insofar as this Court might have a concern that the temporary emergency accommodation offered by the City in this matter may not entirely meet the needs of the Respondents, or fall short of the standards reasonably to be expected of alternative accommodation (in other words, a concern that it is a requirement for an eviction to be just/and equitable that the accommodation be in all respects suitable and satisfactory), this Court has answered this question recently on a number of occasions. It has held, within the particular circumstances of each matter, that the provision of such temporary accommodation is reasonable, particularly taking into consideration the realities imposed by the vast scale of housing backlogs that the State in general, and the City in particular, are constrained to engage with. This was expressed in various unreported cases.

149. In *City of Cape Town v Natasha Maart and 91 others*[40] the Court stated: *"It is correct that the alternative accommodation offered by the applicant may not meet the needs of the Respondents and they may find it unsuitable. This is not the question. The question*

[40] WCHC case number 8667/2006, decided on 16 March 2010.

is whether the alternative accommodation is reasonable in the circumstances of the present matter. I consider it reasonable having regard to the fact that is an interim arrangement."

150. In *Maart,* what was offered at a site known as Blikkiesdorp was an 18m^2 structure with insulated wooden and metal framework including a roof and windows, erected on a concrete slab, situated on a site with electricity, water and sanitation.

151. In *City of Cape Town v Hoosain NO and others*[41] it was held as follows: *"Once it is recognised that emergency accommodation by its very nature will invariably fall short of the standards reasonably expected of permanent housing, it follows that those who need to occupy such accommodation must accept less than what would ordinarily be acceptable. The apparent harshness of an acceptance of this recognition* has *to be seen against the realities imposed by the vast scale of the housing backlogs with which the State, in general, and the City, in particular, are having to engage."*

152. The Court in *Hoosain* was unable to find that the provision of 80 temporary housing units of 24m^2 in floor area as emergency shelter to house the displaced community would be unreasonable.

153. The structures that have been offered by the City in the present application, and that certain of the Respondents in this matter have rejected in advance, are not dissimilar to those offered previously by the City in other matters, and found by the Courts (in the circumstances of each particular case), to represent reasonable and acceptable provision of temporary emergency accommodation.

154. I have referred to what was offered in *Maart* and *Hoosain*. In *Ocean Monarch CC v Jazman & Others*[42] what was offered, at a site near Philippi, were container-like structures constructed from corrugated iron sheeting affording units, 18m^2 in size

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41 WCHC case number 10334/2011, decided on 20 October 2011.

42 [2019] ZAWCHC 119 (2 September 2019).

with one small window. These emergency housing units, which were at Kampies, had access to shared services such as water standpipes and sanitation.

155. In *SOHCO Property Investments NPC v Primrose Jiza* [43] this Court granted an eviction order on 10 December 2020, in respect of other persons occupying units at the Steenberg Project. In that matter, the Court ordered that the occupants vacate the dwellings on a date effectively three months from the date of the order. It directed the City to provide temporary emergency accommodation at Kampies Informal Settlement in Philippi to any of the Respondents who may require it, and who had accepted the offer made by the City in writing. The Court directed that such accommodation had to be provided not less than two weeks prior to the date for vacation of the premises. The Court found, after lengthy consideration, that the temporary emergency accommodation offered by the City was sufficient in the circumstances and noted that the City was willing to arrange a site inspection for the occupants to view the site. The order was, notably, not made subject to the occupants accepting the site after they had viewed it.

156. The Courts have generally not required (at the time that the order is made that temporary emergency accommodation be provided to evictees), that the local authority in question identify precisely where that temporary emergency accommodation will be located, and exactly what it will constitute. Such detailed specifications are generally not incorporated in the Court orders.

157. The Constitutional Court was required to consider the temporary emergency accommodation that was offered to certain evictees who had been dealt with in the Constitutional Court's judgment in *Blue Moonlight supra.* It did this in *Dladla v Cit y of Johannesburg.*[44] The majority judgment pointed out[45] that the City was forced, subsequent to the eviction order having been granted, to determine how to go about providing temporary accommodation to the evictees in order to comply with the order. The Court was required to determine whether the City had complied with the order that

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43 An unreported decision of this Division under case number 2369/2019, delivered on 10 December 2019.

44 2018 (2) SA 327 (CC).

45 At para [5] of the judgment.

the Constitutional Court had issued in *Blue Moonlight*.

158. The majority concluded[46] that the order meant that the City had to provide temporary accommodation in accordance with general legal standards applicable to the provision of temporary accommodation. The Court required that the City take reasonable measures, within its available resources, to prevent homelessness on the part of the occupants by providing temporary accommodation.[47] The Court also emphasized[48] that what the City was required to do (and which was ordered) was to provide temporary accommodation in line with its Housing Policy.

159. The second judgment (whilst supporting the main judgment, but for different reasons) observed as follows:[49]*" .....the Blue Moonlight order gave no details, no guidance on how the City was to provide the residents with temporary accommodation. The court simply ordered the City to provide the residents with "temporary accommodation" as near as possible to their old homes. It did not say how the City should do this. What type of accommodation? With or without other people? In family units? Or separated by gender? And how many people per room? What meals? What ablutions? What lockout hours? None of that was before the Blue Moonlight court. And obviously so. It was the City that was obliged, in fulfilling the order, to fill out the details. And in doing so, it had to act reasonably... "*

160. In *Charnell Commando* and *25 others v Woodstock Hub (Pty) Ltd and one other*,[50] the Court cautioned that the order that the Court had made in that matter (which specified, in the particular circumstances of the case, the area in which the accommodation was to be located) did not, as a matter of law, afford evictees in the City a right to demand to be placed in temporary emergency accommodation in the area or location which they lived.

161. The Court accepted this to be beyond the remit of the Court's powers in eviction

46 At para [39].
47 At para [40].
48 At para [46].
49 At para [58].
50 [2021] 4 All SA 408 (WCC) at para [159].

applications, even though they might be equity based, as these were by definition matters of State and policy which required careful and weighty consideration by those functionaries who were empowered by law and equipped with the necessary expertise to deal with them. It was not for the Court to pronounce on issues such as where social housing and emergency housing developments should be constructed. For a Court to interfere with this would be a breach of the doctrine of separation of powers and would constitute an impermissible intrusion into the domain of the executive and legislative arms of State. Were a Court to ascribe such a power to itself, it would place an impossible burden on the State, which would result in it having to accommodate evictees who were going to be rendered homeless, in virtually every suburb or area in which they lived. For obvious reasons, this approach was untenable.

162. In the circumstances, I agree with counsel that the improved offer made by the City in September 2022 is reasonable in the circumstances of this case, and within the means of the City, taking into account the great demand for emergency accommodation in the greater Cape Town area. The accommodation offered is in any event far superior to that offered at Kampies or Wolwerivier.

Conclusion

163. There was thus no reason why the eviction of the Respondents should not be ordered, and I have done so in the terms set out at the outset of these reasons.

164. There was also no reason for costs (including the costs of two counsel) not to follow the event, even though it is unlikely that SOHCO will be able to recover any costs. Costs are to be paid by the Respondents jointly and severally, the one paying, the other to be absolved.

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P. S. VAN ZYL

Acting judge of the High Court

Appearances:

For the Applicant:

D. W. Gess (with him G. Samkange), instructed by Foxcroft & Associates

For the First, Second, Sixth, Seventh, Tenth, Eleventh, Twelfth, Thirteenth, Fourteenth, Fifteenth, Eighteenth, Nineteenth, Twenty Second, Thirty-Second and Thirty-Third Respondents:

E. R. Mentoor II, instructed by Marlon Shevelew & Associates

For the Third, Fourth, Seventeenth, Twentieth, Twenty-First, Twenty Third, Twenty-Fifth, Twenty-Sixth, Twenty-Seventh, Thirty-First and Thirty-Fourth Respondents:

Mr Mzantsi, instructed by PA Mdanjelwa Attorneys

For the Twenty-Fourth Respondent:

G. Papier, instructed by September & Associates

For the Thirty-Fifth Respondent:

W. A. Fisher, instructed by Sylvester Vogel Attorneys