

**IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA**

APPEAL CASE NUMBER: 253/2006

HIGH COURT (WLD) CASE NUMBERS:

04/10330; 04/10331; 04/10333; 04/24101; 04/13835

In the matter between –

THE CITY OF JOHANNESBURG

Appellant (*Applicant a quo*)

and

RAND PROPERTIES (PTY) LTD

First Respondent

OCCUPIERS OF ERF 381 BEREA TOWNSHIP

Second Respondent

MINISTER OF TRADE AND INDUSTRY

Third Respondent

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA

Fourth Respondent

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

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## PART 1:

### THE REQUIREMENTS OF SECTION 26(3) OF THE CONSTITUTION

1. Section 26(3) of the Constitution prohibits evictions without an order of Court “made after considering all the relevant circumstances”. It provides further that no legislation may permit “arbitrary” evictions.
2. In Brisley v Drotsky, this Court pointed out that for circumstances to be “relevant” for the purposes of this section, they must be legally relevant.<sup>1</sup>
3. The Prevention of Illegal Eviction From and Unlawful Occupation of Land Act 19 of 1998 (“the PIE Act”) describes the circumstances which will be “relevant” where that Act is applicable. The overarching test is whether the eviction will be “just and equitable”.<sup>2</sup> In essence, this amounts to asking whether the eviction will be fair.
4. There is a dispute between the parties as to whether the PIE Act is applicable to the present proceedings. Having regard to the functions of an *amicus curiae*, we do not enter into that debate. Rather, we address the requirements of section 26, which apply whether or not it is found that the PIE Act is applicable.

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<sup>1</sup> 2002 (4) SA 1 (SCA) at [42]

<sup>2</sup> See for example sections 4(6) and (7), and 6(1) of PIE.

5. The question then becomes what are the legally “relevant” circumstances which section 26(3) obliges the court to consider. These will in the first instance be the circumstances which are relevant under the Constitution. The two key elements of constitutional relevance are the following:

5.1. Section 26(3) stipulates that no legislation may permit “arbitrary” evictions. In the context of this case, the question is whether the NBRBSA permits arbitrary evictions.<sup>3</sup>

5.2. If an eviction will lead to a breach of a constitutional right, then that is a matter which is “relevant” and which a court must take into account in deciding whether to order eviction.

6. We first consider the general approach to the interpretation of section 26. We then consider each of those elements in turn.

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<sup>3</sup> The prohibition in section 26(3) necessarily implies that the common law, too, may not permit arbitrary evictions. It is inconceivable that arbitrary evictions are impermissible if authorised by a statute, but permissible if authorised by the common law.

**A: THE GENERAL APPROACH TO SECTION 26**

7. Section 26 of the Constitution has to be interpreted in the light of the values and interests it seeks to promote in our new constitutional order, and also the historical injustices it aims to redress. Where an eviction is likely to lead to homelessness, the section must be interpreted with regard to the historical and social context of homelessness, which has been described in the following terms:

*“The problem of homelessness is particularly acute in our society. It is a direct consequence of apartheid urban planning which sought to exclude African people from urban areas, and enforced this vision through policies regulating access to land and housing which meant that far too little land and too few houses were supplied to African people. The painful consequences of these policies are still with us eleven years into our new democracy, despite government’s attempts to remedy them. The frustration and helplessness suffered by many who still struggle against heavy odds to meet the challenge merely to survive and to have shelter can never be underestimated.”<sup>4</sup>*

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<sup>4</sup> President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd (Agri SA and Others, Amici Curiae) 2005 (5) SA 3 (CC)at [36]

8. This historical context has the result that legislation which on the face of it deals with purely “neutral” and technical matters, such as health and safety, may in practice reinforce the consequences of that history. Historically, such laws have been used and to achieve the eviction of “undesirable” urban dwellers from inner city areas. Prof Van der Walt points out the following in this regard:

*“Seemingly ‘normal’ eviction provisions in statutes such as the Physical Planning Act 88 of 1967, the Health Act 63 of 1977 and the Slums Act 76 of 1979 relate to the health, public safety and public interest functions for which a state organ may sometimes require the right to evict (eg to remove people from a dangerous building or a flood plain), but in the apartheid era these laws were applied on a racial basis and so served the agenda of apartheid rather than public health and safety.”<sup>5</sup>*

9. Legislation which authorises the eviction of poor, mostly black and marginalised people from their homes, even where it purports to do so on health and safety grounds, must be scrutinised and interpreted in the light of the constitutional aim of redressing this historical legacy. Care must be taken to ensure that the legislation is not again used to achieve another agenda.

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<sup>5</sup> A J Van der Walt *Constitutional Property Law* (Juta & Co: 2005), p 412 n 45. On current practice, see W de Klerk “Evictions under PIE: Recent Developments” July 2004 *De Rebus* 57 at 58.

10. The Constitutional Court has pointed out, in relation to evictions:

*“Section 26(3) evinces special constitutional regard for a person’s place of abode. It acknowledges that a home is more than just a shelter from the elements. It is a zone of personal intimacy and family security. Often it will be the only relatively secure space of privacy and tranquillity in what (for poor people in particular) is a turbulent and hostile world. Forced removal is a shock for any family, the more so for one that established itself on a site that has become its familiar habitat.”*<sup>6</sup>

11. This is consistent with the approach of the UN Committee on Economic, Social and Cultural Rights, which supervises States Parties’ obligations under the International Covenant on Economic, Social and Cultural Rights, 1966.<sup>7</sup> That Committee has pointed out that owing to *“the interrelationship and interdependency which exist among all human rights”*, forced evictions frequently violate other human rights, including civil and political rights, such as the right to life, the right to security of

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<sup>6</sup> *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) at [17]

<sup>7</sup> South Africa has signed but not yet ratified the International Covenant on Economic, Social and Cultural Rights. In terms of article 18 of the Vienna Convention on the Law of Treaties (1980), South Africa as a signatory to this treaty is legally obliged not to defeat its object and purpose, including the right to adequate housing.

the person, the right to non-interference with privacy, family and home and the right to peaceful enjoyment of possessions.<sup>8</sup>

12. In similar vein, the African Commission on Human and Peoples' Rights observed in the case of The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria<sup>9</sup> that forced evictions have a drastic impact on people's social, economic, physical and psychological well-being:

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

13. All of these matters will come into play when a court considers “all relevant circumstances” in deciding whether an eviction is to be ordered. The Constitutional Court has held that the use of the phrase

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<sup>8</sup> Committee on Economic, Social and Cultural Rights, General Comment No. 7 (Sixteenth session, 1997), UN doc. E/1998/22, *The right to adequate housing (art 11(1) of the Covenant): forced evictions*, para. 5. For the relevance of the General Comments of the UN Committee on Economic, Social and Cultural Rights to the interpretation of similar provisions in our Constitution, see Government of The Republic of South Africa and Others v Grootboom and Others 2001 (1) SA 46 (CC) at [45].

<sup>9</sup> African Commission on Human and Peoples' Rights, Communication No. 155/96; (2001) AHRLR 60 (ACHPR 2001) at para 63. In this case, the Commission derived a right to adequate housing, including a prohibition on unjustified evictions, from a combined reading of articles 14, 16 and 18(1) of the African Charter on Human and Peoples' Rights (1981).

“all the relevant circumstances” in section 26(3) “serves a clear constitutional purpose”:

*“A third aspect of s 26(3) is the emphasis it places on the need to seek concrete and case-specific solutions to the difficult problems that arise. Absent the historical background outlined above, the statement in the Constitution that the courts must do what courts are normally expected to do, namely, take all relevant factors into account, would appear otiose (superfluous), even odd. Its use in s 26(3), however, serves a clear constitutional purpose. It is there precisely to underline how non-prescriptive the provision is intended to be. The way in which the courts are to manage the process has, accordingly, been left as wide open as constitutional language could achieve, by design and not by accident, by deliberate purpose and not by omission.”<sup>10</sup>*

*“It is not easy to classify the multitude of places and relationships involved. This is precisely why, even though unlawfulness is established, the eviction process is not automatic and why the courts are called upon to exercise a broad judicial discretion on a case by case basis.”<sup>11</sup>*

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<sup>10</sup> Port Elizabeth Municipality v Various Occupiers 2005 (1) SA 217 (CC) at [22].

<sup>11</sup> Port Elizabeth Municipality at [31]

*“As has been pointed out, section 26(3) of the Constitution and PIE between them give the courts the widest possible discretion in eviction proceedings, taking account of all relevant circumstances.”<sup>12</sup>*

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<sup>12</sup> Port Elizabeth Municipality at [45]

## **B: THE PROHIBITION ON ARBITRARY EVICTIONS**

14. Section 26(3) of the Constitution prohibits arbitrary evictions. Evictions are permissible, but only if they are not arbitrary. The structure of this subsection is similar to that of section 25(1). Section 25(1) provides that deprivation of property is permissible, but only if the deprivation is not arbitrary: no law may permit arbitrary deprivation of property. The jurisprudence on “arbitrary” deprivation of property is therefore helpful for the analysis of section 26(3).
  
15. The Constitutional Court has explained that a deprivation of property may be arbitrary in two respects: it may be procedurally arbitrary, because the procedure is unfair; and it may be substantively arbitrary, in that there is not “sufficient reason” for it.<sup>13</sup>
  
16. Section 26(3) explicitly addresses one aspect of the prohibition of evictions which are procedurally arbitrary, by prescribing that an eviction may not take place except by virtue of an order of court. Other aspects are fair and effective notice of eviction proceedings, and fair notice of when an eviction order is to be carried out (if granted). These matters are dealt with in section 4 of the PIE Act. International law also recognises

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<sup>13</sup> First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another 2002 (4) SA 768 (CC) at [100].

that that appropriate procedural protection and due process are essential in eviction cases.<sup>14</sup>

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

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

(h) *Whether there is sufficient reason to warrant the deprivation is a matter to be decided on all the relevant facts of each particular case ....*<sup>15</sup>

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<sup>14</sup> UN Committee on Economic, Social and Cultural Rights, General Comment No. 7, para.14, and 16.

<sup>15</sup> First National Bank at [100] (g) and (h).

18. We submit that this passage indicates the nature of the enquiry which a court is required to undertake in determining whether a proposed eviction is substantively arbitrary.
  
19. In this matter, the eviction of the Respondents will lead to their becoming homeless. They will be deprived of access to any housing at all, let alone adequate housing. Because of this likely consequence of eviction, and because of the nature of evictions to which we have referred above, we submit that in this matter the appropriate test is a form of proportionality evaluation.
  
20. We submit further that in order to determine whether an eviction will be arbitrary, it is necessary to examine:
  - 20.1. The ends which the Appellant seeks to achieve by the eviction.
  
  - 20.2. The means which it has chosen to achieve those ends.
  
  - 20.3. The impact which that particular means will have on the people affected.

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

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

*“... in line with section 26(3), the order can only be granted if eviction is justifiable in view of all the circumstances. Secondly, consideration of the order in view of the circumstances amounts to a balancing exercise ... Thirdly, this balancing exercise takes place against the background of the history of eviction in the apartheid era and its lasting and enduring effects on the distribution of land and access to housing today.”<sup>16</sup>*

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<sup>16</sup> A J Van der Walt Constitutional Property Law p 426. He is writing there in the context of the contest between the respective rights of owners and occupiers, but his analysis applies equally to the balancing of other considerations.

**C: EVICTIONS WHICH LEAD TO HOMELESSNESS**

22. The most fundamental element in the approach to interpretation of the section, is that an eviction order should not lead to a breach of the rights and obligations created by the Constitution.

23. Section 26(3) has to be read in the context of section 26 as a whole, and in particular in the context of the section 26(1), which confers a right on everyone to have access to adequate housing:

*“Section 26(3) is the provision which speaks directly to the practice of forced removals and summary eviction from land and which guarantees that a person will not be evicted from his or her home or have his or her home demolished without an order of court considering all of the circumstances relevant to the particular case. The whole section, however, is aimed at creating a new dispensation in which every person has adequate housing and in which the State may not interfere with such access unless it would be justifiable to do so.”<sup>17</sup>*

24. The reason for the passage which we have emphasised is that section 7(2) of the Constitution obliges the state to “respect, protect, promote

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<sup>17</sup> Jafftha v Schoeman and Others; Van Rooyen v Stoltz and Others 2005 (2) SA 140 (CC) at [25] – [26] (emphasis added)

and fulfil” the rights in the Bill of Rights. The duty to “respect” a right involves the duty not to take action which has the effect of depriving that person of existing access to the right.<sup>18</sup> The effect of the duty on the State to “respect” the right of access to adequate housing in section 26(1) is that the State should not take action which deprives someone of existing access to housing:

*“... there is, at the very least, a negative obligation placed upon the State and all other entities and persons to desist from preventing or impairing the right of access to adequate housing.”<sup>19</sup>*

25. From this it follows that while there is no unqualified constitutional duty on local authorities to provide alternative accommodation,

*“a court should be reluctant to grant an eviction against relatively settled occupiers unless it is satisfied that a reasonable alternative*

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<sup>18</sup> The UN Committee has explained the duty to “respect” rights of access as follows, in relation to the right to food: “The obligation to respect existing access to adequate food requires State parties not to take any measures that result in preventing such access.” General Comment 12, UN doc. E/C.12/1999/5, para 15. In relation to the right to health, the Committee has indicated that the obligation to *respect* requires States to refrain from interfering directly or indirectly with the enjoyment of the right to health. General Comment No. 14, UN doc E/C. 12/2000/4, para. 33.

<sup>19</sup> Government of the Republic of South Africa and Others v Grootboom and Others 2001 (1) SA 46 (CC) at [34]; see also Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others 2005 (2) SA 140 (CC) at [31] – [34].

*is available, even if only as an interim measure pending ultimate access to housing in the formal housing programme.*<sup>20</sup>

26. This is consistent with the approach in international law. The UN Committee on Economic, Social and Cultural Rights has found that

*“instances of forced eviction are prima facie incompatible with the requirements of the Covenant and can only be justified in the most exceptional circumstances and in accordance with the relevant principles of international law.”*<sup>21</sup>

27. The record shows that if the present Respondents are evicted, at least a very large number of them will be left homeless, because they will be unable to obtain other housing through the use of their own resources, and no alternative accommodation will be made available to them. The effect of the eviction will therefore be to deprive them of existing access to housing. It is *prima facie* inconsistent with the Constitution for the local government, which is one of the three spheres of government, to act to achieve that result.

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<sup>20</sup> Port Elizabeth Municipality v Various Occupiers 2005 (1) SA 217 (CC) at [28]. This dictum is articulated in the context of the PIE Act, but we submit that in the light of the passages cited from the Grootboom and Jaftha cases, it is of equal application under section 26 of the Constitution.

<sup>21</sup> Committee on Economic, Social and Cultural Rights, General Comment No. 4 (Sixth session, 1991) UN doc E/1992/23, *The right to adequate housing (art. 11(1) of the Covenant)*, para. 18.

28. The Appellant contends that while interference with access to adequate housing may violate the negative component of the right, this does not apply to interference with access to inadequate housing.<sup>22</sup> If we correctly understand this argument, what it means is that the Constitution is not implicated if people are deprived of inadequate housing and left homeless. It is only implicated if they are deprived of adequate housing and left homeless. We submit that this rests on a remarkably mechanistic reading of the Constitution. One of the self-evident purposes of section 26 is to prevent homelessness. The Appellants' reading of section 26 is that there is no constitutional difficulty if the state causes homelessness, as long as the only people it makes homeless are those who were not adequately housed. But the purpose of the Constitution, and of section 26 in particular, is to improve the position of vulnerable and marginal people. We submit that the interpretation proposed by the Appellant can fairly be described as perverse, because it entitles the state to aggravate the position of people on condition that they are already vulnerable and marginal.

29. We submit that this question is a central one. The court a quo found that if the occupiers are evicted in the present circumstances

*“they will accordingly lose their protection from the elements and literally be rendered homeless. They will also lose their access to*

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<sup>22</sup> Appellant's heads of argument para 10.11 to 10.14

*water. The eviction of the occupiers from their current unsafe accommodation will leave them far worse off – they will be without any accommodation at all.*<sup>23</sup>

30. These findings are not challenged by the Appellant. We submit that no reasonable interpretation of a Constitution which contains a right of access to adequate housing, could lead to the conclusion that the Constitution is not implicated where the state takes action which leads to the result described by the court a quo.

31. Section 27(1)(b) of the Constitution established the right of access to “sufficient food and water”. On the logic of the Appellant’s approach, if someone is hungry because he has insufficient food, the Constitution is not implicated if the state intervenes and takes away that food, because there is no right of access to insufficient food. The Constitution confers the right of access to sufficient food, and prohibits only the taking away of access to sufficient food. There is no constitutional problem if hungry people are made into starving people, just as there is no constitutional problem if inadequately housed people are turned into homeless people.

32. Of course there would not be a breach of the right of access to adequate housing if the state removed people from inadequate housing

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<sup>23</sup> Judgment Volume 15 p 1068 line 20 – p 1069 line 1

and gave them adequate housing. But it can not possibly be the case that the Constitution is not implicated where people are deprived of inadequate housing, and made totally homeless.

**The relevance of the failure of the Appellant to make any provision for people in desperate circumstances**

33. The Appellant is plainly and, as we understand its position, admittedly in breach of its obligations in terms of section 26(2) of the Constitution. These were explained in the Grootboom case more than six years ago: they include an obligation to take reasonable short-term measures to provide relief for people who are living in intolerable conditions or crisis situations.

34. The Appellant submits, however, that there is no logical connection between the Appellant's failure to comply with section 26(2), and the refusal of the court a quo to permit to it carry out an eviction: it is a non-sequitur to conclude that a failure to carry out a constitution obligation deprives the Appellant of its right to exercise statutory powers.

35. We submit that this misses the point. The point here is what the consequence will be of the exercise by the Appellant of its statutory powers. Because the Appellant has failed to take any short-term

measures to provide relief for people in crisis situations, the eviction of the Respondents will result in their becoming homeless. That is at least prima facie a constitutionally intolerable situation. The eviction will, at least prima facie, lead to a breach of the Constitution. That is a “relevant circumstance” in terms of section 26(3).

36. We submit that in the ordinary course, a court faced with an application by a local authority for the eviction of a substantial number of people, in circumstances where:

36.1. the people concerned, or a significant number of them, are likely to be left homeless; and

36.2. the local authority is in breach of its constitutional duty to provide relief for people who have no access to land, no roof over their heads, and who are living in intolerable conditions or crisis situations,

ought to refuse the application, at least until reasonable alternative accommodation has been made available. This principle has been upheld in judgments of this Court and the Constitutional Court in cases such as the Port Elizabeth Municipality<sup>24</sup> and Modderklip.<sup>25</sup>

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<sup>24</sup> Baartman and others v Port Elizabeth Municipality 2004 (1) SA 560 (SCA); Port Elizabeth Municipality v Various Occupiers 2005 (1) SA 217 (CC).

## **Evictions for urgent health and safety reasons**

37. The question is what a court ought to do when these are the underlying circumstances of an application for eviction, but it is claimed that there is some pressing reason of health or safety which nevertheless justifies an eviction.
38. We submit that under these circumstances, a court ought to have regard to the following matters.
39. First, a court ought to regard the claim with a measure of scepticism where it is clear that the context of the claim is a policy with regard to the development of the inner city, which requires the large-scale removal of low-income occupiers from buildings. In this instance, the policy involves the “eradication” of 235 “bad” buildings in the Johannesburg inner city.<sup>26</sup> The first step in that process is the eviction of their current occupiers. It is of course not for the court to say that the policy is either right or wrong. However, the policy context requires that a claim of pressing health or safety need ought to be regarded with an appropriate measure of scepticism.

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<sup>25</sup> President of the Republic of South Africa and Others v Modderklip Boerdery (Pty) Ltd 2004 (6) SA 40 (SCA).

<sup>26</sup> The policy and its mode of implementation are described in the report by the Centre on Housing Rights and Evictions, Any Room for the Poor? Forced Evictions in Johannesburg, South Africa, in Volume 8 at pages 524-549. They are summarised at paragraphs 41 to 50 of the Second Respondent’s heads of argument.

40. Secondly, the court ought to have regard to the practice of the applicant in matters of this kind.<sup>27</sup> The scepticism ought to be deepened if the practice of the applicant is to obtain orders in advance, often on an urgent basis, and then “stockpile” them for future use as and when considered appropriate.<sup>28</sup> It should be further deepened if the evidence shows that the steps prior to litigation are taken at a leisurely pace, and application is then made to the court on an urgent basis.<sup>29</sup> And the scepticism should be still further deepened when it is shown that the applicant’s practice is to proceed with the litigation at a leisurely pace, if at all, if there is opposition to the application. All of this casts real doubt on whether there truly is a pressing need for a removal.
41. Thirdly, the court ought to examine whether the applicant has attempted to discuss the matter with the occupiers in order to explore reasonable alternatives to improve the safety and habitability of the buildings without resorting to what should be a last-resort option of eviction – and, if necessary, to seek to persuade the occupiers that it is indeed in their best interests to vacate the building. In this regard, it is relevant that section 12(1) – (3) of the NBRBSA envisages that the first option is the

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<sup>27</sup> The practice is described in the Answering Affidavit of Poto, Volume 2 pp 61-66 para 18 26

<sup>28</sup> See in this regard the report on the City’s website “Inner City being reborn” [http://www.joburg.org.za/2005/nov/nov9\\_regeneration.stm](http://www.joburg.org.za/2005/nov/nov9_regeneration.stm): “Makda said 60 court orders were issued in the last month”; also reported in “Residents of 60 Jo'burg buildings face eviction” <http://www.sundayindependent.co.za/index.php?fArticleId=2992427> where Mr Makda of the City confirmed that this number of orders had been obtained, but had not yet been acted on.

<sup>29</sup> The evidence in this regard is summarised in the Second Respondent’s heads of argument at paragraphs 43 and 46.

taking of necessary steps in order to render a building safe. Where genuine consultation has not taken place, there is further reason to doubt whether a concern for the health and welfare of the occupiers is the true cause of the steps which are being taken.

42. In this matter, the court a quo found that the Applicant did not approach the occupiers to discuss how any steps to improve health or safety on the properties might be taken.<sup>30</sup> That finding does not appear to be challenged.

43. Fourthly, the court ought to enquire whether the applicant has complied with its constitutional obligation to conduct negotiations, and if appropriate mediation, before resorting to proceedings for eviction. In the Port Elizabeth Municipality case, the Constitutional Court observed that a relevant factor in determining whether it is just and equitable to grant an eviction order is the extent to which “*serious negotiations had taken place with equality of voice for all concerned*”.<sup>31</sup> The Court held:

*“The fact that mediation has not been tried will, however, be an important factor in determining whether it is just and equitable for an eviction order to be made.”*<sup>32</sup>

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<sup>30</sup> Judgment Volume 15 p 1049 para 21

<sup>31</sup> Port Elizabeth Municipality v Various Occupiers 2005 (1) SA 217 (CC) at [30]

<sup>32</sup> Port Elizabeth Municipality at [41].

*They [local authorities] must attend to their duties with insight and a sense of humanity. Their duties extend beyond the development of housing schemes, to treating those within their jurisdiction with respect. Where the need to evict people arises, some attempts to resolve the problem before seeking a court order will ordinarily be required.*<sup>33</sup>

44. Genuine consultation with affected communities prior to resorting to evictions is also an internationally recognised human rights standard.<sup>34</sup>
45. It is clear that there was no consultation, let alone negotiation, in this instance.<sup>35</sup>
46. Fifthly, the court ought to investigate whether the applicant has genuinely considered all alternatives to removal and homelessness. If people are living in unhealthy or unsafe conditions, and the local government has failed to carry out its section 26(2) obligations, with the result that eviction will result in homelessness, the local government is obliged at the very least to give serious consideration to enabling them to remain where they are, by assisting them to improve the conditions under which they are living. Evicting them from where they are, into a condition of homelessness, is *prima facie* inconsistent with the

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<sup>33</sup> Port Elizabeth Municipality at [56]

<sup>34</sup> UN Committee on Economic, Social and Cultural Rights, General Comment No 7, para 16(a)

<sup>35</sup> Judgment Volume 15 p 1049 para 21, p 1063 para 47

obligations on local government. A local government which does not give serious consideration to alternatives to homelessness is in breach of its constitutional obligations:

*“In a society founded on human dignity, equality and freedom, it cannot be presupposed that the greatest good for the many can be achieved at the cost of intolerable hardship for the few, particularly if, by a reasonable application of Judicial and administrative statecraft, such human distress could be avoided.”<sup>36</sup>*

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

*“States parties must ensure, prior to carrying out any evictions, and particularly those involving large groups that all feasible alternatives are explored in consultation with the affected persons, with a view to avoiding, or at least minimizing, the need to use force.”<sup>37</sup>*

48. The events in relation to the Joel Street case, where remedial action after the institution of the application resulted in the Applicant no longer seeking an eviction order, vividly demonstrate that alternative solutions

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<sup>36</sup> Port Elizabeth Municipality at [29]

<sup>37</sup> General Comment No. 7 para 14.

can be viable.<sup>38</sup> It seems that they were not even considered, let alone in consultation with the occupiers.

49. Fifthly, if removal does seem genuinely unavoidable, the court should require the local government to show what emergency measures it has taken or at least considered to provide some respite for the people, if only on a rudimentary basis.<sup>39</sup>

50. Alternative measures, both short-term and long-term, must be reasonable. This means that they must have regard to the circumstance and needs of the people affected. This would include their need to pursue their livelihoods, maintain their social networks, and ensure that their children's schooling is not unduly disrupted.<sup>40</sup> The impact of the eviction can not be ignored by local authorities. To be heard effectively to say to the residents that "your plight does not concern us" is not consistent with a constitutional democracy in which each person is entitled to have their human dignity respected and protected.<sup>41</sup>

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<sup>38</sup> Judgment Volume 15 p 1050 para 24

<sup>39</sup> In Grootboom, for example, an order was made by consent, in terms of which the government made available vacant land, some materials, and access to basic services: see the judgment at [5] and Constitutional Court order 38-00, 21 September 2000. In Minister of Public Works and Others v Kyalami Ridge Environmental Association and Others 2001 (3) 1151 (CC), the Court emphasised that the flood victims concerned had a constitutional right to relief and to be given access to housing: at [51] and [106]

<sup>40</sup> See judgment of the court *a quo*, para. 64.

<sup>41</sup> On the value of human dignity in protecting socio-economic rights see S. Liebenberg 'The value of human dignity in interpreting socio-economic rights' 21 *SAJHR* (2005) 1 – 31.

51. In this regard, the UN Committee on Economic, Social and Cultural Rights has concluded:

*“Evictions should not result in rendering individuals homeless or vulnerable to the violation of other human rights. Where those affected are unable to provide for themselves, the State party must take all appropriate measures, to the maximum of its available resources, to ensure that adequate alternative housing, resettlement or access to productive land, as the case may be, is available.”<sup>42</sup>*

52. Here, the Appellant does not tender to make any provision at all for the occupiers, let alone reasonable provision.

53. Sixthly, once all of these factors have been considered, the court ought to enquire into the proportionality of eviction as a response to the problem. The Jaftha case illustrates the importance of a proportionality inquiry which takes into account the relevant contextual factors, in circumstances where the state seeks to take action which will have the effect of depriving people of their access to housing.<sup>43</sup>

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<sup>42</sup> General Comment No. 7, para 17

<sup>43</sup> Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others 2005 (2) SA 140 (CC) at [39] – [43], [56] – [60]

54. Finally, we note that it appears that during the hearing, counsel for the Applicant suggested that an eviction order be granted, but that implementation of the order be suspended. That throws some light on the urgency of the matter.<sup>44</sup>

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<sup>44</sup> Judgment Volume 15 p 1070 para 61

**PART 2:**

**UNCONSTITUTIONALITY OF THE NBRBSA – AND THE APPROPRIATE**

**REMEDY**

55. The Minister responsible for the NBRBSA has not opposed the application by the Respondents for an order declaring sections 12(4)(b), 12(5) and 12(6) of the NBRBSA inconsistent with the Constitution.

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

57. On the face of it, those sections

57.1. authorise administrative action (the making of the order) which is not procedurally fair. This is inconsistent with section 33(1) of the Constitution.

57.2. create a procedure for eviction without an order of a court, made after considering all relevant circumstances. This is inconsistent with section 26(3) of the Constitution.

## Reading down

58. It is a general principle of constitutional interpretation that findings of constitutional invalidity of legislation should be avoided, if this is reasonably possible. Statutes should be interpreted in such a way that they “promote the spirit, purport and objects of the Bill of Rights”.<sup>45</sup>
59. This is achieved by, when it is possible, interpreting legislation so that it conforms to the Bill of Rights. Where legislation is capable of being read in two ways – as a violation of fundamental rights or, if read more restrictively or expansively, as not violating rights – the latter reading must be preferred.
60. The approach to dealing with constitutional challenges to legislation was summarised by this Court in Govender.<sup>46</sup> The interpretation which is sought in order to save the provision from unconstitutionality must be “reasonably possible”,<sup>47</sup> or not “unduly strained”.<sup>48</sup> Thus, in De Beer<sup>49</sup> the relevant ordinance was capable of two interpretations. It was reasonably possible to interpret it in a way that enabled a court to exercise a discretion as to whether to grant an order of execution

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<sup>45</sup> Investigating Directorate Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit NO 2001 (1) SA 545 (CC) para 21 - 23; Daniels v Campbell NO and Others 2004 (7) BCLR 735 (CC) para 19 – 37; sec 39 (2) of the Constitution.

<sup>46</sup> Govender v Minister of Safety and Security 2001 (4) SA 273 (SCA)

<sup>47</sup> Mateis v Ngwathe Plaaslike Munisipaliteit 2003 (4) SA 361 (SCA)

<sup>48</sup> Hyundai para 24

<sup>49</sup> De Beer NO v North-Central Local Council & South-Central Local Council 2002 (1) SA 429 (CC)

against property in the particular circumstances.<sup>50</sup> This interpretation was preferred, and saved the ordinance from unconstitutionality.

61. The Promotion of Administrative Justice Act 3 of 2000 (“PAJA”) creates what might be regarded as a form of statutory (as opposed to constitutional) reading down. Section 3(1) of PAJA stipulates that administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair. Section 3(2) sets out the requirements of procedural fairness.
62. It appears that the effect of this is that a local authority which is considering whether to issue a section 12(4) order under the NBRBSA is obliged to comply with the requirements of section 3 of PAJA. Such a reading is reasonably possible and not unduly strained. There is nothing in the NBRBSA which expressly or by implication excludes such a procedure. Section 12(4) can therefore be read in a manner which is consistent with the requirements of the Constitution as far as procedural fairness is concerned.
63. However, the inconsistency with section 26(3) can not be resolved in this manner. It explicitly authorises the local authority to issue a notice ordering occupiers to vacate the building. It can not reasonably be suggested that the section requires the municipality to obtain the

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<sup>50</sup> At [24]

authority of a court in order to do so. Such an interpretation is not “reasonably possible”, and is “unduly strained”.

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

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

64.2. after the local authority has made the determination, but before it has issued an order, for authority to issue the order;<sup>51</sup> or

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

65. One searches the Act in vain for anything which indicates which of these is supposedly intended. In truth, it is plain that none of them is contemplated. What is plainly contemplated is a procedure which does not involve the determination of any issue by a court, except of course

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<sup>51</sup> This is the procedure followed by the Appellant in this case.

in the case of a criminal prosecution. Any attempt to infer the contrary is unduly strained, and not reasonably possible.

66. Sections 12(4)(b), 12(5) and 12(6) are therefore inconsistent with section 26(3) of the Constitution.

### **The appropriate remedy**

67. A court must declare a law that is inconsistent with the Constitution invalid to the extent of that inconsistency.<sup>52</sup>

68. A court making such a declaration may also make any order that is just and equitable.<sup>53</sup> That includes the remedy of “reading in”.

### **Reading in**

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

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<sup>52</sup> Constitution section 172(1)(a)

<sup>53</sup> Section 172(1)(b)

- 69.1. It will not be appropriate to read words in, unless in so doing a court can define *with sufficient precision* how the statute ought to be extended in order to comply with the Constitution; and
- 69.2. When reading in, a court should endeavour to be *as faithful as possible to the legislative scheme* within the constraints of the Constitution.<sup>54</sup>
- 69.3. the court will be reluctant to use its 'reading-in' powers where there are various options open to the legislature to cure the constitutional defect:

*“Where, as in the present case, a range of possibilities exists, and the Court is able to afford appropriate interim relief to affected persons, it will ordinarily be appropriate to leave the legislature to determine in the first instance how the unconstitutionality should be cured. The Court should be slow to make those choices which are primarily choices suitable for the legislature.”*<sup>55</sup>

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<sup>54</sup> National Coalition for Gay and Lesbian Equality v Minister of Home Affairs 2000 (2) SA 1 (CC) para 75.

<sup>55</sup> Dawood v Minister of Home Affairs 2000 (3) SA 936 (CC) at [64]

70. In Lawyers for Human Rights,<sup>56</sup> the relevant statute contained two sections dealing with suspected illegal immigrants. One limited the period of detention, and provided for the detainee to be brought before a court before the end of that period. The other did not. The court read words into the latter section, in terms virtually identical to the former section. The insertion was faithful to the legislative scheme.
71. In Jaftha,<sup>57</sup> the relevant statute did not provide for judicial oversight over execution against immovable property. The court read in words which conferred on a court, instead of the clerk of the court, the power to authorise execution against immovable property.
72. In both of those case, the “surgery” required was very limited, it was clear where it was required, and it was clear what was required.
73. In this matter, however, it is somewhat more difficult, for two reasons.
74. First, as we have pointed out, it is not clear where the judicial decision is to be inserted. At least three possibilities present themselves:

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<sup>56</sup> Lawyers for Human Rights v Minister of Home Affairs 2004 (4) SA 125 (CC)

<sup>57</sup> Jaftha v Schoeman 2005 (2) SA 140 (CC)

- 74.1. before the local authority makes a determination deeming the issuing of an order necessary, for authority to make that determination;
- 74.2. after the local authority has made the determination, but before it has issued an order, for authority to issue the order; or
- 74.3. before instituting a prosecution or taking another step to achieve the eviction of the occupiers, for authority to take that step.

75. Secondly, it is not clear what the nature of the judicial decision is to be. The Appellant appears to take the view that it should in effect be a review of the determination already made by the municipality that it is necessary for the sec 12(4)(a) or (b) notice to be issued. An alternative approach is that there should be a judicial decision on the merits of whether a notice should be issued. That is a choice which it is probably more appropriate for the Legislature to make.

76. Thirdly, it is not clear on what grounds the judicial decision should be made. It could be open-text, for example “after considering all the relevant circumstances”; it could be value-bound, for example “just and

equitable”; it could be specific as to particular matters to be taken into account; or it could be a variety of combinations of those possibilities.

77. We submit that the Act should provide a nuanced, appropriately calibrated regime for dealing with the residents of buildings that pose a health and safety threat. Of critical importance is that relevant legislation gives full effect to relevant constitutional rights and values, particularly those underpinning section 26 of the Constitution. In terms of international human rights law, the UN Committee on Economic, Social and Cultural Rights has held that legislation against forced evictions “is an essential basis upon which to build a system of effective protection”. Such legislation must be “designed to control strictly the circumstances under which evictions may be carried out.”<sup>58</sup> Similarly, in its General Comment on article 17 of the International Covenant on Civil and Political Rights, the UN Human Rights Committee concluded that all interference with a person’s home may take place only in terms of a law and that “relevant legislation must specify in detail the precise circumstances in which such interferences may be permitted.”<sup>59</sup>
78. We submit that the choice of option, and the detail of the design, are matters which are more appropriate for the Legislature than for the courts.

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<sup>58</sup> General Comment No. 7, para 10.

<sup>59</sup> UN Human Rights Committee, General Comment No. 16 (Thirty-Second Session) UN doc A/43/40, annex VI, paras 3; 8.

79. In Zondi,<sup>60</sup> the Ordinance was inconsistent with the Constitution for various reasons. The decision as to how to remedy the defect was best made by the Legislature. The question was then what should happen in the interim. Immediate invalidity of the Ordinance would not have been just and equitable, because there was a need for workable legislation in this area. This suggested that a suspended declaration of invalidity would be appropriate. However, the Ordinance could not be allowed to remain in force in its existing form while the Legislature went about the task of remedying the defect. The Ordinance affected fundamental rights, and dealt with a matter involving social conflict. The Court resolved the issue by:

79.1. making an order of suspended invalidity; and

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

80. We submit that this would be a just and equitable remedy in this case.

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<sup>60</sup> Zondi v Member of the Executive Council for Traditional and Local Govt Affairs and Others 2005 (3) SA 589 (CC).

**PART C: THE APPELLANT’S BREACH OF SECTION 26(2) OF THE CONSTITUTION – AND THE APPROPRIATE REMEDY**

81. It appears to be common cause, or at least not in dispute, that the Appellant is in breach of section 26(2) of the Constitution through its failure to implement an emergency programme of the kind described in the Grootboom judgment.<sup>61</sup>

82. We submit that it is a matter for comment that more than ten years after the 1996 Constitution was introduced, and more than six years after the Constitutional Court explained the requirements of section 26(2) of that Constitution, South Africa’s richest and largest city has still not complied with its constitutional obligations. The question is what would be an appropriate remedy under the circumstances.

83. Under section 38 of the Constitution, the Respondents are entitled to “*appropriate relief*”. This means an effective remedy:

*“[A]n appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced”.*<sup>62</sup>

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<sup>61</sup> See for example Appellant’s heads of argument para 11.23 p 73

<sup>62</sup> Fose v Minister of Safety and Security 1997(3) SA 786 (CC) at [69].

84. Kriegler J expressed the approach as follows in Fose,

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

*“[97] Once the object of the relief in s 7(4)(a)<sup>63</sup> has been determined, the meaning of 'appropriate relief' follows as a matter of course. When something is appropriate it is 'specially fitted or suitable'. Suitability, in this context, is measured by the extent to which a particular form of relief vindicates the Constitution and acts as a deterrent against further violations of rights enshrined in chap 3. In pursuing this enquiry one should consider the nature of the infringement and the probable impact of a particular remedy. One cannot be more specific. The facts surrounding a violation of rights will determine what form of relief is appropriate.”*

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<sup>63</sup> Of the interim Constitution

## **STRUCTURAL INTERDICTS**

85. In the counter-application, the Respondents seek relief which can conveniently be described as a structural interdict. In this section of the argument we seek to analyse the desirability of an order of that kind in this case.

86. In doing so, we apply a broad definition of structural interdicts. An order containing a structural interdict usually includes declaratory and mandatory relief of the usual kind. What distinguishes the structural interdict is that it generally contains either or both of the following additional elements:

86.1. an order requiring the respondent to report on what it has done and will do in order to give effect to the mandatory order. We refer to this as the “reporting” element; and

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

87. In Modderklip Boerdery, this Court pointed to the difficulties which structural interdicts can present:

*“Structural interdicts ... have a tendency to blur the distinction between the Executive and the Judiciary and impact on the separation of powers. They tend to deal with policy matters and not with the enforcement of particular rights. Another aspect to take into account is the comity between the different arms of the State. Then there is the problem of sensible enforcement: the State must be able to comply with the order within the limits of its capabilities, financial or otherwise. Policies also change, as do requirements, and all this impacts on enforcement.”<sup>64</sup>*

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<sup>64</sup> President of the Republic of South Africa and Others v Modderklip Boerdery (Pty) Ltd 2004 (6) SA 40 (SCA) para 39

## **Situations where structural relief is appropriate**

88. Despite these concerns, our courts have issued structural interdicts in an increasing number of cases.<sup>65</sup> From those cases and from the experience in other parts of the world, one can establish the sorts of cases in which various forms of structural interdicts will provide appropriate relief.
89. In Treatment Action Campaign, the Constitutional Court emphasised that the decision to grant mandatory and structural interdicts would depend on the circumstances of each particular case. It concluded that structural interdicts constitute “appropriate relief” when they are “necessary to secure compliance with a court order”. This could be the case, for example, where there is a proven “failure to heed declaratory orders or other relief granted by a court in a particular case”.<sup>66</sup>

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<sup>65</sup> They include August v Electoral Commission 1999 (3) SA 1 (CC); Strydom v Minister of Correctional Services 1999 (3) BCLR 342 (W); Ngxuza v Permanent Secretary, Dept of Welfare, Eastern Cape 2001 (2) SA 609 (E); 2000 (12) BCLR 1322; S v Z and 23 Similar Cases 2004 (1) SACR 400 (E); City of Cape Town v Rudolph 2004 (5) SA 39 (C); Sibiya and others v Director of Public Prosecutions, Johannesburg and Others 2005 (5) SA 315 (C); Minister of Education (Western Cape) v Mikro Primary School 2006 (1) SA 1 (SCA); Magidimisi v Premier of the Eastern Cape & others [2006] JOL 17274 (Ck); Kiliko and Others v Minister of Home Affairs and Others 2006 (4) SA 114 (C); Centre for Child Law and Others v MEC for Education and Others, Transvaal Provincial Division, Case No. 19559/2006, 30 June 2006 (unreported); EN and Others v Govt of the RSA and Others 2006 JOL 18038 (D); Ngxuza & others v Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government & another [2006] JOL 18239 (E)

<sup>66</sup> Minister of Health and Others v Treatment Action Campaign and Others (No 2) 2002 (5) SA 721 (CC) at [129]

90. Subsequently, in Sibiya,<sup>67</sup> the Constitutional Court ordered a structural interdict in order to enable it to exercise supervisory jurisdiction over the process of converting the sentences of those who had been sentenced to death prior to the decision in S v Makwanyane. The court engaged in an extended process of receiving reports prepared by the government, considering them and giving further directions as to the steps required for compliance. The process was finally completed by a judgment given on 30 November 2006,<sup>68</sup> in which the Court expressed its satisfaction at the effectiveness of the procedure which had been followed. The Court noted that it had ordered a structural interdict because

*“[5] ... The mandamus was therefore principally aimed at ensuring compliance with the order of this Court in Makwanyane.*

*“[6] The Court felt that given the delay that had occurred since its order in Makwanyane coupled with the pressing need for the sentences to be replaced, it was an appropriate case for a supervisory order to be made in addition to the mandamus.”*

91. A failure to comply with a previous order of court, and particularly a sustained failure to do so, is perhaps the paradigmatic case for a

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<sup>67</sup> Sibiya and Others v Director of Public Prosecutions, Johannesburg, and Others 2005 (5) SA 315 (CC)

<sup>68</sup> Sibiya and Others v Director of Public Prosecutions, Johannesburg, and Others CCT 45/04 judgment delivered 30 November 2006

structural interdict. There are other indicators of where a structural interdict may be appropriate. These include the following.<sup>69</sup>

92. First, proven past non-compliance is not a prerequisite for the court to take steps to ensure compliance. Where it is found, as it was in Sibiya (No 1), that it would be “inadvisable for the court to assume” that the order would be carried out promptly, that would justify the grant of a structural interdict.
93. Secondly, a structural interdict may be considered necessary where the consequences of even a good-faith failure to comply with a court order are so serious that the court should be at pains to ensure effective compliance.
94. Thirdly, a structural interdict may be necessary to ensure compliance with a court order where the order in question is so general that it is not possible to define with any precision what the government is required to do – either because of the general nature of the right it enforces, or because the court is anxious to leave the state with as much latitude as possible with regard to compliance.

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<sup>69</sup> In the analysis which follows we borrow liberally, without further attribution, from K Roach & G Budlender “Mandatory Relief and Supervisory Jurisdiction: When is it Appropriate Just and Equitable?” (2005) *SALJ* 325

95. Sibiya is an example of this: The Constitutional Court ordered the respondents to take “all the necessary steps”, without describing each step in specific terms, or stating when each step should be taken. As the Court noted, its use of the phrase “as soon as possible” also had a lack of specificity. This was plainly relevant to the decision to order a structural interdict, as there would be debate, in any enforcement proceedings, as to whether the respondents had done everything in their power that was necessary.<sup>70</sup>
96. In such circumstances, a structural interdict may provide benefit to all, including government. The approval of a plan (including a timeline) by the court can allow the government to move forward with implementation, secure in the knowledge that implementation will constitute compliance with its obligations. The court can make an order which is as non-intrusive as possible on the choices which the elected government makes, because it can be secure in the knowledge that this will not be an invitation to non-compliance, but rather an invitation to the government to formulate a plan in order to achieve compliance with the Constitution.
97. Structural interdicts granted in these circumstances do not undermine the separation of powers, but actually allow the state the space to fulfil its executive function.

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<sup>70</sup> See the discussion in the judgment of 30 November 2006 at [6]

98. We do not suggest these as either rigid categories or as a numerus clausus: rather, they demonstrate types of instances in which it will be “appropriate” to order structural relief.

### **Identifying the cause of the constitutional breach**

99. In determining what relief will be appropriate, the most useful starting point will often be to determine the cause of the constitutional breach. Once the cause of the infringement has been determined, it is easier to “*strike effectively at its source*”.
100. Hansen has identified three primary reasons for governmental non-compliance with constitutional standards: inattentiveness, incompetence and intransigence.<sup>71</sup> Each of these calls for different remedial techniques. What works with a government that is simply inattentive to constitutional standards may not work with a government that is incompetent. Even stronger remedies, including ultimately the threat and use of contempt proceedings, may be necessary to deal with government actors that are simply opposed or intransigent to constitutional standards.

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<sup>71</sup> C Hansen “Making It Work: Implementation of Court Orders Requiring Restructuring of State Executive Branch Agencies” in SR Humm (ed) Child, Parent and State (1994)

## *Inattention*

101. Remedies that are merely persuasive in nature may be sufficient to deal with the situation where the cause of non-compliance is simply inattention on the part of the relevant state actor. In such circumstances, a declarator may be sufficient to simply remind the defaulter that it has obligations, point out that they have not been fulfilled, and bring about prompt and competent action.
  
102. Even at this lowest level, however, and even in the absence of any bad faith on the part of government, a declarator may not be sufficient to ensure that the relief is effective. This may be the case where the action required from government is complex and programmatic, or requires action by a variety of agencies, some of which may not have been directly involved in the litigation. To this may be added the situation (common in socio-economic rights cases) where the required action may have an effect on a broad range of potential claimants who are not before the court. In such circumstances, the declaratory relief may usefully be coupled with a requirement that government report to the public (as opposed to the court for supervisory purposes) on its compliance. In this way, a court harnesses the power of the core democratic mechanism of transparency, and enables supervision of the declaratory order by the public at little or no additional cost to the state.

103. An order requiring public reporting is not a novel remedy. In August, the Constitutional Court ordered the respondents to deliver a once-off report in the form of an affidavit to the parties, and to file it with the registrar. No provision was made in the order for any further hearing on the matter. The requirement of filing was imposed so that “any interested person may inspect this affidavit at the Registrar's office once it has been lodged”.<sup>72</sup>
104. In some circumstances, other forms of publication might be ordered, in terms of either the number of reports or the manner of publication. Thus in Western Cape Minister of Education v Mikro Primary School, this Court approved an order made by the Cape High Court requiring the respondent to report to the school governing body on a monthly basis regarding its compliance with the order, and leave was granted to the parties to approach the court on the same papers “for further relief in this regard”.<sup>73</sup>
105. We submit that the mere fact of having to report, requires the defaulting authority to apply its mind to the problem at hand and encourages the development and implementation of a plan within a reasonable period.

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<sup>72</sup> August at [39]

<sup>73</sup> At [51]

### *Incapacity and incompetence*

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

107. In a recent judgment, Froneman J indicated that:

*“in my personal experience [structural interdicts] have contributed to a better understanding on the part of public authorities of their constitutional legal obligations in particular areas, whilst it has also assisted the judiciary in gaining a valuable insight in the difficulties that these authorities encounter in their efforts to comply with their duties”<sup>74</sup>*

108. While this form of structural interdict does involve the judiciary more closely in the work of the executive, and imposes greater burdens on the court, the choice of plan remains squarely within the purview of the administrator. The court’s only role is to evaluate the plan for compliance with the constitutional obligation. In the case of a housing

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<sup>74</sup> Magidimisi para 29 (referring to S v Z and Ngxuza (2001))

plan, for example, the question would be whether it complies with the reasonableness requirement laid down by the Constitutional Court in Grootboom. Issues such as budgeting and prioritisation of policy goals would remain under the control of the executive, subject only to the reasonableness requirement.

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

### *Intransigence*

110. The last category of infringers is the intransigent state. The most invasive remedies should be reserved for these officials or institutions which, in the words of Iacobucci J of the Canadian Supreme Court “*have proven themselves unworthy of trust*”.<sup>75</sup>

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

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<sup>75</sup> Little Sisters Book and Art Emporium v Canada (Minister of Justice) [2000] 2 SCR 1120 para 257

## **Applying this analysis to the present case**

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

112.1. More than six years have now passed since the Constitutional Court clarified the obligations of local authorities, and the Appellant has still not acted on this. There has been a sustained and systemic failure to comply with the requirements of the judgment.

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

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

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

112.4. The precise content of the Appellant's obligations is, inevitably, difficult to determine. The Appellant should be left with latitude to make the policy choices which are properly within the ambit of its functions; but it should be required to place its plans and their implementation before a court, to ensure that they are consistent with its obligations. In the light of the history of the matter, people such as the Respondents should not be left to the tender mercies of the Appellant's planners.

113. We submit that at the very least, the Appellant should be ordered to submit periodic reports to the Respondents and to the public (we suggest every six months) on:

113.1. what it has done to comply with its obligations;

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

113.3. when it will take such steps.

114. We submit that this is necessary both because of the history of this case, and also because it is an appropriate element of accountability.

Accountability is a founding value of our Constitution:

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

*'The Republic of South Africa is one, sovereign, democratic State founded on the following values: ...*

*(d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.'*

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

*'All spheres of government and all organs of State within each sphere must - ...*

*(c) provide effective, transparent, accountable and coherent government for the Republic as a whole.'*

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

*'(1) Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles: ....*

*(f) Public administration must be accountable.”<sup>76</sup>*

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

**GEOFF BUDLENDER**

**RICHARD MOULTRIE**

*Counsel for the amici curiae*

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<sup>76</sup> Rail Commuters Action Group and others v Transnet Ltd t/a Metrorail and others 2005 (2) SA 359 (CC) at [74]

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