

**IN THE HIGH COURT OF SOUTH AFRICA**  
**GAUTENG LOCAL DIVISION, JOHANNESBURG**

**APPEAL CASE NO: A5008/14**

**CASE NO: 02312/13**

In the matter between:

**MTSHALI, THOKOZANI**

1<sup>st</sup> Appellant

**THE OCCUPIERS OF 238 CORNER MAIN  
& BERA STREETS, JEPPESTOWN**

2<sup>nd</sup> to 230<sup>th</sup> Appellants

and

**TAYENGWA MASAWI**

1<sup>st</sup> Respondent

**IRENE RUMBIDZAI MASAWI**

2<sup>nd</sup> Respondent

**PHUMANGELAKHE MAKHAYA**

3<sup>rd</sup> Respondent

**CITY OF JOHANNESBURG METROPOLITAN  
MUNICIPALITY**

4<sup>th</sup> Respondent

**NATIONAL COMMISSIONER,  
SOUTH AFRICAN POLICE SERVICE**

5<sup>th</sup> Respondent

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**FILING SHEET**

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PRESENTED FOR SERVICE AND FILING:

1. **FOURTH RESPONDENT'S PRACTICE NOTE; and**
2. **HEADS OF ARGUMENT.**

DATED AT JOHANNESBURG ON THIS *2<sup>nd</sup>* DAY OF MARCH 2015



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**MOODIE & ROBERTSON**  
4<sup>th</sup> Respondent's Attorneys  
4<sup>th</sup> Floor  
222 Smit Street  
Braamfontein  
PO Box 4685  
Johannesburg 2000  
Tel: (011) 628-8600  
Fax: (011) 403-5662  
Ref: Mr C Beckenstrater/jct

TO:  
**THE REGISTRAR OF THE  
ABOVE HONOURABLE COURT  
JOHANNESBURG**

AND TO:  
**CENTRE FOR APPLIED LEGAL STUDIES**  
Applicants' Attorneys  
1<sup>st</sup> Floor, D J du Plessis Building  
1 Jan Smuts Avenue  
Braamfontein  
Tel: (011) 717-8607  
Fax: (011) 717-1702  
Cell: 083 457 8227  
Ref: Ms Z Sujee

SERVICE PER E-MAIL AS AGREED

AND TO:  
**CLARK ATTORNEYS**  
1<sup>st</sup> & 2<sup>nd</sup> Respondent's Attorneys  
3<sup>rd</sup> Floor, The Mall Offices  
11 Craddock Avenue  
Rosebank  
Tel: (011) 880-0837  
Fax: 086 647 9902  
E-mail: paula@clarkattorneys.co.za  
Ref: Ms P Clark/LT/MASAWI

Received copy hereof on this the  
day of MARCH 2015

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For: 1<sup>st</sup> & 2<sup>nd</sup> Respondents'  
Attorneys

**IN THE HIGH COURT OF SOUTH AFRICA**  
**GAUTENG LOCAL DIVISION, JOHANNESBURG**

Appeal Case No : A5008 / 14

Case No : 02312 / 2012

In the matter between:

**MTSHALI, THOKOZANI**

First Appellant

**THE OCCUPIERS OF 238 CORNER MAIN & BEREA  
STREETS, JEPPESTOWN**

Second to 230<sup>th</sup> Appellants

and

**TAYENGWA MASAWI**

First Respondent

**IRENE RUMBIDZAI MASAWI**

Second Respondent

**PHUMANGELAKHE MAKHAYA**

Third Respondent

**CITY OF JHB METROPOLITAN MUNICIPALITY**

Fourth Respondent

**NATIONAL COMMISSIONER, SAPS**

Fifth Respondent

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**FOURTH RESPONDENT'S PRACTICE NOTE**

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1. **NUMBER OF MATTER**

A5008/14

2. **NATURE OF APPEAL**

2.1 The Appellants appeals against the whole of the judgment and the order of Molahleli AJ of 15 February 2013.

2.2 In terms of the order of Molahleli AJ:-

2.2.1 The Appellants' application for the rescission of the eviction order of Kathree-Setiloane J granted on 28 March 2012 under case number 47208 / 2011 was dismissed with costs.

2.2.2 The Fourth Respondent was ordered to provide the Appellants whose names appeared in Annexure B to the Appellants' amended notice of motion with temporary accommodation.

2.2.3 It was ordered that should the current arrangement of accommodating the Appellants at Khaya House continue, those of the Appellants who have income as reflected in Exhibit X may be required to pay R10 on a daily basis and this would apply only to adults and not to children.

3. **ISSUES ON APPEAL**

3.1 The Appellants' appeal in regard to the dismissal of the rescission application does not have anything to do with the Fourth Respondent, and such issue is not traversed by the Fourth Respondent in its heads of argument.

3.2 What concerns the Fourth Respondent is paragraphs 3 and 4 of the order of Molahleli AJ (as stated in paragraphs 2.2.2 and 2.2.3 above). In this regard, it is submitted that paragraphs 3 and 4 of the order of Molahleli AJ were correctly granted in the circumstances, and that such an order can be granted by a court.

4. **PARTS OF RECORD THAT NEED TO BE READ**

It is submitted that the whole of the record should be read, including the affidavits in the Appellant's application to the SCA for leave to appeal.

**L HOLLANDER**  
Fourth Respondent's counsel  
Chambers  
Sandton  
23 February 2015

**IN THE HIGH COURT OF SOUTH AFRICA**  
**GAUTENG LOCAL DIVISION, JOHANNESBURG**

Appeal Case No : A5008 / 14

Case No : 02312 / 2012

In the matter between:

**MTSHALI, THOKOZANI**

First Appellant

**THE OCCUPIERS OF 238 CORNER MAIN & BEREA  
STREETS, JEPPESTOWN**

Second to 230<sup>th</sup> Appellants

and

**TAYENGWA MASAWI**

First Respondent

**IRENE RUMBIDZAI MASAWI**

Second Respondent

**PHUMANGELAKHE MAKHAYA**

Third Respondent

**CITY OF JHB METROPOLITAN MUNICIPALITY**

Fourth Respondent

**NATIONAL COMMISSIONER, SAPS**

Fifth Respondent

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**FOURTH RESPONDENT'S HEADS OF ARGUMENT**

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**INTRODUCTION**

1. The Appellants appeal<sup>1</sup> against the judgment<sup>2</sup> and order<sup>3</sup> of His Lordship Mr Acting Justice Molahleli. Molahleli AJ granted an *ex tempore* judgment on 15 February 2013, and a written judgment was handed down on 28 March 2013.

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<sup>1</sup> Notice of application for leave to appeal, Volume 7, pp 450-457. The Appellants were refused leave to appeal by Molahleli AJ (Vol 5, pp 463-468), however leave to appeal to the Full Bench of the Gauteng Local Division was ultimately granted by the SCA on 15 January 2014 (Vol 7, pp 636, 637). The Appellants do not appear to have ever delivered a notice of appeal. The Fourth Respondents takes no issue with this and will assume that the Appellants' notice of application for leave to appeal constitutes their notice of appeal.

<sup>2</sup> Volume 7, pp 441-447.

<sup>3</sup> Volume 7, pp 448, 449.

2. In terms of the judgment and order of Molahleli AJ:
  - 2.1. The Appellants' application for the rescission of the eviction order of Kathree-Setiloane J was granted on 28 March 2012 under case number 47208 / 2011 was dismissed with costs.
  - 2.2. The Fourth Respondent was ordered to provide the Appellants whose names appeared in Annexure B to the Appellants' amended notice of motion with temporary accommodation.
  - 2.3. It was ordered that should the current arrangement of accommodating the Appellants at Khaya House continue, those of the Appellants who have income as reflected in Exhibit X may be required to pay R10 on a daily basis and this would apply only to adults and not to children.
3. The issue pertaining to the rescission of the eviction order of Kathree-Setiloane J does not concern the Fourth Respondent, and the Fourth Respondent's heads of argument do not deal with this issue.

## **BACKGROUND**

4. The Appellants initially brought an urgent application seeking *inter alia* to be restored possession of a certain building in Johannesburg occupied by them<sup>4</sup> (Part A<sup>5</sup>) and the rescission of the eviction order obtained by the First and Second Respondents (the owner of the property) on 28 March 2012 (Part B<sup>6</sup>).
5. On 29 January 2013 the application came before the urgent court and was heard by His Lordship Mr Justice Mokgoatheng, who dismissed the spoliation application and postponed the rescission application to 12 February 2013<sup>7</sup>.

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<sup>4</sup> 238 (Corner) Main and Berea Streets, Jeppestown, Johannesburg.

<sup>5</sup> Volume 1, NOM, pp 2. 3.

<sup>6</sup> Volume 1, NOM pp 4.

<sup>7</sup> Volume 5, FA of Appellants in application to SCA for leave to appeal, para 29, pp 483.

6. Initially no relief was sought against the Fourth Respondent, however on 4 February 2013 the Appellants served a supplementary affidavit<sup>8</sup> and amended notice of motion<sup>9</sup> seeking certain relief against the Fourth Respondent in the event that the Appellants were not successful in the relief rescinding the eviction order and being put back into occupation of the property.
7. The relief then sought against the Fourth Respondent was that the Fourth Respondent be ordered to provide the Appellants (the Appellants whose names appear on Annexure “B” to the amended notice of motion<sup>10</sup> and “*any other Appellants*”) with temporary accommodation within 5 days of the date of the order<sup>11</sup>.
8. The supplementary affidavit set out *inter alia* the circumstances of the Appellants whose names appeared on Annexure “B” to the amended notice of motion, which persons had been living under a bridge on the corner of Berea and Main Street.
9. Significantly, the Appellants’ amended notice of motion and their supplementary affidavit<sup>12</sup> dealt with the income of the Appellants. The supporting affidavits of Anna Kate Tissington<sup>13</sup> and Marie Huchzermeyer<sup>14</sup> also dealt with the income of the Appellants. Of particular importance is that the Appellants tendered to pay rental to the First and Second Respondents<sup>15</sup> in the amounts set out in Annexure “A” to the amended notice of motion.

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<sup>8</sup> Volume 4, pp 344-384.

<sup>9</sup> Volume 4, pp 335-344.

<sup>10</sup> Volume 4, pp 344, 344.

<sup>11</sup> Volume 4, Amended NOM, prayer 8-10, pp 337, 338; Supplementary Affidavit, para 40, pp 455.

<sup>12</sup> Volume 4, para 19-27, pp 351, 352.

<sup>13</sup> Volume 4, para 5, pp 371.

<sup>14</sup> Volume 4, para 22, pp 382.

<sup>15</sup> Volume 4, Supplementary Affidavit, para 38, pp 354, NOM, prayer 6, pp 336.

10. In response to the Appellants' supplementary affidavit, the Fourth Respondent delivered an answering affidavit<sup>16</sup> setting out *inter alia* that:-

10.1. The Fourth Respondent did not dispute (and indeed still does not dispute), its constitutional duty to provide alternative accommodation to the Appellants.

10.2. The Fourth Respondent had (and still has) no temporary emergency accommodation available to provide to the Appellants, other than the very temporary (72 hour) emergency accommodation of the Appellants in the building known as Ekhaya Shelter in Hillbrow, Johannesburg, where the Appellants had been relocated to by the Fourth Respondent on 8 February 2013<sup>17</sup>.

10.3. The Fourth Respondent's resources were (and are) exhausted consequent upon being ordered in other matters by the above Honourable Court and the Constitutional Court to provide other persons temporary emergency accommodation<sup>18</sup>, and by virtue of the accommodation that the Fourth Respondent being able to provide already being occupied or earmarked for occupation by others<sup>19</sup>.

### **JUDGMENT OF MOLAHLEHI AJ**

11. The application was initially heard by Molahleli AJ on 13 February 2013, and was stood down to 15 February 2015 in order for the Appellants' attorneys and the Fourth Respondents' attorneys to engage in regard the Appellant's accommodation in Ekhaya House.

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<sup>16</sup> Volume 5, pp 401-431.

<sup>17</sup> Volume 5, AA, para 7-10, pp 406.

<sup>18</sup> Volume 5, AA, para 12.3, 12.3.2, 12.3.3, pp 407, 408, para 16.1, pp 411, para 17.9, pp 412-414.

<sup>19</sup> Volume 5, AA, para 18.1-18.6, 19.1, 19.2, 20.1-20.7, 21.1-21.4, 22.1, pp 415-422.

12. The matter stood down after Molahleli AJ instructed the Fourth Respondent to find alternative accommodation for the Appellants and to report back to court on 15 February 2013<sup>20</sup>.
13. On 15 February 2013 and after the Appellants' attorneys and the Fourth Respondent's attorneys had engaged with each other and there was an exchange of correspondence, Molahleli AJ granted judgment and an order as follows, which judgment correctly records what transpired in regard to the Appellants' application<sup>21</sup>:

“... .

[16] I now turn to deal with the alternative relief sought by the Appellants. This relates to the issue of whether the Fourth Respondent of Johannesburg should provide alternative accommodation to the 30 Appellants, who after eviction were rendered homeless resulting in them taking sanctuary under a bridge.

[17] After their eviction the Appellants were provided temporary accommodation for 72 hours by a non-governmental organisation arranged by the Johannesburg Metropolitan Fourth Respondent Council. The NGO that has provided the temporary accommodation required that each of the Appellants and members of their family, both who are employed and unemployed to make a daily contribution of R20,00 daily. It would appear that the amount of R20,00 is unaffordable even to people who have some income. It further seems unjust and unfair to expect people with no income to contribute.

[18] The Fourth Respondent of Johannesburg does not dispute its constitutional duty to provide alternative accommodation to the Appellants. It was, however, submitted on behalf of the Johannesburg Metropolitan Fourth Respondent Council that there is no available space in its temporary accommodation which it has been providing for people faced with similar situations as the Appellants.

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<sup>20</sup> Volume 5, FA of Appellants in application to SCA for leave to appeal, para 30, 31, pp 484; Volume 6, AA of Fourth Respondent, para 39, 40, pp 538.

<sup>21</sup> Volume 5, pp 441-447.

[19] Accepting that the Fourth Respondent Council has as matter of principle the duty to provide alternative accommodation it seems to go without saying that in light of the decision not to grant the rescission and in light of there being no dispute that the Appellants are consequently homeless, the Johannesburg Metropolitan Fourth Respondent Council should be directed to carry out its constitutional duty. In doing so a balance has of course to be struck between the interest of the Appellants and others who have been waiting for accommodation from the Fourth Respondent Council.

[20] In the premises the following order is made:

1. The applicant's rescission application is dismissed.
  2. The Appellants and the third respondent are to pay the costs of this application, jointly and severally the one paying the other to be absolved.
  3. The Fourth Respondent of Johannesburg Metropolitan Fourth Respondent Council must provide the Appellants whose names appears in ANNEXURE B to the amended notice of motion with temporary accommodation.
  4. Should the current arrangement of accommodating the Appellants at a Khaya House continue those of the Appellants who have income as reflected in EXHIBIT X may be required to pay R10 on a daily basis and this will apply only to adults and not children."
14. What transpired after the application stood down and until Molahleli AJ again dealt with the matter on 15 February 2013 appears from the Appellants' founding affidavit<sup>22</sup>, the Fourth Respondent's answering affidavit<sup>23</sup> and the Appellants' replying affidavit<sup>24</sup> in the Appellants' application to the SCA for leave to appeal.
15. There was an agreed meeting between the Appellants and the Fourth Respondent to discuss the matter and agreed registration of the Appellants on the Fourth Respondent's Expanded Social Package ("ESP") programme verifying the Appellants' personal circumstances.

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<sup>22</sup> Volume 5, para 32, pp 484.

<sup>23</sup> Volume 6, para 6-12, pp 524-526, para 18.1, pp 528, para 19.3.9-19.3.11, pp 531, 532, para 41.1, 41.2, pp 539, para 45.1-45.3, pp 540, 541.

<sup>24</sup> Volume 7, para 28-32, pp 617, 618.

16. It was this meeting and registration which resulted in the document referred to as Exhibit "X" in the judgment of Molahleli AJ<sup>25</sup>. There have further been ongoing discussions and engagements between the parties ever since the judgment<sup>26</sup>.
17. Materially, the Appellants at all times contended that they were, while in occupation of the property, paying rental of between R400, 00 and R650, 00 per month. The Appellants' tendered in paragraph 6 of their amended notice of motion (as stated above) to pay such rental to the First and Second Respondent if their rescission was granted.
18. By February 2013 the Fourth Respondent's position was that its emergency accommodation facilities were full and it had no other facilities immediately available. Notwithstanding this, it made special arrangements on 8 February 2013 to have the Appellants accommodated, on an extremely emergency basis, in a 72 hour emergency shelter known as Ekhaya (as stated above).
19. The Fourth Respondent does not manage or control that facility. It simply used its influence to have the managers of that property (Metropolitan Evangelical Services – MES) allow the Appellants into that shelter. The property that houses the shelter is owned by the Fourth Respondent but is controlled by an independent third party, Madulamoho Housing Association, a social housing company which controls the property in terms of a long term notarial lease.
20. Pursuant to the Appellants' attorneys and Fourth Respondent's attorneys engaging with each other, a document was prepared which recorded *inter alia* the names, surnames, identity numbers and incomes of the Appellants' who were being accommodated at Ekhaya Shelter.

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<sup>25</sup> Volume 6, pp 567, Annexure "SN3" to AA of Fourth Respondent in application to the SCA for leave to appeal.

<sup>26</sup> Volume 6, para 7, pp 525.

21. When the Appellants' application was again heard by Molahleli AJ on 15 February 2013, the aforesaid document, being Exhibit "X" as referred to by Molahleli AJ in paragraph 4 of his order<sup>27</sup>, was handed up by the Fourth Respondent's counsel to Molahleli AJ without demur by the Appellants' counsel or attorney present in court, save for what is stated in paragraphs 22 and 23 below.
22. On 15 February 2013 the Fourth Respondent proposed that those Appellants in need of temporary emergency accommodation could remain at Ekhaya Shelter on condition that they pay R20, 00 per person per day. The amount proposed was based on the amount MES ordinarily charged homeless people to sleep overnight in the Ekhaya Shelter. It is accordingly the amount that would be paid directly to MES for making their shelter available to the Appellants while being under no other obligation to do so.
23. The Appellants were not agreeable to the condition that they pay R20, 00 per person per day, and the Fourth Respondent then proposed that the Appellants pay R10, 00 per person per day which the Appellants were also not agreeable to.
24. The Appellants' counsel did not accept that R10, 00 per person per day was affordable, even for those with some source of income, and did not consent to the imposition of such a requirement. What was not contested was the obligation *per se* that those Appellants who had a source of income should make payment in respect of their accommodation at Ekhaya Shelter. The Appellants' counsel, respectfully, could not make such a contention because it was the Appellants' version that they had been paying for rental accommodation at the property which was the subject of the main application<sup>28</sup>.
25. The Appellants' counsel did, however, stress the point that Exhibit "X" reflected some people who had no source of income and also covered children. This was taken into account in paragraph 4 of the order of Molahleli AJ.

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<sup>27</sup> Volume 6, pp 567, Annexure "SN3" to AA of Fourth Respondent in application to the SCA for leave to appeal.

<sup>28</sup> Volume 1, FA, para 100-216, pp 31-50.

26. It was in these circumstances that when Molahleli AJ refused the Appellants' rescission application, he made orders that the Fourth Respondent provide the Appellants with "*temporary accommodation*" and that if such temporary accommodation remained at Ekhaya Shelter, those Appellants who had been identified as having an ability to pay for accommodation pay for such accommodation at a rate of R10, 00 per day (or R300, 00 per month).
27. There was no dispute between the Appellants and the Fourth Respondent that the Fourth Respondent should provide them with temporary emergency accommodation if it were able, and no issue was taken with the nature of the accommodation at Ekhaya Shelter.
28. The Fourth Respondent's position was that orders pertaining to further engagements were neither required nor necessary as the parties were involved in ongoing engagements and that, but for the issue of how much should be paid by the Appellants to remain in Ekhaya Shelter, their temporary accommodation in Ekhaya Shelter was in effect and agreed to.
29. The aspect of the order granted by Molahleli AJ that was based on consensus between the Appellants and the Fourth Respondent, as explained below, was that part of Molahleli AJ's order which pertained to maintaining the status quo at the time in regard to the Ekhaya Shelter, i.e. paragraph 4 of Molahleli AJ's order which states as follows:

*"4. Should the current arrangement of accommodating the Appellants at a Khaya House continue those of the Appellants who have income as reflected in EXHIBIT X maybe required to pay R10 on a daily basis and this will apply only to adults and not children."*
30. The document, Exhibit X, which was handed up to Molahleli AJ, records the income of the Appellants named on the document. The document evidently constituted, in the circumstances, evidence of the income of the Appellants referred to in the document.

31. Likewise, what the Appellants stated in their founding affidavit in the main application and in their supplementary affidavit in regard to rental and their income, and their tender to pay rental to the First and Second Respondents, was further evidence of their income.
32. In accordance with paragraph 4 of the order, if circumstances of the Appellants have changed so that they no longer have an income, they would not be required to pay the amount of R10, 00 per day.
33. The judgment of Molahleli AJ dismissing the Appellants' application for leave to appeal is also relevant and also reflects essentially what transpired on 13 and 15 February 2013, wherein Molahleli AJ states as follows<sup>29</sup>:

"[2] The alternative relief sought by the applicants was that the City of Johannesburg should provide alternative accommodation to the 30 applicant, who after their eviction were rendered homeless resulting in them taking sanctuary under a bridge. The applicant complained under this heading that Johannesburg Metropolitan City Council had arranged alternative accommodation which required them irrespective of whether they were employed or not to pay R20,00 per person. The applicants also complained that even those who had income the amount of R20,00 was unaffordable because they were unemployed and did not have constant income. It was for this reason that the Court ordered that the amount should be reduced to R10,00 and payment be limited to those who had some sources of income.

...

[4] On the first day of the hearing of this matter the issue of the role and responsibility of the City Council was debate at some length. The City Council did not dispute its responsibility but indicated the difficulty they were faced concerns the number of people that require accommodation. The cordial engagement and corporation between the City Council and the applicants' representatives was apparent. The issue of R20,00 which the applicants had to pay was also discussed at length. After a lengthy debate the matter stood down for the parties to engage further in discussions about the issued relating to the alternatively relief.

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<sup>29</sup> Volume 5, pp 463-468.

[5] It was apparent from the report received the following day as to how far the parties were in relation to the alternative relief. The impression I had was that the parties had reached a consensus on the approach to be adopted. And it was on that basis that the order as to the alternative relief was formulated. It was for instance apparent that requiring every person including children and those who did not have income to pay was unfair and that at least the payment should be limited to those who have income. The issue of affordability was also raised even for those who have income. It was contended that the amount was unaffordable because most of applicants were not in full time employment and that whatever the source of income they had it was not stable and consistent. It was in this context that the order was made and in particular the reduction of the amount to R10,00 for those who has income. In this respect an annexure was submitted showing those who received income including the amount of the income and those who did not.

[6] In my view the alternative order was in essence an order based on consensus of the parties.”

#### **APPELLANTS' GROUNDS OF APPEAL**

34. The Appellants' grounds upon which they have appealed against the judgment and order of Molahleli AJ are as follows<sup>30</sup>:

“4. The learned judge correctly held that the City was under a constitutional and statutory obligation to provide temporary alternative accommodation to the applicants listed in annexure “B” to the notice of motion (as amended) who had been rendered homeless by the eviction. However, the learned judge erred in making the orders in paragraphs 2 and 3 of the order in the following respects:

4.1 The learned judge failed to provide the time period for which the City is directed to provide temporary alternative accommodation to the applicants, alternatively a mechanism to regulate the provision of temporary alternative accommodation, such as a supervisory order, with the result that the order in paragraph 2 is open-ended and leaves the parties uncertain as to their rights and obligations;

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<sup>30</sup> Volume 5, notice of application for leave to appeal, para 4, pp 453, 454.

- 4.2 The learned judge failed to provide for any obligation for the City to engage meaningfully with the applicants and report to court regarding steps that the City is taking to make temporary alternative accommodation available to those applicants who had been rendered homeless, in light of the City's evidence that its temporary accommodation facilities are exhausted and have no capacity to accommodate any of the applicants;
- 4.3 The learned judge erred in ordering the applicants who were provided with temporary shelter at eKhaya House, a shelter operated by the Methodist Evangelical Services, to pay R10 per employed adult per day for as long as they are accommodated, in circumstances in which :
- 4.3.1 No evidence was led to establish any policy requiring such payment or to establish that the amount was reasonable;
- 4.3.2 The requirement for payment was arbitrarily imposed on the Appellants, who were treated differently from other persons provided with temporary alternative accommodation by the City without charge;
- 4.3.3 The City admitted that it bore a legal obligation to provide temporary alternative accommodation to the applicants who had been rendered homeless by the eviction by the eviction but took the position that it had no such accommodation available, and accordingly "facilitated" accommodation at eKhaya House;
- 4.3.4 The applicant were accordingly ordered to pay for temporary alternative accommodation because the City had failed to discharge its constitutional obligations to them;
- 4.3.5 The cost of the accommodation at eKhaya House, if it was required to be borne by any party, should have been paid by the City;
- 4.3.6 Even if the applicants could reasonably have been ordered to pay for the temporary alternative accommodation at eKhaya House, the amount ordered failed to take into account the personal circumstances of the occupiers and was unaffordable to a number of the occupiers."<sup>31</sup>

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<sup>31</sup> See also FA of Appellants in application to SCA for leave to appeal, para 6, 7, pp 475, 476, para 33, pp 484, 485, para 43, 45.2, pp 489, para 62, 497-499.

#### FOURTH RESPONDENT'S SUBMISSIONS

35. It is apparent from paragraph 3 of the order of Molahleli AJ that the Fourth Respondent was directed to provide the Appellants whose names appear in Annexure "B" to the Appellants' amended notice of motion with temporary accommodation, without any limitation to the period of such temporary accommodation.
36. Paragraph 3 of the order is consistent with that granted by the Constitutional Court in City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Limited<sup>32</sup>.
37. The effect of paragraph 4 of the order, read together with paragraph 3 thereof, is that the Fourth Respondent was directed to provide temporary accommodation and if this was at Ekhaya Shelter (which it was) with the proviso that those of the Appellants who have the income as reflected in the document being Exhibit "X"<sup>33</sup>, may be required to pay R10, 00 on a daily basis, which would be applicable only to adults and not children.
38. However, what is apparent from paragraphs 3 and 4 of the order is that an order was not granted to the effect that those Appellants who would be required to make payment and did not do so would cease to be accommodated by the Fourth Respondent.
39. Effectively, by virtue of paragraphs 3 and 4 of the order, those of the Appellants who the Fourth Respondent had, prior to the hearing of the Appellants' application and the granting of the order, accommodated at Ekhaya Shelter, became entitled to temporary accommodation at Ekhaya Shelter, and the Fourth Respondent was directed to provide such accommodation.

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<sup>32</sup> 2012 (2) SA 104 (CC) para [104(e)(iv)] at 136.

<sup>33</sup> Volume 6, pp 567, Annexure "SN3" to AA of Fourth Respondent in application to the SCA for leave to appeal.

40. Indeed, this is the situation that prevails<sup>34</sup>.
41. As stated in the Fourth Respondent's answering affidavit in the main application, the Fourth Respondent had already prior to the hearing of the Appellants' application engaged with the Appellants who had been staying under the bridge, and arranged for their relocation to Ekhaya Shelter, which relocation was effected by the Fourth Respondent at its own cost, which resulted in the Appellants being relocated to the Ekhaya Shelter on Friday 8 February 2013.
42. The Appellants have, since 8 February 2013 and to date, remained at Ekhaya Shelter, and since 8 February 2013 the Fourth Respondent has continued to attempt to find alternative accommodation for the Appellants who remain at Ekhaya Shelter<sup>35</sup>. This is even in circumstances where the Appellants have taken it upon themselves not to pay the R10, 00 daily charge for their occupation for Ekhaya Shelter which they are able to pay, which Molahleli AJ ordered that they pay and which would (partially) defray the costs being incurred by MES.
43. There have been ongoing discussions between the Fourth Respondent, MES, the Appellants and the Appellants' attorneys about the Appellants' adherence to house rules of Ekhaya Shelter<sup>36</sup>. This has taken place in the absence of, and it is submitted without need for, any further court order.
44. The Fourth Respondent, through MES, has in fact offered each of the Appellants that they relocate from Ekhaya Shelter to one of the Fourth Respondent's designated emergency shelters, a building known as Linatex.

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<sup>34</sup> Volume 6, AA of Fourth Respondent in application to SCA for leave to appeal, para 19.3.3, pp 529, 530.

<sup>35</sup> Volume 6, AA of Fourth Respondent in application to SCA for leave to appeal, para 19.3.5, pp 530.

<sup>36</sup> Volume 6, AA of Fourth Respondent in application to SCA for leave to appeal, para 19.3.6, pp 530.

45. In Linatex the Appellants would not be obliged to pay R10, 00 per daily accommodation because Linatex is a property owned and controlled by the Fourth Respondent (and managed on behalf of the Fourth Respondent by MES). The Appellants have, however, refused this offer because they do not want to accept the rules that would be applicable to the accommodation in Linatex<sup>37</sup>.
46. The Appellants complain about the conditions at Ekhaya Shelter<sup>38</sup>, however they have refused the Fourth Respondent's offer to move to Linatex<sup>39</sup>.
47. By virtue of the Fourth Respondent having relocated the Appellants to Ekhaya Shelter, the Fourth Respondent's attorneys having engaged with the Appellants' attorneys, Exhibit "X" having been handed up by consent and without demur by the Appellants' legal representatives (save to what is stated in paragraphs 22 and 23 above), and the Fourth Respondent having continued subsequent to the order, and continuing, to engage with the Appellants who are living at Ekhaya Shelter<sup>40</sup>, there was, with respect, no need for Molahleli AJ to have granted any order in addition to what was ordered in paragraphs 3 and 4 of Molahleli AJ's order.
48. The position of the Appellants, consequent upon the order of Molahleli AJ, in particular paragraphs 3 and 4 thereof, is that, as stated above, the Appellants enjoy accommodation at Ekhaya Shelter which continues. Nevertheless, the Appellants cannot remain accommodated at Ekhaya Shelter forever, and the Fourth Respondent has been engaging with the Appellants in regard to accommodation other than at Ekhaya Shelter.
49. In the circumstances, the order of Molahleli AJ, in particular paragraphs 3 and 4 thereof cannot have occasioned any prejudice to the Appellants, who are most certainly not left in a vulnerable position as a result of the order.

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<sup>37</sup> Volume 6, AA of Fourth Respondent in application to SCA for leave to appeal, para 19.3.7, 19.3.8, pp 530, 531, para 49.4, pp 542, para 50.1-50.5, pp 543, 544, para 51.2, pp 544; Volume 5; FA of Appellants in application to SCA for leave to appeal, para 41, pp 487, 488.

<sup>38</sup> Volume 5, FA of Appellants in application to the SCA for leave to appeal, para 38-40, pp 486, 487.

<sup>39</sup> Volume 5, FA of Appellants in application to the SCA for leave to appeal, para 41, pp 487, 487; RA, para 3, pp 618, 619.

<sup>40</sup> Volume 6, AA of Fourth Respondent in application to SCA for leave to appeal, para 19.3.12, pp 532.

50. As stated above, the document, Exhibit X, which was handed up to Molahleli AJ, records the income of the Appellants named on the document. The document evidently constituted, in the circumstances, evidence of the income of the Appellants referred to in the document.
51. Likewise, what the Appellants stated in their founding affidavit in the main application and in their supplementary affidavit in regard to rental and their income, and their tender to pay rental to the First and Second Respondents, was further evidence of their income.
52. In accordance with paragraph 4 of the order, if circumstances of the Appellants have changed so that they no longer have an income, they would not be required to pay the amount of R10, 00 per day.
53. Insofar as the Appellants have taken issue with the order of Molahleli AJ that they pay for the accommodation at Ekhaya House, it is submitted that there is no reason in principle why such an order cannot be granted if the circumstances warrant the granting of such an order. Indeed, and as stated above, what was not contested by the Appellants' counsel was the obligation *per se* that those Appellants who had a source of income should make payment in respect of their accommodation at Ekhaya House.
54. Indeed, the circumstances of the matter, i.e. that certain of the Appellants were earning an income, warranted the granting of such an order.

## **CONCLUSION**

55. In the circumstances, it is submitted that the Appellants appeal vis-à-vis the Fourth Respondent ought to be dismissed with costs.

**L HOLLANDER**  
Fourth Respondent's Counsel  
Chambers  
Sandton  
23 February 2015