IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG LOCAL DIVISION, JOHANNESBURG)

Case No: 16703/14

In the matter between:

MTSHALI THOKOZANI	First Appellant
THE OCCUPIERS OF 238 CORNER MAIN AND BEREA STREET	Second to 230th Appellants

and

TAYENGWA MASAWI	First Respondent
IRENE RUMBIDZAI MASAWI	Second Respondent
PHUMANGELAKHE MAKHAYA	Third Respondent
CITY OF JOHANNESBURG METROPOLITAN MUNICIPALITY	Fourth Respondent
NATIONAL COMMISSIONER OF SOUTH AFRICAN SOUTH AFRICAN POLICE	Fifth Respondent

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APPELLANTS' WRITTEN SUBMISSIONS

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INTRODUCTION

1 This is an appeal against the judgment and order of Molahlehi AJ, delivered in the South Gauteng High Court ("High Court") on 15 February 2013, in which the rescission application instituted by the appellants was dismissed with costs and the alternative relief sought was granted only in part. The appellants sought the rescission of an eviction order granted against them in the High Court by Kathree-Setiloane J on 28 March 2012 (under case number 47708/11) and the restoration of possession of their homes at the property.

2 Molahlehi AJ dismissed the rescission application but granted an order which gave partial effect to the constitutional duty of the fourth respondent ("the City") to provide temporary accommodation to the thirty applicants who had been rendered homeless upon eviction from their homes.[1] As the City maintained that its temporary accommodation facilities were filled to capacity, Molahlehi AJ ordered that those applicants rendered homeless on their eviction be accommodated at a private shelter sourced by the City called eKhaya House.[2] However, Molahlehi AJ further ordered that every adult with an income may be required to pay R10.00 per person per day for accommodation at eKhaya House and granted costs against the appellants ("the occupiers"). Despite

[1] Judgment of Molahlehi AJ, vol 5, p 440-447.

[2] Court order dated 15 February 2013, vol 5, p 448-449.

granting the occupiers partial relief, Molahlehi AJ ordered them to pay the costs of the rescission application.[3]

3 In addition to contesting the finding of the court *a quo* on rescission and the award of costs, the occupiers appeal against the order of Molahlehi AJ on the basis that, in granting alternative relief, the High Court failed to provide any procedural directions and safeguards pertaining to the City's obligation to provide temporary alternative accommodation. This failure left the appellants in a vulnerable position and resulted in ongoing and unreasonable prejudice. In particular, the High Court failed in the following respects:

3.1 It failed to declare the time period for which the City is directed to provide temporary alternative accommodation, with the result that the order on temporary accommodation is open-ended and leaves the parties uncertain as to their rights and obligations;

3.2 The High Court erred in ordering that the adult occupiers who earn an income and were afforded temporary alternative accommodation at eKhaya House were required to pay R10.00 daily for such occupation in circumstances where no factual basis was laid for such payment being required of other persons provided with emergency accommodation by the City;

3.3 The High Court failed to provide for any obligation for the City to engage meaningfully with the applicants and report to the court

[3] Court order dated 15 February 2013, vol 5, p 448-449.

regarding the steps that the City is taking to make temporary alternative accommodation available to those applicants who had been rendered homeless. Such engagement is necessary, given the City's submissions that its temporary accommodation facilities were exhausted and that complying with its constitutional obligations was simply "impossible".

4 In these submissions, we address the following issues in turn:

4.1 First, the occupiers satisfaction of the requirements for the rescission of Kathree-Setiloane J's judgment;

4.2 Second, the City's constitutional duty to provide temporary alternative accommodation to individuals living in emergency conditions;

4.3 Third, the issue of mootness raised by the first and second respondents; and

4.4 Fourth, why the City should be ordered to pay the appellants' costs.

5 Before addressing these issues, we give a brief overview of the factual background and litigation history of the matter.

FACTUAL BACKGROUND AND LITIGATION HISTORY

6 The appellants are the occupiers who, prior to their eviction on 21 December 2012, lived at the Radiator Centre Building situated at 238 Main Street, on the corner of Main Street and Berea Street, Johannesburg ("the property").[4]

7 The occupiers had occupied the property for a considerable period of time (some for up to 13 years).[5] They occupied the building in good faith and paid monthly rental to the third respondent ("Mr Makhaya") who held himself out to be the owner of the property. [6] After the eviction was challenged, it transpired that, despite concluding an agreement of sale, Mr Makhaya had not taken transfer of the property and that the registered owners, the first and second respondents, had not received any of the rental payments.[7] The occupiers paid rent in amounts ranging from R400-R650 per month, with the last payments having been made in December 2012. [8]

[4] Founding Affidavit , vol 1, p 9, paras 1, 14 and 15.

[5] Founding Affidavit, vol 1, p 30-50.

[6] Founding Affidavit, vol 1, p 30-50.

[7] Founding Affidavit, vol 1, p 20, paras 50-51; Answering Affidavit of First and Second Respondents - Urgent Application, vol 3, p 278, para 17-19.

[8] Founding Affidavit, vol 1, p 30-50, paras 90, 97, 100, 104, 108, 111, 116, 120, 122, 124, 126, 128, 133, 137, 139, 145, 151, 156, 157, 160, 162, 166, 169,170, 172, 176, 178, 181, 184, 188, 190, 193, 196, 199, 202, 205, 208, 211, 214.

8 The property has three floors and a basement, and was subdivided into approximately 45 rooms shared by the appellants and their families.[9] It provided the occupiers with access to water, sanitation and electricity.[10]

9 The appellants comprise unemployed persons who survive through informal trading and piece jobs, and persons employed in low-income jobs such as cleaners and security guards. The average income of the households who resided at the property was R1800 per month, with some households earning as little as R600 per month.[11]

10 Twenty-one children lived on the property, as well as elderly women and persons suffering from illnesses.[12] In addition, there were a number of women-headed households on the property.[13]

11 The first and second respondents, the owners of the property, addressed a letter to the occupants of the property in May 2011, advising them to vacate the property. The notice was contested by Mr Makhaya, who disputed the first and second respondents' ownership of the property. The appellants continued to occupy the property and to pay rental to Mr Makhaya, up to and including in December 2012.[14]

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[9] Founding Affidavit, vol 1, p 30, para 92.

[10] Founding Affidavit, vol 1, p 30, para 96; Replying Affidavit – Urgent Application, vol 4, p 319, para 10.1-10.4.

[11] Founding Affidavit, vol 1, p 30-50, paras 94 and 100-213.

[12] Founding Affidavit, vol 1, p 30, para 93.

[13] Founding Affidavit, vol 1, p 30-50, paras 100-213.

[14] Founding Affidavit, vol 1, p 31, para 97.

12 The occupiers received no further notices or court orders prior to their eviction on 21 December 2012.[15]

13 The first and second respondents proceeded to institute eviction proceedings on 21 February 2012, and to obtain an eviction order against the occupiers on 18 April 2012.[16] The occupiers had no knowledge of these proceedings.[17]

14 The occupiers were first informed that they were being evicted on 19 December 2012 when the Red Ants arrived and removed the occupiers and their belongings from the property.[18] The occupiers later returned to the building and took their belongings back into the property. They were evicted permanently on 21 December 2012.[19] On this date, the occupiers were locked out of the property with no access to their personal belongings.[20] Having no alternative place to go, many of the occupiers slept under a bridge near the property.[21] Over thirty of the occupiers lived homeless under the bridge for almost two months.[22]

15 The occupiers approached the Centre for Applied Legal Studies (CALS) for legal assistance on 7 January 2013. The attorneys of CALS instituted

[15] Founding Affidavit, vol 1, p 31, para 97.

[16] Founding Affidavit – Application to the SCA for Leave to Appeal, vol 5, p 480, para 21.

[17] Founding Affidavit, vol 1, p 13, para 16; Replying Affidavit – Urgent Application, vol 4, p 322, para 17.2.

[18] Founding Affidavit, vol 1, p 12, para 15.

[19] Replying Affidavit – Urgent Application, vol 4, p 326, para 27.2.

[20] Replying Affidavit – Urgent Application, vol 4, p 326, para 27.2.

[21] Founding Affidavit, vol 1, p 31, para 98.

[22] Applicants' Supplementary Affidavit, vol 4, p 346, para 4 and p 351, para 23.1-23.3.

an urgent spoliation application, with the hearing set down for 9 January 2013.[23]

16 The urgent application was initially brought against the third respondent, Mr Makhaya, who the occupiers still believed to be the owner of the property. This mistake arose from the fraudulent conduct and misinformation provided by Mr Makhaya. [24]

17 On 9 January 2013, His Lordship Justice Kgomo postponed the hearing for lack of personal service on Mr Makhaya.[25] Soon after the hearing of 9 January, the occupiers' attorneys learnt that Mr Makhaya was not in fact the owner of the property, but that the title vested in the first and second respondents.[26] The occupiers also learned for the first time that the order for their eviction had been granted on a default basis on 28 March 2012, without their knowledge and without their circumstances being placed before the court.[27]

18 The occupiers' attorneys proceeded to withdraw the application against Mr Makhaya, and sought to obtain emergency assistance from the City in an effort to avoid instituting another urgent application pending a challenge to the eviction order.

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[23] Founding Affidavit, vol 1, p 16, paras 37-38.

[24] Founding Affidavit, vol 1, p 18, paras 47.2-47.4.

[25] Founding Affidavit, vol 1, p 17, paras 39-40.

[26] Founding Affidavit, vol 1, p 18-20, paras 47.2-51.

[27] Founding Affidavit, vol 1, p 20, para 51-55.

18.1 On 11 January 2013, the occupiers' attorneys met with the City officials to request that emergency temporary accommodation be provided to the appellants. At this meeting, the City advised that it was not in a position to provide temporary shelter.[28]

18.2 On 17 January 2013, the occupiers' attorneys addressed a letter to the City again advising it of its obligations under the Housing Code, and requesting the City to investigate the situation and provide emergency assistance. The occupiers' attorneys received no reply to this letter. [29]

19 Left with no other option but to approach the High Court again, on 19 January 2013, the occupiers instituted an application in two parts:[30]

19.1 In Part A, the applicants sought urgent relief in the form of the restoration of undisturbed possession of their homes, and an interdict preventing the first and second respondents from taking any steps to evict the applicants, pending the finalisation of Part B.

19.2 In Part B, the applicants sought the rescission of the eviction order obtained by the owners in the High Court, on the basis that the order was granted erroneously upon the fraudulent representations of the third respondent, without the knowledge of the occupiers and without the circumstances of the occupiers being placed before the court.

[28] Founding Affidavit, vol 1, p 24, para 69.

[29] Founding Affidavit, vol 1, p 25, para 71.

[30] Founding Affidavit, vol 1, p 25-27, paras 71-81.

20 The urgent application came before His Lordship Justice Mokgoathleng on 29 January 2013. He dismissed the spoliation application and postponed the rescission application to 12 February 2013.[31]

21 Thereafter, the occupiers' attorneys again approached the City to seek temporary alternative accommodation because the appellants were still living under the bridge. The City only responded on 8 February 2013, when it took steps to provide the occupiers with temporary accommodation in eKhaya House.

22 On 13 February 2013, the rescission application was argued. The City's initial stance was that it could do no more to assist the occupiers because its temporary accommodation resources were exhausted. Molahlehi AJ instructed the City to find alternative accommodation and to report to the Court on Friday, 15 February 2013.[32]

23 On the return day, the City proposed that those occupiers in need of temporary emergency accommodation remain at eKhaya House on condition that they pay R20.00 per person per day. The occupiers opposed the offer as they could not afford to make such payments. The City thereafter proposed that the occupiers pay R10.00 per person per day, which the occupiers again opposed on the basis of affordability and on the basis that it was not clear what policy required such payment.[33]

[31] Applicants' Supplementary Affidavit, vol 4, p 347, para 6.

[32] Founding Affidavit – Application to the SCA for Leave to Appeal, vol 5, p 484, para 31.

[33] Founding Affidavit – Application to the SCA for Leave to Appeal, vol 5, p 484, para 32.

24 Molahlehi AJ dismissed the rescission application but directed the City to provide those applicants that were homeless with temporary emergency accommodation. The order was entirely open-ended, however, and did not provide any clarity on the nature of the City's obligations in relation to the occupiers, particularly in the event that the occupiers' emergency accommodation at eKhaya House were to be terminated – as has been threatened. Molahlehi AJ ordered that, should the arrangement at eKhaya House continue, every adult with an income was to pay R10.00 per person per day.[34]

25 The application for leave to appeal against the High Court's judgment and order was argued on 7 August 2013. Molahlehi AJ dismissed the applicants' application for leave to appeal against his judgment on 30 August 2013.[35]

26 The occupiers subsequently made application to the Supreme Court of appeal for an order granting leave to appeal to that Court. On 15 January 2014, the Supreme Court of Appeal (per Ponnan and Petse JJA) granted the occupiers leave to appeal to the Full Bench of the High Court.[36]

27 In total, 230 occupiers were evicted from the property. Of the 230 occupiers, 127 were directly involved in the application brought by the applicants for the restoration of their homes in the court *a quo.*[37]

[34] Founding Affidavit – Application to the SCA for Leave to Appeal, vol 5, p 485, para 33.

[35] Judgment of Molahlehi AJ on the Application for Leave to Appeal dated 30 August 2013, vol 5, p 463.

[36] Supreme Court of Appeal order, vol 7, p 636.

[37] Founding Affidavit , vol 1, p 9, para 4.

Following the dismissal of their application, the 30 occupiers who still remained homeless were provided with temporary emergency accommodation at eKhaya House from 8 February 2013. There are currently 27 occupiers residing at eKhaya House. Of these, 19 are adults and eight are children (aged between 6 months and 17 years old). Thirteen are women and fourteen are men. Ten of these applicants are employed – as domestic workers, truck drivers or security guards. The average income of the applicants staying at eKhaya House is R585.18 per month.[38]

THE EVICTION ORDER FELL TO BE RESCINDED

28 The first ground of appeal is that the court below erred in refusing rescission.[39]

29 In order to succeed, an applicant for rescission of a judgment taken against him by default must show good cause for the rescission.[40] This generally entails establishing three elements - the applicant must:

29.1 Give a reasonable and acceptable explanation for his default;

29.2 Show that his application is made *bona fide*; and

[38] Founding Affidavit – Application to the SCA for Leave to Appeal, vol 5, p 486, para 38.

[39] Notice of application for leave to appeal para 1, vol 5 p 451.

[40] *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA) at para 11; *Chetty v Law Society, Transvaal* 1985 (2) SA 756 (A) at 764J–765D.

29.3 Show that on the merits he has a *bona fide* defence which *prima facie* carries some prospect of success.

30 In this case, the occupiers have clearly satisfied each of the above requirements.

Reasonable explanation for default

31 The occupiers have demonstrated that there was a reasonable explanation for their failure to appear at the eviction proceedings before Kathree-Setiloane J. In short, the occupiers received no notices or court papers prior to their eviction on 21 December 2012 and had no knowledge of the eviction proceedings:

31.1 The occupiers received a letter from the first and second respondents' attorney instructing them to vacate the property on 22 May 2011 but received no notice of the eviction application. Mr Makhaya contested their ownership and continued to charge rent. No notices or letters were sent after the notice to vacate.[41]

31.2 The court file in the eviction application contained returns of service for the notice of eviction proceedings and the eviction order itself. However, both returns of service state that a copy of the papers was given to a person identified only as "Tenten". The occupiers do

[41] Founding Affidavit, vol 1, p 31, para 97.

not know any “Tenten” and did not receive any of the papers so served.[42]

31.3 The notice of intention to oppose the application indicates that the occupiers were represented by V.M. Mashele Attorneys. The applicants had no knowledge of such alleged representation.[43]

31.4 Following the eviction, on 16 January 2013, the occupiers’ legal representative contacted Mr Gudluza of Mashele Attorneys who confirmed that he acted in the matter and was instructed by the third respondent, Mr Makhaya, and not the applicants. He further confirmed that he had never been in contact with any of the occupiers of the property at any point before, during or after the proceedings.[44]

31.5 The first and second respondents were aware that V.M. Mashele in fact represented Mr Makhaya rather than the occupiers of the property, but it appears that they did not draw this to the attention of the court that was hearing the eviction application. They secured an order on an unopposed basis. They deny having been aware before the application for rescission was launched that Mr Mashele did not represent the occupiers.[45] However, in their answering affidavit, the first and second respondents state that they received

[42] Founding Affidavit, vol 1, p 21, para 54 and p 27-28, paras 83.1 and 84-85.

[43] Founding Affidavit, vol 1, p 27-28, para 83.2-84.

[44] Founding Affidavit, vol 1, p 21-22, para 56-58.

[45] Answering Affidavit of the First and Second Respondents, dated 29 October 2013, at para 11, vol 6, p 571.

a letter from Mr Mashele on 2 June 2011 (before the eviction proceedings commenced) informing them that M.V. Mashele Attorneys acted for Mr Makhaya and "the Makhaya family".[46]

32 As a consequence of receiving no notice of the eviction proceedings, the occupiers did not appear in court on the day of the hearing and the eviction order was taken against them by default.

The application is bona fide

33 There is no doubt that the application for rescission was *bona fide*. The occupiers were rendered homeless by the eviction. They sought to assert their constitutional rights against unlawful eviction by rescinding the eviction order.

34 In the circumstances, the rescission application was brought in good faith. Not only does this satisfy one of the requirements for rescission, but it is also relevant to the order of costs wrongly made against the occupiers in the court below.[47]

Bona fide defence with prima facie prospects of success

35 The final requirement for rescission, and the requirement on which the matter turned in the court below, is that the applicant for rescission may

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[46] Answering Affidavit of the First and Second Respondents, dated 29 October 2013, at para 22, vol 6, p 573.

[47] This ground of appeal is addressed below.

have a bona fide defence to the underlying claim with *prima facie* prospects of success.

36 The occupiers have demonstrated that they had a *bona fide* defence to the eviction application that had *prima facie* prospects of success. The eviction application did not meet four of the requirements for an order evicting occupiers under the Prevention of Illegal Eviction from Unlawful Occupation of Land Act ("PIE")[48]:

36.1 First, the occupiers were given no notice of the eviction application, to which they are entitled under PIE.

36.2 Second, there was no proper consideration in the eviction application of the occupiers' personal circumstances and whether the eviction was just and equitable.

36.3 Third, even if it is just and equitable to evict the occupiers, this does not mean that the order of eviction – and specifically, the conditions attached to the eviction order granted by Kathree-Setiloane J – was just and equitable.

36.4 Fourth, the questions of alternative accommodation and the obligations of the City to provide alternative accommodation were not considered by the court before granting the order of eviction.

[48] 19 of 1998.

37 Each of these grounds constitutes a self-standing defence to the eviction application and is addressed, in turn, below. The reasoning of the court below, which cuts across all four potential defences, is then analysed.

(i) The failure to give notice to the occupiers

38 For the reasons more fully set out above in the section dealing with the occupiers' explanation for failing to oppose the eviction proceedings, the occupiers were not given the requisite notice of the eviction application.

39 Not only does this satisfy the first requirement for rescission; it would also have constituted a defence to the eviction application. An eviction order may not lawfully be granted under PIE until the applicants have complied with the notice requirements under PIE.

40 On this ground alone, the occupiers have a defence to the eviction application with reasonable prospects of success.

(ii) The failure to consider the personal circumstances of the occupiers and whether it was just and equitable to evict them

41 Both the Constitution and PIE require that the court must consider the personal circumstances of the occupants in determining whether, and if so on what conditions, an eviction would be just and equitable. Section 26(3) of the Constitution provides that:

> *No one may be evicted from their home, or have their home demolished, without an order of court made <u>after considering all the</u>*

relevant circumstances. No legislation may permit arbitrary evictions.

42 Section 4(7) of PIE provides that:

> *If an unlawful occupier has occupied the land in question for more than six months at the time when the proceedings are initiated, a court may grant an order for eviction if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances, including … whether land has been made available or can reasonably be made available by a municipality or other organ of state or another land owner for the relocation of the unlawful occupier, and including the rights and needs of the elderly, children, disabled persons and households headed by women.*

43 Section 4(8) of PIE stipulates that:

> *If the court is satisfied that all the requirements of this section have been complied with and that no valid defence has been raised by the unlawful occupier, it must grant an order for the eviction of the unlawful occupier, and determine-*
>
> *(a) a just and equitable date on which the unlawful occupier must vacate the land under the circumstances; and*
>
> *(b) the date on which an eviction order may be carried out if the unlawful occupier has not vacated the land on the date contemplated in paragraph (a).*

44 Given that the occupiers did not receive notice of the eviction application, they were not afforded the opportunity to place their personal circumstances before the Court. Had the occupiers been afforded such an opportunity, they would have contended that an eviction would not be just and equitable in the circumstances, given the following facts:

44.1 First, the occupiers of 238 Berea and Main Street included a number of minor children and women-headed households. Of the 127 occupiers who were applicants in the urgent application that

was brought in early January 2013, 51 were minor children. Three of the children were below six months of age.[49] One of the occupiers was pregnant at the time of the eviction and gave birth to her child on 27 December 2012, less than a week after she was evicted.[50]

44.2 In the eviction application, the applicants provided incorrect information and misled the court with regard to the personal circumstances of the occupiers. The applicants stated on oath that:

> *"The rights and needs of children, the elderly and or disabled persons or households headed by women, will not be unduly affected by the eviction of the occupiers from the property pursuant to this application. I did not observe any elder, children or disabled persons staying in the property*".[51]

44.3 The claim that there were no children or households headed by women is patently false. The Court relied upon this claim when making its decision that the eviction was just and equitable.

44.4 Second, the occupiers lived on the premises in good faith and made regular rental payments to the individual who purported to be the landlord of the premises.

44.5 Third, the occupiers had lived in the building for a number of years and considered it as their home. The building was located within a reasonable distance of the workplace of a number of the occupiers

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[49] Founding Affidavit, vol 1, p9, para 4; Replying Affidavit of the Appellants, dated 14 November 2013, at para 12, vol 7, p 614.

[50] Found Affidavit of the Applicants, dated 22 January 2013, at para 64, vol 1, p 23.

[51] Founding Affidavit in the Eviction Application, dated 1 November 2011, at para 27.3, vol 1, p 87.

and of the schools that the children attended. Many of the occupiers had nowhere else to go and were rendered homeless after the eviction and took shelter under a nearby bridge.

44.6 Fourth, the first and second respondents imply that the behaviour of the occupiers justified the eviction order that was granted against them.

44.6.1 In particular, they allege that the occupiers were uncooperative and assaulted the security guards stationed on the property.[52] These allegations are largely denied by the occupiers.[53] At most, the occupiers admit that there were skirmishes between security guards and occupiers on one occasion, but that only a few individuals were involved in these skirmishes. The actions of a few individuals cannot justify the eviction of all of the occupiers.

44.6.2 The respondents also allege that the occupiers initially exaggerated the extent to which they were denied access to their belongings and maintain that the occupiers were free to access and remove their belongings from storage.[54] However, the occupiers were not able to do so

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[52] Answering Affidavit of the First and Second Respondents, dated 29 October 2013, at para 38, vol 6, p 576.

[53] Replying Affidavit of the Appellants, dated 14 November 2013, at paras 16-21, vol 7, p 615.

[54] Answering Affidavit of the First and Second Respondents, dated 29 October 2013, at para 39-40, vol 6, p 577.

at that stage because they were living under the bridge and had nowhere secure to keep their belongings.[55]

(iii) The conditions of the eviction

45 Even if it is just and equitable to evict the occupiers, this does not mean that the order of eviction – and specifically, the conditions attached to the eviction order granted by Kathree-Setiloane J – was just and equitable.

46 Following ***Blue Moonlight***,[56] as well as the Supreme Court of Appeal's decision in ***Changing Tide****s*,[57] it is well-established that both the eviction and the conditions and date of the eviction must be just and equitable in order for an eviction to be lawful.[58] Given that the eviction order did not attach any conditions to prevent the homelessness that ensued for the occupiers, we submit that the terms of the eviction (if not the eviction itself) was unjust and inequitable, and unlawful.

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[55] Replying Affidavit of the Appellants, dated 14 November 2013, at paras 22-26, vol 7, p 616.

[56] *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another 2012 (2) SA 104 (CC)* ("*Blue Moonlight*") at para 100.

[57] *City of Johannesburg v Changing Tides 74 (pty) Ltd and Others* 2012 (6) SA 294 (SCA) at para 20.

[58] See in particular paragraph 12 of the judgment, where Wallis JA held as follows:

> *In considering whether eviction is just and equitable the court must come to a decision that is just and equitable to all parties. Once the conclusion has been reached that eviction would be just and equitable the court enters upon the second enquiry. It must then consider what conditions should attach to the eviction order and what date would be just and equitable upon which the eviction order should take effect. Once again the date that it determines must be one that is just and equitable to all parties.*

(iv) The failure to consider alternative accommodation

47 The questions of alternative accommodation and the obligations of the City to provide alternative accommodation were not considered by the court before granting the order of eviction.

48 In making an order requiring the provision of emergency accommodation (though subject to the arbitrary and unlawful fee discussed separately below), Molahlehi AJ impliedly recognised that alternative accommodation ought to have been taken into account when the eviction application was originally decided. Despite this, the court below did not recognise that the failure to address alternative accommodation provided a defence to the eviction application.

49 In sum, the occupiers had *bona fide* defences to the eviction application arising from the failure of the first and second respondents to comply with four central requirements for an eviction order, which defences had *prima facie* prospects of success. These are the procedural requirement of proper notice of the application and the substantive requirements relating to the personal circumstances of the occupiers, the conditions of the eviction and the availability of alternative accommodation. The court below rejected these defences, not on the merits of each issue, but because it incorrectly took the approach that none of these issues could have deprived the owner of the right to evict the occupiers.

The flawed approach of the court below

50 In refusing the rescission application, Molahlehi AJ held that the case turned on this issue - whether the applicants had established a *bona fide* defence with prospects of success. He found that they had not. In his reasoning, he took into account the following factors:

50.1 The occupiers rebuffed the first and second respondents when they attempted to inform the occupiers of their ownership of the property and the need for the occupiers to vacate the property;

50.2 The occupiers did not dispute that they never entered into an agreement with the first and second respondents (the true owners) for the duration of their stay on the property. There is no evidence of any agreement between the occupiers and the owners of the property for the occupiers to remain as tenants of the property;[59]

50.3 Molahlehi AJ relied on the dictum in ***Blue Moonlight***, in which the Court held that "*To the extent that it is the owner of the property and the occupation is unlawful Blue Moonlight is entitled to an eviction order*".[60]

51 Hence, Molahlehi AJ held that the occupiers had failed to satisfy the requirements for rescission because "*they have failed to show that they*

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[59] Judgment of Molahlehi J at para 10-13, vol 5, p 444.

[60] *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 Pty Ltd* 2012 (2) SA 104 (CC) at para 96.

had a right to remain in the property and that the first respondent was not entitled to evict them".[61]

52 We respectfully submit that this finding is incorrect, for the following reasons:

52.1 A *bona fide* defence to eviction can never simply turn on whether or not the occupiers are in lawful occupation (that is, with the consent of the owners); and

52.2 *Blue Moonlight* is not authority for the proposition that an owner of property is always entitled to an eviction order in respect of unlawful occupiers, as was suggested by the High Court.

53 These two central flaws in the approach of the court below are addressed, in turn, below.

Unlawful occupation does not pre-determine all eviction applications

54 The first central flaw in the judgment of the court below relates to the court's approach to unlawfulness and whether proof of unlawfulness deprives occupiers of protection from eviction. The court below erred in holding (in the passages quoted above) that proof of unlawful occupation was fatal for the occupiers in the eviction proceedings.

55 The fact of illegal occupation merely triggers the discretion of the Court in deciding whether evictions are just and equitable under section 26(3) of

[61] Judgment of Molahlehi J at para 15, vol 5, p 445.

the Constitution and the PIE Act – unlawful occupation is the foundation of the eviction enquiry, not the subject matter. The Constitutional Court made clear in ***Port Elizabeth Municipality***[62] that the subject matter of the enquiry is whether eviction is just and equitable in the circumstances. It held accordingly that "*even though lawfulness is established, the eviction process is not automatic.*"

56 The Constitutional Court further explained that the nature of the enquiry which the courts are called upon to make involves the exercise of a broad judicial discretion on a case by case basis.[63] It held that the Court's function is "*not to establish a hierarchical arrangement between the different interests involved, privileging in an abstract and mechanical way the rights of ownership over the right not to be dispossessed of a home, or vice versa*". Rather, it is "*to balance out and reconcile the opposed claims in* as *just a manner as possible taking into account all of the interests involved and the specific factors relevant in each particular case.*"[64]

57 The Constitutional Court thus emphasised in ***Port Elizabeth Municipality*** that, to pass constitutional muster, an order of eviction must be based on a fact-sensitive enquiry, which requires the court to be "fully-informed" before granting an eviction order,[65] and may require the court to engage in "active judicial management" to establish the true state of

[62] *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC).

[63] *Port Elizabeth Municipality* at para 31.

[64] *Port Elizabeth Municipality* at para 22-23.

[65] *Port Elizabeth Municipality* at para 32.

affairs and ensure a just and equitable result.[66] More recently, in ***Malan v City of Cape Town***, [67] the Constitutional Court reaffirmed these principles, which define a special role and function for the court in eviction proceedings. [68]

58 The proper constitutional approach to eviction proceedings was followed by the Supreme Court of Appeal ("SCA") in ***Shulana Court***.[69] In that case, a unanimous bench overturned a refusal by the High Court to rescind an eviction order, and rescinded the eviction order on the basis that it was granted in default of appearance of the occupiers and without the Court having regard to all the relevant circumstances. In granting this order:

58.1 The SCA emphasised that the procedural requirements under section 4 of PIE – in particular, the requirement to consider all relevant circumstances including the risk of homelessness and alternative accommodation – were peremptory.[70] It explained that these requirements served as "*safeguards which are designed to ensure that an occupier's constitutional rights are protected and …*

[66] *Port Elizabeth Municipality* at para 36.

67 *Malan v City of Cape Town* 2014 (6) SA 315 (CC).

[68] See at paras 140-141 especially.

[69] *The Occupiers, Shulana Court, 11 Henton Road, Yeoville, Johannesburg v Steel* [2010] ZACSA 28 (25 March 2010) ("*Shulana Court*").

[70] *Shulana Court* at para 12.

that evictions take place in a humane manner consistent with the values of the Constitution."[71]

58.2 The SCA found that, "*Based on the information which has been placed before the High Court, it cannot be said that the court was sufficiently informed of all relevant circumstances before granting an order which had the effect of depriving people of their homes. The High Court failed to apply the mandatory provisions of s 4 of PIE.*"[72]

58.3 It found further that the High Court ought to have taken a more "proactive approach" to obtain the relevant information, especially given the apparent risk of homelessness on eviction.[73] In these circumstances, the SCA held that the High Court had "*also failed to comply with its constitutional obligations*."[74]

58.4 For the above reasons, the SCA held that the appellants had shown good cause for a rescission order and had established a *bona fide* defence that carried some prospect of success.[75] It upheld the rescission appeal and set aside the eviction order, notwithstanding that it had been granted more than 18 months before.

[71] *Shulana Court* at para 14.

[72] *Shulana Court* at para 14.

[73] *Shulana Court* at para 15.

[74] *Shulana Court* at para 15.

[75] *Shulana Court* at para 16.

59 ***Shulana Court*** is on all fours with the present case and constitutes binding authority on the High Court. Notably, in this case:

59.1 As in *Shulana Court*, the order of eviction was not just and equitable because the High Court was not fully informed of the relevant circumstances when it granted the eviction order against the applicants; and

59.2 The occupiers had no knowledge of the eviction proceedings and did not make submissions to the Court as to their circumstances and the risk of homelessness that they faced and which transpired on their eviction.

60 The respondents attempt to distinguish *Shulana Court* from the present case.[76] They contend that the facts of *Shulana Court* are different to this case, in that the applicant in *Shulana* had been the landlord of the occupiers and had leases with them, which he terminated. As a result, it was reasonable for the Court to expect that the applicant had the full details of the individuals who were occupying the property and would know if there were children, elderly persons or women-headed households. By contrast, in this case, the first and second respondents had no details of the occupiers and their attempts to find out were rebuffed. They could not reasonably have been expected to do more to gather information in the circumstances.

[76] Answering Affidavit of the First and Second Respondents, dated 29 October 2013, at paras 41-42, vol 6, p 577-578.

61 This argument is manifestly flawed.

61.1 The fact that a landlord has a lease with a member of a household does not mean that the landlord has the full details of the age, gender and circumstances of each member of the family. To distinguish the cases on this basis is tenuous at best.

61.2 Further, it cannot be said that the first and second respondents could not reasonably have taken further steps to obtain information about the occupiers. They could have sent a representative to the property to speak to the occupiers. They could have left a notice at the property requesting the information. At the very least, they could have highlighted the difficulty that they had experienced in the founding application to the eviction application and requested directions from the court on how best to address the issue. Rather, they made a misleading claim in the eviction papers, suggesting that the occupiers did not include any elderly people, women and children who faced the prospect of homelessness if evicted.

The court below misconstrued Blue Moonlight

62 The court below erred in holding that ***Blue Moonlight*** held that an owner is automatically entitled to an eviction order. The court below quoted a single sentence from paragraph 96 of the judgment in ***Blue Moonlight*** in isolation to support this finding.

63 ***Blue Moonlight*** is not authority for the proposition that an owner of

property is always entitled to an eviction order in respect of unlawful occupiers, as was suggested by the High Court. In *Blue Moonlight*, the Constitutional Court affirmed the centrality of the justice and equity enquiry in determining eviction applications under PIE, and recognised that a private landowner's right to property may indeed be justifiably limited in the application of PIE. The Court stated that:

> *Section 4 [of PIE], concerning eviction of unlawful occupiers by an owner or a person in charge of land, provides that courts may only grant an order for eviction if it is just and equitable to do so, after considering all the relevant circumstances.*[77]

64 The Court went on to hold that "*the owner's right to use and enjoy property at common law can be limited in the process of the justice enquiry mandated by PIE*".[78] It reasoned that:

> *Unlawful occupation results in a deprivation of property under section 25(1). Deprivation might however pass constitutional muster by virtue of being mandated by a law of general application and if not arbitrary. Therefore PIE allows for eviction of unlawful occupiers only when it is just and equitable.*[79]

65 The approach of the Constitutional Court in ***Blue Moonlight*** confirms the appellants' case for rescission. It confirms that:

65.1 The order of eviction must be just and equitable, which requires a proper consideration of all the relevant facts, including the availability of alternative accommodation and the risk of

[77] *Blue Moonlight* at para 29.

[78] *Blue Moonlight* at para 40.

[79] *Blue Moonlight* at para 37.

homelessness on eviction. This was not done prior to the appellants' eviction.

65.2 Where eviction would result in homelessness for the occupiers, the eviction cannot be granted without conditions being attached to prevent homelessness from resulting – in particular, the provision of temporary alternative accommodation by the municipality. Thus, the Constitutional Court held that "*the date of the eviction must be linked to the date on which the City has to provide accommodation*".[80] This inevitably limits the landowner's right to the enjoyment of his or her property, but this is a justifiable limitation under PIE. In the present case, no conditions of alternative accommodation were attached to the eviction, nor was the risk of homelessness properly considered by the Court.

66 The approach of the court below is therefore inconsistent with the requirements of section 26(3) of the Constitution and PIE, as interpreted in a line of cases, most notably ***Blue Moonlight*** and ***Shulana Court.***[81] The court below adopted the pre-constitutional paradigm in terms of which an owner could secure an eviction simply by proving ownership and unlawful occupation.

67 The result of the court's approach was to fail to consider whether the appellants had one or more defences to the eviction application with

[80] *Blue Moonlight* at para 100.

[81] See also *Occupiers of Erf 101, 102, 104 & 112 Shorts Retreat, Pietermaritzburg v Daisy Dear Investments (Pty) Ltd* 2010 (4) BCLR 354 (SCA); 2009 4 All SA 410; *Occupiers of Mooiplaats v Golden Thread Ltd and Others* 2012 (2) SA 337 (CC).

prima facie prospects of success arising from the failure of the first and second respondents to comply with the procedural and substantive requirements for an eviction application under PIE. The appellants indeed had a *bona fide* defence against the order of eviction with prospects of success on these grounds.

THE CITY'S UNLAWFUL FEE FOR EMERGENCY ACCOMMODATION

68 Even if the High Court was correct in refusing to rescind the eviction (which is denied), it erred in granting the alternative relief in the terms that it did by requiring each of employed adult occupiers to pay R10 per day order to receive emergency accommodation.[82]

69 As the Constitutional Court made clear in ***Blue Moonlight****,* the City has a constitutional and statutory obligation to provide temporary emergency accommodation to the occupiers who are rendered homeless by eviction, and further must fund itself in the sphere of emergency housing and "*react to, engage with and prospectively plan around the needs of local communities"*.[83]

70 The occupiers should not be required to pay to enjoy the constitutional protection against homelessness. Further, even if the City were entitled to impose a fee for the provision of emergency accommodation (which it

[82] Paragraph 4 of the order, High Court judgment, vol 5 pp 446-447.

[83] See *Blue Moonlight Properties* at paras 21-27, 51, 53, 66, 96-97.

is not), it may not lawfully do so by selecting an ad hoc and arbitrary charge in the absence of any legal and policy framework.

71 The City's obligation to provide temporary emergency accommodation is clearly set out in the *National Housing Code Emergency Housing Program (2009)*.

71.1 Part 3, clause 2.3.1(e) of the Housing Code provides that an emergency housing situation arises where people are "*evicted or threatened with imminent eviction from land or from unsafe buildings, or situations where pro-active steps ought to be taken to forestall such consequences*."

71.2 Clause 2.3.1(h) states that an emergency housing situation also arises where people "*live in conditions that pose immediate threats to life, health and safety and require emergency assistance*."

71.3 The Housing Code sets out the process to be followed by the Municipality and the factors to be considered when assessing an emergency situation. The "*municipality must immediately investigate and assess the identified emergency housing need*." In doing so, it must consider:

> *"1. The nature and extent of the situation in terms of the number of families/persons affected;*
>
> *2. Any prevailing risk factors that might aggravate the situation;*
>
> *3. If the situation requires intervention and if so, whether the municipality can itself address the situation utilising its own means;*
>
> *4. If the situation requires immediate or emergency assistance*

> *beyond the means of the municipality, the Provincial Department must be notified immediately and requested to assist."*

72 The occupiers' circumstances at the time of the eviction clearly constituted an emergency housing situation. Many of them had nowhere to go and were forced to live under a nearby bridge, exposed to the elements and without any form of security. The City thus rightly conceded that it bore an obligation to provide temporary emergency accommodation to the occupiers who had been rendered homeless on eviction.[84]

73 However the City took the position that it had no temporary emergency accommodation available. It accordingly "facilitated" accommodation for the occupiers at eKhaya House, on the condition that adults who could afford it were obliged to pay for as long as they were accommodated. The Court *a quo* endorsed the City's proposed solution and ordered that those adults who could afford it were to pay R10 per day for receiving temporary emergency accommodation at eKhaya House.

74 The Court *a quo's* order in this regard cannot be justified for three main reasons:

74.1 First, the fee cannot be justified, in fact or in law, by the consent of the occupiers;

74.2 Second, it is inconsistent with the City's constitutional obligations under section 26 of the Constitution to impose a fee for the

[84] Fourth Respondent's Answering Affidavit dated 28 October 2013, at para 51.1-51.5, vol 6, p 544.

enjoyment of a constitutional right to emergency accommodation; and

74.3 Thirdly, even if it could ever be justified to charge a fee for emergency accommodation, it cannot be done on an ad hoc, arbitrary basis in the absence of a law or policy to regulate such a fee.

No basis in fact or law for consent as a justification of the fee

75 The respondents' attempt to justify the imposition of the fee by alleging that the occupiers consented to the fee is without any factual or policy basis on the record.

75.1 The respondents allege that the amount was reasonable because the occupiers agreed to the amount of R10 per day. Similarly, Molahlehi AJ refused leave to appeal against this aspect of his order on the basis that the parties had consented to the order.[85] However, the occupiers deny having consented to paying the amount of R10 and submit that the learned judge has failed to correctly recollect the position advanced by counsel for the occupiers. He erred in presuming that consensus had been reached in respect of the accommodation arrangement at eKhaya House.

[85] Judgment of Molahlehi AJ in the Application for Leave to Appeal, at para 6, vol 5, p 465.

75.2 Molahlehi AJ's judgment refusing the rescission application was handed down ex tempore on 15 February 2013. Notably, however, the case file went missing and the written record of the judgment was transcribed without access to the file or the record of proceedings. The transcribed judgment was made available to the parties on 28 March 2013.

75.3 When the application for leave to appeal was argued in the High Court on 7 August 2013, Molahlehi AJ intimated that he would require a copy of the transcript to decide the application in that he could not recall whether the order granted in respect of the alternative relief was agreed to between the parties.[86] The learned acting judge indicated, however, that he was of the preliminary view that the temporary alternative accommodation arrangement at eKhaya House had been agreed to between the parties, and that accordingly, there was little prospect that another Court would have decided the matter differently.

75.4 Molahlehi AJ handed down judgment dismissing the application for leave to appeal on 30 August 2013. It is apparent from the judgment that the transcript was not found. The appellants' attorney, Ms Zeenat Sujee, confirmed this with the Judge's registrar.

[86] Founding affidavit in Petition to the Supreme Court of Appeal at para 34, vol 5, p 485.

75.5 The occupiers submit that the learned judge erred in his recollection of events at the hearing. Counsel for the applicants did not accept that R10 per person per day was affordable, even for those with some source of income. Nor did counsel accept that imposing such a requirement was lawful in the circumstances.

75.6 In its answering affidavit filed on 28 October 2013, the City explicitly states that the occupiers' counsel "*did not accept that R10 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*."[87] However, the City goes on to claim the counsel for the occupiers did not contest the obligation on the occupiers to pay for their accommodation at eKhaya House *per se*.[88] This claim is incorrect. When the occupiers' counsel argued the matter, he contended that the payment of a fee for alternative accommodation was *in principle* inconsistent with the State's obligations to provide alternative accommodation, which should not be subject to 'outsourcing' and an arbitrary charge by a private 'service-provider'.[89] Hence, it is clear that there was no consensus between the parties with regard to payment in the amount of R10 per employed adult per day.

[87] Fourth Respondent's Answering Affidavit dated 28 October 2013, at para 45.2, vol 6, p 540.

[88] Fourth Respondent's Answering Affidavit dated 28 October 2013, at para 45.2, vol 6, p 540 and at para 51.6, vol 6, p 545.

[89] Appellants' Replying Affidavit, dated 14 November 2013, at para 31.1, vol 7, p 618.

76 In any event, even if there were any basis in the record to suggest that the occupiers consented to the fee during the proceedings, it is not competent to waive constitutional rights.[90] Their alleged consent could, therefore, never justify the City's unconstitutional and unlawful conduct in imposing the fee. Even if waiver of the right to housing were found to be competent – to the extent of permitting consent to an arbitrary fee – the onus would be on the City to prove consent.[91]

77 Accordingly, the fee cannot be justified, in fact or in law on the basis of alleged consent.

Imposing a fee is inconsistent with the City's constitutional obligations

78 The City has admitted that it bears a legal obligation to provide temporary alternative accommodation to the occupiers who had been rendered homeless by the eviction but took the position that it had no such accommodation available and accordingly "facilitated" accommodation at eKhaya House.[92]

79 As a result of the City's stance, the occupiers were ordered to pay for temporary alternative accommodation. They were ordered to do so because the City had failed to discharge its constitutional obligations to them, by failing to plan and budget for the provision of sufficient

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[90] *Mohamed and Another v President of the Republic of South Africa and Others* 2001 (3) SA 893 (CC) paras 62-63, expressing doubt that the constitutional rights in issue in that matter could <u>ever</u> be waived, but holding that, if permissible at all, such waiver would have to be fully informed consent.

[91] *Mohamed* para 65.

[92] Fourth Respondent's Answering Affidavit dated 28 October 2013, at para 51.1-51.5, vol 6, p 544.

temporary emergency accommodation. This cannot be constitutionally permissible for at least the following reasons:

79.1 It allowed the City to avoid the force and effect of the Constitutional Court's holding in ***Blue Moonlight*** that "*it is not good enough for the City to state that it has not budgeted for something, if it should indeed have planned and budgeted for it in the fulfilment of its obligations*."[93]

79.2 It also permitted the City to 'outsource' its constitutional obligations to eKhaya shelter and to shift the financial cost of its obligations to the occupiers themselves. It is trite that government cannot contract out of its constitutional obligations,[94] but that is indeed the effect of the Court a quo's order directing that eKhaya shelter accommodate the appellants at the appellants' expense. At the very least, the cost of accommodation at eKhaya House, if it was required to be borne by any party, should have been paid by the City.

80 The City also had a constitutional duty to engage meaningfully with the occupiers and to report to the Court on the steps that the City was taking to make temporary alternative accommodation available to those

[93] At para 74.

[94] See *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council and Another* 2007 (1) SA 343 (CC) at para 40 where it was held that "government cannot be released from its human rights and rule of law obligations simply because it employs the strategy of delegating its functions to another entity." The principle was reiterated in *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency* 2014 (4) SA 179 (CC) at para 53.

occupiers who had been rendered homeless. In ***Mooiplaats***,[95] the Constitutional Court held that where there is a probability of homelessness on eviction, it is obligatory for the City to investigate the particulars of the occupiers' housing situation and the possibility of mediation.[96] There was a particular need for meaningful engagement in light of the City's evidence that its temporary accommodation facilities are exhausted and that it has no capacity to accommodate any of the occupiers. These obligations were avoided too by the Court a quo's order.

Even if a fee may be constitutionally permitted, it cannot be imposed arbitrarily and without law or policy to govern it

81 Even if imposing a fee may be justifiable under the Constitution in certain circumstances, the requirement for payment was arbitrarily imposed on the applicants, who were treated differently from other persons provided with temporary alternative accommodation by the City without charge. There is no indication that such a fee has ever, or will ever, be imposed on other occupiers to whom the City provides emergency accommodation.

82 In ***Mazibuko***, the Constitutional Court accepted that means-testing may be an appropriate method to determine which households qualify for free

[95] *Occupiers of Portion R25 of the Farm Mooiplaats 355JR v Golden Thread and Other* 2012 (2) SA 337 (CC) ("*Mooiplaats*").

[96] *Mooiplaats* at paras 12-13.

basic water (as part of their right to sufficient water under section 27).[97] Importantly, however, the Court was able to consider the rationale and content of the City's means-testing policy to decide whether the policy passed constitutional muster.

83 The requirement of a legal or policy framework is a requirement of the rule of law and the principle of legality.[98] In the absence of such a framework, no persons facing eviction would know if emergency accommodation will come with a fee or, if so, what the conditions and amount of such a fee would be.

84 In the present matter, there was no mention of the charging of a fee anywhere in the papers before the court below. The City raised the imposition of a fee for the first time in argument, without any factual basis and without reliance on any law or policy. In addition, the City adjusted the amount of the fee from R20 to R10 per day per employed occupier. In the circumstances, the fee was an ad hoc, arbitrarily determined condition.

85 The City's approach was not simply unguided by any law or policy, it is in conflict with the Emergency Housing Programme in the National Housing Code. Clause 2.4 of the National Housing Code defines who is entitled to emergency housing assistance at the State's expense. It provides that:

[97] *Mazibuko & others v City of Johannesburg* 2010 (4) SA 1 (CC) paras 98-102.

[98] See also *Dawood and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC) at para 47.

> *"The Programme will benefit all affected persons who are not in a position to address their housing emergency from their own resources or from other sources such as the proceeds of superstructure insurance policies and the following households will qualify for assistance under this Programme:*
>
> - *Households that comply with the Housing Subsidy Scheme qualification criteria;*
>
> - *Households/persons with a monthly income exceeding the maximum income limit as approved by the Minister from time to time"*

86 The households who qualify for a housing subsidy are those that earn R3500 or less per month. The average income of the adult appellants staying at eKhaya House is R585.18 per month.[99] This is well below the income threshold for a full housing subsidy. The effect of clause 2.4 of the National Housing Code is that persons in this situation, and even persons who earn above this threshold, qualify for emergency housing assistance at the State's expense.

87 For all three reasons outlined above, the fee imposed by the court below is unlawful and unconstitutional.

THE MATTER IS NOT "ACADEMIC"

88 In his judgment refusing the application for leave to appeal, Molahlehi AJ stated that "*the matter has now become academic and any decision to be made would not take the matter any further*".[100]

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[99] Founding Affidavit in Application for Leave to Appeal, para 38, vol 5, p. 486.

[100] Judgment of Molahlehi AJ in the Application for Leave to Appeal, at para 7, vol 5, p 466.

89 Section 16(2)(a)(i) of the Superior Court Act[101] empowers a court to dismiss an appeal if it would have no practical effect or result. In ***South African Congo Oil***,[102] the SCA explained the meaning of an identical provision and stated that:

> *It is well settled that mootness does not constitute an absolute bar to the justiciability of an issue and that the court has discretion whether or not to hear a matter. The test is one of the interests of justice. A relevant consideration is whether the order the court makes will have any practical effect either on the parties or on others, and in the exercise of its discretion a court may decide to resolve an issue that is moot if to do so will be in the public interest.*

90 In ***Midi Television***,[103] the SCA declined to dismiss the appeal even though it would have no practical effect between the parties. The Court held that:

> *The case raises important questions of law on which there is little authority and they are bound to arise again. With the benefit we have had of full argument I think we should deal with those questions not only to resolve what was contentious between the parties but also for future guidance.*[104]

91 On the facts of this case, it is clear that the appeal has not become moot or academic.

91.1 First, the appeal raises an important question of law, which is likely to arise again in this jurisdiction, and which requires the

[101] Act 10 of 2013.

[102] *South African Congo Oil (Pty) Ltd v IdentiGuard International (Pty) Ltd* 2012 (5) SA 125 (SCA) at para 5.

[103] *Midi Television (Pty) Ltd v Director of Public Prosecutions (Western Cape)* [2007] 3 All SA 318 (SCA).

[104] *Midi Television* at para 4.

consideration of the Full Bench. The question is whether requiring individuals in emergency housing conditions to pay an ad hoc, arbitrary fee for temporary alternative accommodation is inconsistent with their right to protection against homelessness in section 26(3) of the Constitution, and with the City and the Province's obligations to provide emergency accommodation.

91.2 Second, although the appellants now accept that they cannot return to the property from which they were evicted (following the first and second respondents' contention, for the first time in their answer to the appellant's petition for leave to appeal, that "*the building has partly been torn down and the workers are rebuilding it"*),[105] this was not the factual position at the time of the rescission application. It remains a matter of fundamental importance that the Full Bench declare that Molahlehi AJ erred in not rescinding the eviction order in circumstances where the property owners obtained the eviction without serving eviction notices on the occupiers and misrepresented the occupiers' circumstances to the court, and where return to the property was indeed possible. Molahlehi AJ's suggestion that the rescission application was simply 'academic' because the occupiers had no title and were no longer in occupation of their homes fundamentally undermines the constitutional protection against unlawful eviction and the statutory scheme under the PIE Act.

[105] Answering Affidavit of the First and Second Respondents, dated 29 October 2013, at para 46, vol 6, p 579.

91.3 Third, the order of the court in this appeal may still have a practical effect on the parties. The appellants who reside at eKhaya House continue to suffer prejudice as a result of the High Court's order in that they have no certainty as to whether, on what terms, and for how long they will continue to be accommodated at eKhaya House or elsewhere by the City.

92 In any event, even if the matter is technically moot in the sense of having no direct impact on the immediate parties (which is denied), the court nevertheless has a discretion to decide the appeal. In ***Pillay***, the Constitutional Court listed the following factors as relevant to exercising the discretion to decide moot cases: (a) the nature and extent of the practical effect that any possible order might have; (b) the importance of the issue; (c) the complexity of the issue; (d) the fullness or otherwise of the argument advanced; and (e) the need to resolve disputes between different courts.[106]

93 Even if the court were to conclude that the matter is technically moot, it would nevertheless be in the interests of justice to decide the merits of the appeal because –

93.1 The issues relating to the rescission application concern the requirements for a lawful eviction and the defences to eviction proceedings. These are issues of vital importance to occupiers in

[106] *MEC for Education: Kwazulu-Natal and Others v Pillay* 2008 (1) SA 474 (CC) at para 32.

Johannesburg and all other urban settings. These issues affect the most vital interests of large numbers of people.

93.2 The issues relating to the charging of a fee for emergency accommodation are entirely untested in any court. There is every likelihood, in the absence of a finding of unlawfulness by this court, that the City (and other municipalities) may impose arbitrary fees, on a case-by-case basis, when providing emergency accommodation. The issue is likely to arise again and involves complex and important constitutional issues.

93.3 It is therefore submitted that the appeal is not moot but that, even if it were found to be technically moot, it would be in the interests of justice to decide the appeal.

THE COSTS AWARD AGAINST THE OCCUPIERS

94 The final ground of appeal relates to the imposition by the court below of costs on the occupiers.[107]

95 On the ordinary approach to costs, costs follow the result. Given that the court below granted the occupiers partial relief in the form of an order for the provision of emergency accommodation, it is difficult to justify imposing costs on them even using this rule.

[107] Judgment of Molahlehi AJ at para 20, prayer 2, vol 5, p 446.

96 However, in constitutional litigation, the basic rule that costs follow the result is qualified. In the circumstances, imposing costs on occupiers who have been rendered homeless by an eviction which they seek to challenge in court cannot be reconciled with the jurisprudence on costs in constitutional matters, which limits the court's ordinary discretion with regard to costs.

97 It is submitted that, even if they were considered to be unsuccessful overall, the occupiers should not be ordered to pay the costs of the respondents. The occupiers are poor people who are seeking in good faith to vindicate their rights under section 26(3) of the Constitution. In such circumstances, an order of costs against the occupiers would be contrary to the well-established principles on costs in constitutional litigation as set out by the Constitutional Court in ***Biowatch Trust v Registrar Genetic Resources and Others***.[108]

98 On the other hand, the City's conduct throughout the proceedings in the court below, and subsequently, warrants costs orders against it in the underlying proceedings and in the appeal. The City's dilatory response to the emergency conditions that the appellants have faced has been woefully inadequate and unreasonable, particularly in light of its constitutional obligations.

[108] *Biowatch Trust v Registrar Genetic Resources and Others* 2009 (6) SA 232 (CC). See also *Bothma v Els and Others* 2010 (1) SACR 184 (CC) at para 23.

98.1 The City came to the assistance of the occupiers only on the eve of the High Court hearing, as a result of which a large number of the occupiers were left living under a bridge for nearly two months.

98.2 Further, it was also only at the insistence of Molahlehi AJ that the City endeavoured to locate temporary emergency accommodation beyond the 72-hour emergency shelter regime under which the occupiers were initially placed at eKhaya House.

98.3 On the return day at the High Court, the City failed to put up any affidavit evidence in relation the accommodation that it purported to "facilitate", including the basis on which it asserted that the occupiers must pay a fee. The City belatedly tendered accommodation to a section of the occupiers but sought to impose conditions that had no basis given the facts before the Court.

98.4 Since the judgment in the court below and after "facilitating" the placement of the appellants at Ekhaya House, the City has not meaningfully engaged with the appellants in respect of suitable alternative accommodation. It is not disputed that, in July 2013, the City offered to accommodate the appellants at Linatex Building.[109] However the appellants objected to the conditions that the City imposes at the Linatex building, and queried whether there was in fact any accommodation available at the building.[110] The appellants' objections to the conditions imposed at the Linatex

[109] Fourth Respondent's Answering Affidavit dated 28 October 2013, at para 50.1, vol 6, p 543.

[110] Replying Affidavit at para 33, vol 7, pp. 618-9.

building – specifically, the gender segregation that results in separation of families and the day-time lock-out rule – were not unreasonable nor unjustified. This is demonstrated by ***Dladla and Others v City of Johannesburg Metropolitan Municipality and Others***,[111] where this Court found that the same rules imposed at another temporary emergency accommodation facility used by the City (the Ekhutuleni shelter) violated its occupants' rights to human dignity, freedom and security of the person, as well as privacy enshrined in sections 10, 12 and 14 of the Constitution.[112]

99 It is therefore submitted that the court below erred in ordering the occupiers to pay the costs of the application in the court below. The occupiers ought to have been awarded their costs or, if unsuccessful, ought not to have been mulcted with costs. On this ground, too, the court below erred.

CONCLUSION

100 In the circumstances, we submit that the occupiers have satisfied all of the legal requirements for the rescission of the judgment and order of Kathree-Setiloane J.

[111] *Dladla and Others v City of Johannesburg Metropolitan Municipality and Another* [2014] ZAGPJHC 211; 2014 (6) SA 516 (GJ); [2014] 4 All SA 51 (GJ) (22 August 2014).

[112] We are advised that the City's application for leave to appeal against the judgment and order in *Dladla* was dismissed in the High Court. The City has since applied to the Supreme Court of Appeal for leave to appeal. That application has yet to be decided

101 In addition, the occupiers have shown that the City failed to fulfil its constitutional obligations to the occupiers in that:

101.1 The City neglected to provide the occupiers with temporary emergency accommodation from the date of their eviction;

101.2 The City has required the occupiers staying at eKhaya House to pay an arbitrary, ad hoc fee for their access to temporary alternative accommodation, despite the fact that no evidence of a policy providing for such payment has been produced and no information has been given to prove that the prescribed amount is reasonable. Furthermore, the City has not justified why it has arbitrarily required that the occupiers pay for their emergency accommodation when other persons in the same position are not required to do so;

101.3 The City has failed to meaningfully engage with the occupiers to address the issue of temporary alternative accommodation.

102 Therefore, the appellants pray that the appeal be upheld with an order of costs against the City, including the costs of two counsel.

103 It is submitted the order of the court below should be replaced with an order:

103.1 Rescinding the eviction order, with costs;

103.2 Directing the City to engage meaningfully with the occupiers residing at eKhaya shelter regarding their accommodation needs

and what alternative accommodation the City shall provide them with following judgment;

104 Setting aside paragraph 4 of the order of the court below, which imposed a fee for the provision of emergency accommodation.

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24 February 2015

TABLE OF APPELLANTS' AUTHORITIES

1. *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council and Another* 2007 (1) SA 343 (CC)

2. *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency* 2014 (4) SA 179 (CC)

3. *Biowatch Trust v Registrar Genetic Resources and Others* 2009 (6) SA 232 (CC)

4. *Bothma v Els and Others* 2010 (1) SACR 184 (CC)

5. *Chetty v Law Society, Transvaal* 1985 (2) SA 756 (A)

6. *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* 2012 (2) SA 104 (CC)

7. *City of Johannesburg v Changing Tides 74 (pty) Ltd and Others* 2012 (6) SA 294 (SCA)

8. *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA)

9. *Dawood and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC)

10. *Dladla and Others v City of Johannesburg Metropolitan Municipality and Another* 2014 (6) SA 516 (GJ)

11. *Malan v City of Cape Town* 2014 (6) SA 315 (CC)

12. *Mazibuko & others v City of Johannesburg* 2010 (4) SA 1 (CC)

13. *MEC for Education: Kwazulu-Natal and Others v Pillay* 2008 (1) SA 474 (CC)

14. *Midi Television (Pty) Ltd v Director of Public Prosecutions (Western Cape)* [2007] 3 All SA 318 (SCA)

15. *Mohamed and Another v President of the Republic of South Africa and Others* 2001 (3) SA 893 (CC)

16. *Occupiers of Erf 101, 102, 104 & 112 Shorts Retreat, Pietermaritzburg v Daisy Dear Investments (Pty) Ltd* 2010 (4) BCLR 354 (SCA)

17. *Occupiers of Portion R25 of the Farm Mooiplaats 355JR v Golden Thread and Other* 2012 (2) SA 337 (CC)

18. *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC).

19. *South African Congo Oil (Pty) Ltd v IdentiGuard International (Pty) Ltd* 2012 (5) SA 125 (SCA)

20. *The Occupiers, Shulana Court, 11 Henton Road, Yeoville, Johannesburg v Steel* [2010] ZACSA 28 (25 March 2010)