HANDED DOWN 30 SEPTEMBER 2010
NOT REPORTABLE
IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT, PRETORIA)

CASE NO:33786/2010

In the matter between:

BROOKWAY PROPERTY 30 (PTY) LTD Applicant

and

THE PEOPLE WHO INTEND INVADING PORTION 150 OF THE FARM ZANDFONTEIN 317 J.R., PORTION 124 (A PORTION OF PORTION 10) OF THE FARM ZANDFONTEIN 317 J.R., REMAINING PORTION OF PORTION 37 (A PORTION OF PORTION 17) REMAINING PORTION OF PORTION 21 (A PORTION OF PORTION 17) REMAINING PORTION OF PORTION 38 (A PORTION OF PORTION 17) REMAINING PORTION OF PORTION 39 (A PORTION OF PORTION 17) AND PORTION 227 ALL OF THE FARM ZANDFONTEIN 317 J.R.

First Respondents

THE UNKNOWN PEOPLE WHO INVADED PORTION 150 OF THE FARM ZANDFONTEIN

317 J.R., PORTION 124 (A PORTION OF PORTION 10) OF THE FARM ZANDFONTEIN 317 J.R., REMAINING PORTION OF PORTION 37 (A PORTION OF PORTION 17) REMAINING PORTION OF PORTION 21 (A PORTION OF PORTION 17) REMAINING PORTION OF PORTION 38 (A PORTION OF PORTION 17) REMAINING PORTION OF PORTION 39 (A PORTION OF PORTION 17) AND PORTION 227 ALL OF THE FARM ZANDFONTEIN 317 J.R.

Second Respondents

CITY OF TSHWANE METROPOLITAN MUNICIPALITY Third Respondent

JUDGMENT

MURPHY J

1. The applicant is the owner of certain properties situated in the Pretoria Gardens/Kirkney area in Pretoria West. It seeks an eviction order and other ancillary relief compelling the unlawful occupiers of the properties residing in informal structures to vacate the land and to relocate to alternative land provided for that purpose.

2. The seven properties in question are described as:

   - Portion 150 of the farm Zandfontein 317 JR;
   - Portion 124 (a portion of Portion 10) of the farm Zandfontein 317 JR;

- Remaining Portion of Portion 37 (a portion of Portion 17);
- Remaining Portion of Portion 21 (a portion of Portion 17);
- Remaining Portion of Portion 38 (a portion of Portion 17);
- Remaining Portion of Portion 39 (a portion of Portion 17); and
- Portion 227;

all of the farm Zandfontein 317 JR.

3. The application was originally launched on an urgent basis and comprised a notice of motion in two parts. Part A sought as a matter of urgency a rule *nisi* interdicting the first respondent from invading and taking possession of the properties and erecting houses and structures on the properties. It sought further an order authorising the Sheriff to serve the order together with the application on the first and second respondents in the specified manner, as well as an order directing the third respondent (the City of Tshwane) to file a report to the court on what steps it would take to provide alternative land and/or emergency accommodation to the occupiers in the event of eviction. Part B gave notice that the applicant intended to make application on the return day for orders evicting the First and Second Respondents to be effected by the Sheriff with the assistance of the relevant law enforcement agencies; directing the Third respondent to give the first and second respondents alternative accommodation at the date of eviction; and payment to the applicant of compensation for the duration of the unlawful occupation of the vacant land by the first and

second respondents at an amount of R991 686 per month until such time as the land is vacated by the first and second respondents.

4. The first respondents are cited collectively to be "the people who intend invading the land"; while the second respondents are cited as "the unknown people who invaded" the land. On 15 June 2010 Raulinga J granted the rule nisi and interim interdict against the first respondents and gave leave in terms of section 5(2) alternatively section 4(2) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 ("PIE") that notice be served of the eviction application in the manner contemplated.

5. On the return day, 6 July 2010, Hiemstra AJ extended the rule nisi until 23 August 2010 and postponed the application to the ordinary opposed roll of that date. The order included a timetable for the filing of additional papers. On 23 August 2003 I granted orders (i) granting the West Moot Resident Association leave to intervene in the proceedings; (ii) directing the respondents to engage in meaningful engagement relating to the entitlement to alternative land and emergency accommodation and the availability of such, and to report to the court in that regard; (iii) confirming the rule *nisi* and granting a final interdict against the first respondents; and (iv) postponing the remaining issues to 9 September 2010.

6. The first respondents have not filed any affidavits and accordingly do not oppose the relief. The *lis* regarding the eviction is accordingly between the applicant and the second respondents, to whom I shall refer henceforth as "the occupiers". Although the question of alternative land and emergency accommodation, and the litigation and meaningful engagement process in that regard, are in the final analysis issues between the occupiers and the third respondent ("the City of Tshwane"), the latter was cited by the applicant as a party for two reasons, firstly to ensure that any eviction can be effected in a just and equitable manner, and secondly because it has included a prayer for compensation payable by the City of Tshwane in the event that the unlawful occupation continues. There is accordingly a *lis* as between the applicant and the City of Tshwane as well. The intervening party, ("the resident's association") have joined in the application in support of the applicant principally because it is concerned that the invasion and settlement by the occupiers of the land in uncontrolled circumstances, without adequate provision for basic services, will lead to social problems in the area. It seeks no additional relief by notice of motion, it merely aligns itself with the applicant. But during argument a request was made on its behalf that it be consulted with regard to the implementation of any order of relocation within the area.

7. The seven properties in question are zoned for residential and industrial purposes and are 210 hectares in extent. They were purchased by the applicant during 2007 for more than R30 million and have been currently valued at about R160 million, an amount the respondents contend is unrealistic.

8. The applicant maintains that it first became aware that the occupiers had moved onto and settled on the land when it was told of their presence by Mr Gerhard Botha, the managing member of Impala Trucks Spares and Panelbeaters CC, the owner of the adjacent land, during May 2010. Botha himself became aware of the situation in January 2010. It was because Botha reported that the land invasions were still in progress that the applicant sought the interdict against the first respondents.

9. There is a dispute about which portions of the land have been invaded and settled. Mr Amos Mboweni, the Executive Director: Housing Provision and Resource Management at the City of Tshwane, in the answering affidavit deposed to on behalf of the City took issue with the claim that all the properties of the applicant had been invaded. He, together with officials in the department, inspected the properties and observed that there are occupiers and informal houses only on the western part of Portion 124 (a portion of Portion 10) and the southern part of Portion 150 of the Farm Zandfontein JR. In the replying affidavit the applicant

conceded that some of the properties are not occupied, however a qualified Town Planner, Mr JM Marais after studying aerial photographs and comparing them with the general layout plan sets out in a replying affidavit that the current unlawful occupiers are present on Portion 124, Portion 150, Portion 278 (a portion of Portion 10), Portion 227 and Remainder 21 of Portion 278. The applicant further avers that all the other properties are indirectly affected because it intends to develop them and its development scheme in relation to all the properties cannot proceed until the problem is solved.

10. In paragraph 65 of their answering affidavit the occupiers effectively concede that they are in unlawful occupation of the private property of the applicant. However, they limit that concession to portions 124 and 150 of the farm Zandfontein JR.

11. The expert evidence of Mr Marais has not been countered in any way and probably is more reliable and accurate than that of the occupiers and the officials of the City of Tshwane. Accordingly I accept his account of the extent and location of the settlement.

12. The applicant contends that prior to 2009 there were no occupiers on the land. This contention is supported by aerial photographs obtained by the applicant from the relevant department at the City of Tshwane as well as

by the evidence of the residents in the adjacent neighbourhood. The occupiers dispute this, some claiming even to have been born on the land. The applicant's version is that the settlement began in early 2009. It has established, and this appears from the aerial photographs, that there were approximately 65 unlawful occupiers during March 2009, but the unlawful occupation has gradually expanded since then. It is common cause that there are currently approximately 400 unlawful shacks erected on the properties.

13. It is also common cause that there is property owned by the City of Tshwane immediately adjacent to the applicant's property, namely Portion 45, 87 and 82. There are no informal settlements on these properties. The unlawful occupation is only on the applicant's property.

14. In their answering affidavit, the occupiers, as I have said, do not dispute that they are in unlawful occupation of private property. Indeed they concur that an order should be granted "declaring that the present occupation of portions 124 and 125 of the Farm Zandfontein 317 JR is unlawful and in violation of the applicant's property rights". They make the proposal in the context of a broader proposal requesting the court to declare that the conditions in which they live constitutes a housing emergency for the purposes of part 3 of the National Housing Code promulgated in terms of section 4 of the Housing Act 107 of 1998. They

ask that the City of Tshwane be ordered to bring an end to the housing emergency and to regularise the unlawful occupation by deploying mediation and investigating the feasibility of acquiring ownership or use of portions 124 and 150, or, failing which, the acquisition of appropriate alternative land for relocation and settlement of the occupiers. They suggest also that the City of Tshwane should apply forthwith for any funding that may be needed to give effect to the order from the Gauteng Provincial Government. The proposal is a commendable step in the process of meaningful engagement. It, however, is somewhat at variance with their assertion that many of the occupiers enjoy rights and protection in terms of the Extension of Security of Tenure Act 62 of 1997 ("ESTA"), an issue which I discuss later.

15. The parties differ about the direct consequences and implications for the applicant resulting from its loss of possession and control of its properties. The applicant purchased the properties in 2007 in order to develop a shopping complex. At a cost of R460 000, it has commissioned a development study. On 10 October 2008 it obtained an environmental authorisation for Proposed Township Establishment Booysens Extention 3 or Portion 124 and a portion of portion 150 of the Farm Zandfontein 317 JR. The authorisation was issued to Sinvest Investments 116 (Pty) Ltd, the then owner of the land, and the applicant intends to have it re-issued to itself. The City of Tshwane in its answering affidavit pours cold water

on the proposal, pointing out that not all the properties are subject to the authorisation, that the proposal is at present not more than an idea, and that much will still have to be done before work on the project can start, such as upgrading of the applicant's bulk services network in order to cater for the additional demand that a large development will place on the system. All these aspects will take at least two years for final planning and approval before implementation can commence. Accordingly, in its view, the project is not now on hold due to the unlawful invasions.

16. Having regard to the minutes of the engagement meeting that took place on 3 September 2010, which was handed in at the commencement of the hearing on 9 September 2010, it is clear that the City of Tshwane is hoping for a two year period of grace to deal with the problems and is effectively advancing the case that a two year delay will not prejudice the applicant. In terms of paragraph 7 of the minute the respondents agreed in principle among themselves that a delay of two years would be appropriate. It reads:

> "The parties agree that the municipality will be given a period to identify appropriate alternative land, and thereafter that it will be given 18 months to complete and obtain all planning permissions and budget funding which may be needed."

No explanation is set out in the minute for why the City will need 2 years for what after all would amount to an emergency if eviction is ordered. The attitude does not seem to me to be entirely in line with the approach encouraged by the Emergency Housing Programme contained in the National Housing Code, a matter to which I will return in due course.

17. The applicant's response is to complain legitimately that there is no reason for delay and contends that the process of spatial development should be expedited in accordance with the City of Tshwane's plans for the area. It goes so far as to make a proposal for it to become involved in developing the areas in conjunction with the City and has offered to embark on a structured development of the land and to build 8220 houses, with a view to finalising the project within 48 months, with a density of 60 housing units per hectare, but also including retail, commercial and community facilities. Considering that according to the City there are approximately 20 000 informal structures in the Greater Atteridgeville area, the proposal would seem to be an attractive one. It is not clear whether the City at this stage views it favourably. The proposal alone, however, does nothing to solve the immediate dilemma in terms of which the applicant asserts its rights of ownership in the hope of being allowed to develop the property. It contends rightly that there is no legal and constitutional basis whereby it can be indefinitely deprived of its rights of use and development, especially when the City has similar land available

and is entitled to seek grants from the provincial government in order to relocate the occupiers. The mere presence of the occupiers on the land will probably pose an obstacle to financing and other ventures aimed at development.

18. In its answering affidavit the City maintains that it does not have suitable land available to accommodate the occupiers. It hastens to add that it is not shying away from its constitutional responsibilities and undertakes to engage with other relevant organs of state to try ameliorate the situation. In his report to the court dated 20 August 2010 Mr Mboweni makes frank and full disclosure of the difficulties facing the City in dealing with the problems of land invasion and informal settlement. One is left with no doubt that the problem is a burgeoning one causing considerable anxiety and tensions among the citizens of Tshwane, and making Mr Mboweni's task an exceedingly difficult and frustrating one. He explains in the report that in February 2008 the City adopted the Municipal Housing Development Plan ("MHDP") as a way forward in dealing with and formalising all informal settlements in Tshwane. He states that the MHDP did not include Zandfontein because the settlement did not exist during the time of compilation (mid to late 2007), thus confirming to some extent the applicant's version that the settlement only began in 2009.

19. In terms of the MHDP, the City commissioned a number of Integrated Special Development Frameworks (ISDF) including one for Kirkney/Andeon/Zandfontein and another for Atteridgeville. One of the aims and objectives of the ISDF is "to develop all vacant, developable pockets of land for residential infill purposes". The Kirkney ISDF, approved by the city council in August 2009, records that "the bulk of land in the study area is in private ownership though there are a few large parcels of land owned by the City of Tshwane and Gauteng province". It further records that there are four pockets of government owned land in the area which could be utilised to set certain development trends in motion and states that the area holds enormous development potential by way of redevelopment, densification and the intensification of land uses. It then makes detailed recommendations about residential development. It contemplates that 31 130 units could be developed consisting of 16 569 bonded housing units and 14 561 subsidised units, with a further 9383 bonded houses and 2417 subsidised units to the west of the area.

20. The 20 000 informal structures in the Atteridgeville area cannot be upgraded because they are situated on adverse dolimitic conditions, with the result that in time inhabitants of those structures will have to be relocated elsewhere to developable land and the land availability identified in the Atteridgeville ISDF will not be sufficient for that purpose. It seems some of these people may need to be relocated on the land identified in

the Kirkney ISDF. Nonetheless, it is clear from the report that the City might be willing to negotiate and consider the applicant's development proposal in respect of the Zandfontein land, with such development likely to take at least 18-24 months to deal with environmental and budgeting issues. The report makes no specific proposal about what should happen to the occupiers in the interim while any such development is underway. Nor does it make any reference to the possibility of an emergency programme for temporary re-location.

21. Both the applicant and the residential association have set out in some detail the impact the informal settlement is having on social and environmental concerns in the area. The respondents suggest that their concerns are exaggerated. It has not been contested, or seriously disputed, that there is no sewerage reticulation, water supply, or electricity and fire safety measures in place. Water is drawn from the dam on the property, or obtained legitimately (at a price) and illegitimately from the neighbouring residential areas. The settlement is putting pressure on the environment and natural vegetation in the surrounding bushveld which is being used for firewood and building purposes. The applicant and residents say that there has been a marked increase in crime and illegal activities, and noise levels are ever increasing. It is likely, therefore, as the applicant contends, that property prices in the area have declined and

residents are being deprived of the potential benefit of their capital investments.

22. The occupiers filed their answering affidavits some time after the City of Tshwane filed its answering affidavit. In addition, the attorney for the occupiers has filed 429 questionnaires completed by or on behalf of some of the occupiers. The information it contains is of a limited nature and no attempt has been made to analyse the information in a meaningful way so as to provide the court with a clear impression of the number of occupiers, the history of the settlement and the authenticity of any claims of entitlement to remain on the property in terms of ESTA. The questionnaires, presented in the manner in which they have been, annexed to the confirmatory affidavit of the attorney of the occupiers without any analysis or elaboration of the information, its provenance or method of obtaining it, is of little or no value to the court. Undoubtedly, the court is entitled to play an active and inquisitorial role in proceedings of this nature, but that does not extend to analyzing and drawing conclusions from more than 400 questionnaires annexed without explanation to the papers by the occupiers' legal representative.

23. The people residing in the settlement, known to them as Melusi settlement, are poor people, who, as their circumstances reflect, live on the margins. I am unable to establish from the papers precisely how many

of the inhabitants are women, children or vulnerable persons by virtue of age, infirmity or disability. Mr Makhabela (the main deponent) states in his affidavit that the occupiers have been informal residents of the immediate vicinity for some time and that there have been informal structures for the duration. He maintains that during 2005 and 2006 these informal residents were requested by the authorities to settle on portions 150 and 124 where the occupiers remain at present. He says that he has lived on Zandfontein for the last 35 years. He does not say precisely where on Zandfontein, although he explains that he worked for Corobrick who had premises in the vicinity from 1977 until 1985. Corobrick closed its works and retrenched its employees when it moved to Pretoria North during 1985. During that time he lived in employees' accommodation consisting of a brick house, that was later destroyed. After the brick house was destroyed and he was retrenched he continued to live on the property. He is vague about exactly where he lived and does not describe the abode in which he resided. These circumstances, he contends, entitle him to remain on the property as an ESTA occupier. He acknowledges that there have been subsequent owners of the property who have employed some of the occupiers but he does not specifically aver that he obtained consent from them to remain on the property. He estimates that about 20 occupiers can claim ESTA rights by reason of their association with Corobrick .

24. Makhubela denies that there are ongoing invasions and asserts that since December 2009 there have not been more than 10 new shack erections. Importantly, he makes a concession, qualified by his lacking a binding mandate, that there is "a general sentiment" that the occupiers do not have an objection to move to alternative accommodation as long as it is in the near vicinity and provides the basic amenities for a dignified life. He sets out the advantages enuring to the occupiers from their present location, including easy access to the city, available transport and the proximity of schools for the benefit of the children in the settlement. At the same time, while baulking at the stereotyping of people residing in informal settlements, he accepts that the informal settlement has certain environmental and social impacts, but points out that the settlement is organised along orderly and organised lines. The photographs in Annexure K to the applicant's founding affidavit give some credence to that claim. They depict surprisingly well-built, albeit basic structures, in many cases surrounded by wooden or wire fencing, with each unit numbered. In essence, he submits that the fears of the applicant and resident's association about environmental and social ills are exaggerated.

25. Before turning to the law and principles governing the situation, it will be convenient first to deal with the only substantive defence raised by the respondents to the claim by the applicant for eviction, namely that some of the occupiers enjoy protection from eviction under ESTA. The City of

Tshwane has latched on to the defence and has submitted that the court does not have jurisdiction to adjudicate the matter at least in respect of some of the occupiers and it is not possible to determine on the papers which occupiers are subject to this court's jurisdiction and which are not. In terms of section 17 of ESTA, only the magistrate's court and the Land Claims Court have jurisdiction in respect of disputes arising under ESTA, unless all the parties consent to proceedings in the High Court. The City of Tshwane indicated that should ESTA apply it would not consent to jurisdiction.

26. Section 4 and 5 of PIE allow for the eviction of unlawful occupiers in certain specified circumstances and in accordance with appropriate procedures. The definition of "*unlawful occupiers*" in section 1 of PIE excludes a person who is an occupier under ESTA. An "occupier" in ESTA means "a person residing on land which belongs to another person and who has on 4 February 1997 or thereafter had consent or any other right in law to do so…" Section 2(1) of ESTA provides that the Act applies to all land "other than land in a township established, approved, proclaimed or otherwise recognised as such in terms of any law, or …. by such a township or townships…."

27. The first issue then in determining whether ESTA protection applies is whether the land in question is land other than land in a township

established, approved, proclaimed or otherwise recognised as such in terms of the law. It has not been seriously disputed by the applicant that the land is not in a township so established etc. The determinative issue accordingly is whether the occupiers are "occupiers" in terms of ESTA, that is whether they had consent or any other right to reside on the land. As already mentioned, Makhubela averred that he had been living on the farm Zandfontein for 35 years. He does not refer to any specific portion and it may be that he is referring to other portions that are not the land in dispute. He relies on the consent allegedly given to him by Corobrick. Mr Gerhard Botha, the owner of the land on which Corobrick was situated, has filed a replying affidavit. The relevant property was portion 22. The property is approximately 3,63 hectares in extent and previously was leased by the then owner, the Tongaat Group, to Corobrick, who conducted business from the premises. About 14 years ago Mercor Properties CC purchased the property from the Tongaat Group and demolished all the buildings including the housing for Corobrick employees. It built other buildings which until today are used for the panel beating business. Portion 22 is the adjacent land to the north of portion 150 and is not the applicant's land. The portions in issue in this case were purchased by close corporations in which Botha was the sole member. This land has never been utilised by anyone for business purposes. It was merely open veld and no one stayed there on a temporary or permanent basis. Botha personally ensured that no one stayed on the

land and he burnt the veld annually in order to clear the grass. He sold the properties about 4 years ago. He continued thereafter to keep an eye on the properties and states with conviction that no one resided on the land. According to him neither the representative of the previous owner nor the representative of the current owner or anyone else gave consent to Makhubela or any other occupier to reside on the property. The other three occupiers who deposed to affidavits also make vague allegations and in fact none of them actually states that he or she had consent from anyone to be there. The evidence presented by the deponents in an attempt to establish ESTA protection is vague to the extreme and does not indicate when, by whom and in what form consent was granted.

28. Added to that there is the undisputed rebutting evidence of the aerial photographs. Admittedly this evidence is annexed to the replying affidavit, but, it should be kept in mind, such photographs originate from the relevant department of the City of Tshwane. Annexures HdB11 and HdB12 reveal no visible structures on the land during 2005 and 2007. Annexure HdB13 shows that there were about 35 structures in 2009. A Google Earth photograph annexed to the occupiers' answering affidavit, as Annexure 1, and dated 13 September 2009, shows that there was growth to about 65 shacks then. And finally a further aerial photograph taken on 29 July 2010, annexed as Annexure HdB 17 to the applicant's second replying affidavit, shows a considerable and exponential growth to

about 400 shacks. The settlement effectively has grown to a township, increasing by 335 structures in the space of the last 9 months. The averments of the respondents that people have resided on the land since the 1980's with consent of the owners are therefore untenable and uncreditworthy and should be rejected. In the light of that I have no hesitation in concluding that none of the occupiers had consent and hence that ESTA is not applicable. It follows that this court has jurisdiction to determine the eviction issue in terms of PIE.

29. PIE has been enacted "within a defined and carefully calibrated constitutional matrix" to prevent both illegal evictions and the unlawful occupation of land. The constitutional values to be kept in mind are those in sections 25 and 26 of the Constitution. They respectively protect property owners against unjust deprivation and occupiers of land and housing against unjust eviction. Section 25(1) provides that no one may be deprived of property except in terms of law of general application and no law may permit arbitrary deprivation of property. Section 26(1) provides that everyone has the right to have access to adequate housing. In recognition of the non-self executing nature of the right in section 26(2) provides that the State must take reasonable legislative and other measures within its available resources, to achieve the progressive realisation of this right. Section 26(3) offers a strong constitutional safeguard against eviction. It reads:

> "No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions."

In *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) at 227 Sachs J succinctly summed up the essence of the right when he observed:

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

30. Section 4 of PIE deals with evictions by owners or persons in charge of property. The City of Tshwane has contended that the application was brought in terms of section 5, which permits urgent eviction by a court only if it is satisfied that there is a real and imminent danger of substantial injury or damage if the unlawful occupier is not evicted and provided certain other requirements are met, which the City says were not met in this case. I will return to this point later. The order of Raulinga J of 15 June 2010, on the basis that the eviction application was made in terms of

either section 4 or 5, gave effect to the procedural protections in section 4(2)-(5). Section 4(7) affords a remedy to a property owner against deprivation of its property by unlawful occupation while at the same time protecting occupiers against unconstitutional eviction. The relevant part of the provision reads:

> "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 woman."

31. If the court is satisfied that an eviction is justified it must order the eviction and determine a just and equitable date on which the unlawful occupier must vacate the land and the date upon which the eviction order may be carried out if the unlawful occupier does not vacate the land. In setting the just and equitable date for eviction the court must have regard to all the relevant factors including the period the unlawful occupier and his or her family resided on the land.

32. Of particular relevance in this case is the fact that there seems to be some willingness on the part of the occupiers to submit to a relocation process

provided it is managed in a humane manner sensitive to the needs of the community. The minutes of the engagement between the respondents on 3 September 2010 records that they agreed that a settlement of most issues is possible and that a final solution to the tenure insecurity of the occupiers can be achieved through a process. The suggested process involves a two year period to identify land and obtain all planning permissions and funding, and a comprehensive social survey. The occupiers placed on record that they are of the view that state land or private land that can be expropriated is available within a distance of five kilometres of the present settlement, and that they will not regard any resettlement further than that as reasonable. Such pre-conditions are likely to impede the possibility of settlement and raise the spectre of future delays and the indefinite deprivation of the applicant of critical incidents of its ownership of the land.

33. The circumstances of the occupation of the land and the limited period the occupiers have been on the land are equally relevant. The affidavits of the occupiers provide little information about the circumstances of individual occupiers, but it is perhaps self-evident that they have come to be upon the land because of the real difficulties facing the authorities in meeting the housing need. Regrettably the problem of homelessness caused by rapid urbanization is a major challenge to the authorities. But as discussed earlier, the aerial photographs indicate that the occupiers

arrived on the land recently and accordingly have less entitlement to secure tenure than others who have been waiting longer. A court assessing the circumstances of a land invasion must proceed compassionately, but at the same time should be mindful of the dangers of incentivising and rewarding the practice of unlawful land invasions as a convenient means of jumping the queue and obtaining preferential treatment at the expense of others waiting for housing allocations. In *Port Elizabeth Municipality v Various Occupiers* (*supra* at 232 H) Sachs J cautioned:

> "The public interest requires that the legislative framework and general principles which govern the process of housing development should not be undermined and frustrated by the unlawful and arbitrary actions of a relatively small group of people. Thus the well-structured housing policies of a municipality could not be allowed to be endangered by the unlawful intrusion of people at the expense of those inhabitants who may have had equal claims to be housed on the land earmarked for development by the applicant."

34. Section 4(7) includes as relevant "whether land has been made available or can reasonably be made available by a municipality or other organ of state or another land owner". The City of Tshwane has not made any other land available in this case. The question then is whether land can reasonably be made available. For reasons best known to it, the City has not been particularly forthcoming about the nature, description and full extent of the land it has available. And it has not disclosed any

information about the effort it has made, if any, to access the emergency programme established under the National Housing Code. In *Government of Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) the Constitutional Court held that it is incumbent upon a local authority to have in place funds and a programme to deal with emergency situations where an eviction order is granted to provide adequate housing, even on an interim basis, to desperate, destitute and landless people. In response to that ruling the National Housing Code has established an Emergency Subsidy Programme to provide housing assistance in emergency circumstances.

35. Paragraph 2 of Part A of the Emergency Subsidy Programme specifically provides that funding under the programme will be made available to municipalities as grants to enable them to respond rapidly to emergencies by means of the provision of land, municipal engineering services and shelter, including the possible relocation and resettlement of people on a voluntary and co-operative basis in appropriate cases. In terms of paragraph 2.3.1, an emergency exists when the MEC, on application by a municipality, agrees that persons owing to situations beyond their control are evicted or threatened with imminent evictions from land, or are in a situation where pro-active steps ought to be taken to forestall such consequences. Paragraph 2.6.1 stipulates that it will be the responsibility of a municipality to consider whether specific circumstances in its area of

jurisdiction merits the submission of an application for assistance under this programme, and, if so, it must initiate, plan and formulate applications for projects relating to emergency housing situations and submit the application to the relevant provincial department. Furthermore, a municipality is given the specific responsibility to:

> "ensure that situations which may qualify for consideration under the Programme are given *expeditious treatment*. This includes the use of accelerated land use and planning procedures."

36. Despite having a measure of sympathetic appreciation for the difficulties facing the City of Tshwane, it strikes me that its officials either have scant knowledge of this programme and the opportunity it presents to resolve the present impasse, or are reluctant to access its benefits. The municipality has a legal duty to act expeditiously to access funds under this programme and to do the necessary to establish emergency housing *rapidly*. Instead, in this case it has obfuscated around the issue of ESTA and has inappropriately tried to kick for touch to the Land Claims Court. It has also tried to avoid a section 4(7) procedure, claiming that the applicant brought the application in terms of section 5 and should be held to the requirements of that section. I agree with the applicant that when the matter was postponed to the ordinary opposed motion roll by agreement the intention was to deal with the application in terms of section 4(7). Notwithstanding its protestations to the contrary, the City of Tshwane

appears to be shying away from its responsibilities. It has not placed before the court any evidence that it has availed itself of the benefits of the emergency programme, or that it intends soon to do so.

37. It has been said that in applications like the present the court is called upon to go beyond its normal functions and engage in active judicial management according to equitable principles of an ongoing, stressful and law-governed social process with implications for the procedures it follows and the orders it might make - *Port Elizabeth Municipality v Various Occupiers* (*supra* at 237). Accordingly, it seems appropriate that an order should be made compelling the City of Tshwane to make urgent application to the province and to direct the province to process that application expeditiously. The provincial government has not been joined as a party or even had effective notice of the proceedings and service of the pleadings. Fairness dictates therefore that any direction from the court at this stage should be in the form of an institutional request. As appears from what follows, should the City and the province for whatever reason be unable to provide a budget for emergency accommodation such is likely to result in the final analysis in an award of compensation for expropriation of the right of use or in constitutional damages. In my opinion, the funding might be better deployed were the organs of state to meet their obligations earlier by using it directly under the emergency

programme in a manner bolstering confidence in the state's ability to resolve pressing social problems expeditiously.

38. At the commencement of the hearing Mr Strydom for the applicant handed up a draft order detailing the relief sought by the applicant. I propose altering it in some respects to take account of what I consider necessary to move this dispute towards a satisfactory conclusion. From what has gone before, I am persuaded that it will be just and equitable to order the eviction together with safeguards ensuring that the occupiers are not left destitute. In reaching that conclusion I have held uppermost the fact that the occupation has been for a short period and that the City of Tshwane has available to its means to provide short-term emergency accommodation which should not impinge unduly upon its other long-term human settlement projects. By acting in terms of the emergency programme, and by enlisting the assistance of the province, the City will be able to avoid the problem of queue jumping.

39. The draft order seeks to direct the City of Tshwane firstly to make a full list of the unlawful occupiers, then to make alternative emergency accommodation or land available, and then for a process of eviction and relocation to that land. Paragraph 9 of the draft order deals with the question of compensation. The applicant no longer seeks a monthly payment of R991 666 as sought in the notice of motion. Instead it seeks

an order that should the City of Tshwane fail to provide alternative emergency accommodation and for land by the specified date that a declaratory order be issued that the applicant is entitled to compensation from the City of Tshwane to be calculated in terms of section 12(1) of the Expropriation Act 63 of 1975, as if the right to use had been acquired in terms of that Act and that the quantification of the compensation be determined by way of oral evidence and if need be in accordance with the directions of the court.

40. Compensation could be payable in a case such as this when a relevant organ of state, through its conduct or omissions, in effect expropriates or arbitrarily deprives a party of its property. It is also conceivable that an applicant could be awarded constitutional or delictual damages for proven constitutional violations or breaches of statutory duty. However, I am not persuaded that the applicant has adduced sufficient evidence of any such violation or has laid a proper basis for a declarator that it be entitled to compensation for the contingency of the City not providing emergency accommodation or land. The appropriate time for determining any entitlement to compensation or damages is when any such violation or breach actually materialises. The City has not effectively expropriated the applicant. At most it is perhaps in breach of its duties to access provincial government funding and to facilitate a solution. It may be that in time its persistent and continued failure to act will concretize into a creeping

expropriation of the applicant's right to use. But I do not accept, and nor is the evidence sufficient for that purpose, that its present conduct can be equated with an expropriation. Should it fail to comply with the directives and orders I propose to issue, its conduct, justifications and explanations associated with such failure, should it occur, must be assessed *ex post facto* to determine whether a creeping expropriation has indeed occurred.

41. The applicant's reliance on *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd* 2005 (5) SA 3 (CC) in support of the claim for compensation is misplaced, albeit understandable. In that case a situation had been reached, as a consequence of neglect and prevarication, where the community had grown to 40 000 people over a number of years, with the result that the eviction order could not be effectively implemented because the residents could not be relocated on account of the size of the community and the unacceptable risk of social dislocation. The court held that it had been unreasonable for the State to remain passive and consequently it had breached its obligation to take the available reasonable steps (expropriating the property, providing other land) to ensure effective relief for the private land owner. By failing to do anything the State had breached the landowner's constitutional right to an effective remedy as required by the rule of law and section 34 of the Constitution which entrenches the right of everyone to have any dispute that can be resolved by the application of law decided in a fair public

hearing before a court or, where appropriate, another independent and impartial tribunal or forum, which would normally include the mechanisms and infrastructure created to facilitate the execution of court orders. We are not at that stage in the present matter. The City has evinced a willingness to engage meaningfully (albeit not very expeditiously or conscientiously) and no court order has yet been issued directing it to act in a particular manner, which it has failed to heed. An order declaring an entitlement to compensation, contingent on future possible failures of duty or in violation of constitutional rights, in my opinion, would be premature.

42. In *Blue Moonlight Properties 39 (Pty) Ltd v Occupiers of Saratoga Avenue and Another* [2010] JOL 25031 (GSJ), Spilg J, having found various breaches of duty on the part of the City of Johannesburg by failing to apply a budgetary surplus to implement its emergency or temporary accommodation programme to assist indigent unlawful occupiers of privately owned property, awarded constitutional damages to the landowner. Because the landowner had to some extent been supine, the learned judge assessed the damages award by reference to rental values and not by reference to lost opportunity revenues had the property been developed in the interim period. He based the compensation on the benefit to the municipality of not being obliged to incur the cost of itself procuring accommodation and effectively foisting its duties on the applicant when it appeared to have adequate resources at the time.

Again, it may be that the applicant in the present case will eventually obtain similar relief because it becomes compelled to allow its land to be used to provide accommodation to people for whom the City has the appropriate responsibility. However, it would be a dangerous precedent to regard the imposition of liability for compensation or damages as the starting point. First an eviction order should be granted and humanely implemented by the City of Tshwane meeting its constitutional obligations after having a fair and proper opportunity to do so.

43. The City of Tshwane has put up vigorous opposition to the application, attempting, if perhaps not prudently, at least legitimately, to avoid the consequence of an eviction order and the obligations it will impose upon it in terms of the National Housing Code. It has not succeeded, and therefore I see no reason why it should not in accordance with the ordinary conventions pay the costs of the applicant.

44. I therefore make the following orders:

(i) The third respondent is ordered within 10 days of this order to conduct an audit and to compile a comprehensive report detailing the particulars of each and every unlawful occupier occupying the applicant's properties mentioned in paragraph 2 of this judgment as at the date of this order.

(ii) The third respondent is ordered to initiate, plan, formulate and submit an application for assistance to the provincial department responsible for human settlements of the Gauteng government, in terms of the applicable provisions of the National Housing Programme for Housing Assistance in Emergency Housing Circumstances, for the purpose of acquiring a grant, resources and necessary technical co-operation to enable it to respond rapidly to the emergency arising from the imminent eviction of the second respondents from the applicant's land, as provided for in this order.

(iii) The application referred to in paragraph (ii) of this order shall be submitted by the second respondent to the provincial department responsible for human settlements within 30 days of this order.

(iv) The provincial department responsible for human settlements of the Gauteng government is mandated and requested to consider and determine the application of the third respondent within 14 days of the submission of the application and to furnish written reasons for its decision to

the third respondent and the legal representatives of the applicant and the second respondents.

(v) The third respondent is ordered to make available alternative emergency accommodation or land, as envisaged in terms of the National Housing Programme for Housing Assistance in Emergency Housing Circumstances, for the unlawful occupiers occupying the applicant's properties on the date of this order, which emergency accommodation and/or land must be provided on or before 31 January 2011.

(vi) The unlawful occupiers referred to in the report referred to in paragraph (i) of this order are ordered to vacate the applicant's property on or before 28 February 2011.

(vii) The third respondent is ordered to assist the unlawful occupiers with transport and other means to relocate from the applicant's properties to the accommodation and/or land contemplated in paragraph (v) of this order.

(viii) The third respondent is ordered to consult and to meaningfully engage with the intervening party, the West Moot Residents Association, with a view to accommodating

the concerns, rights and interests of its members and to give full and proper consideration to its views regarding the identification of alternative land, and the allocation and relocation of the unlawful occupiers to the alternative emergency accommodation and/or land referred to in paragraph (v) of this order.

(ix) In the event that the unlawful occupiers should fail or refuse to vacate the applicant's properties as contemplated in paragraph (vi) of this order on or before 28 February 2011, the applicant shall be entitled to evict the unlawful occupiers from its properties at any time on or after 15 March 2011.

(x) All other unlawful occupiers or invaders who occupy the applicant's properties on 15 March 2011, but who are not included in the report referred to in paragraph (i) shall be evicted from the properties on that date irrespective of alternative accommodation being provided by the third respondent to them or not.

(xi) The Sheriff and the South African Police Services are mandated and requested to assist the applicant in its

activities and endeavours to evict all unlawful occupiers and invaders from the properties as envisaged in this order.

(xii) The applicant's prayer for compensation in paragraph 4 of Part B of this notice of motion is postponed *sine die*. The

application for the payment of and the quantification of such compensation shall be referred to and decided by oral evidence on such date and in accordance with any directions regarding pleadings, discovery, inspection and other matters of procedure as determined by the Deputy Judge President or any other judge designated by him.

(xiii) The third respondent is ordered to pay the applicant's costs of the application, including the costs of the proceedings on 6 July 2010 and 26 August 2010.

John Murphy

JR MURPHY
JUDGE OF THE HIGH COURT

Date Heard: 26 August 2010
For the Applicant: Adv T Strydom
Instructed By: Moduka More Attorneys, Pretoria
For the First and Second Respondents: Adv CR Jansen
Instructed By:Gilfillan du Plessis Inc., Pretoria
For the Third Respondent: Adv J Botha
Instructed By: Stegmanns Inc.
For the Intervening Party: Adv J Mollentze
INSTRUCTED BY: HURTER + SPIES INC