REPORTABLE

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Case no: 735/2011

In the matter between:

THE CITY OF JOHANNESBURG Appellant

and

CHANGING TIDES 74 (PTY) LTD First Respondent

THE UNLAWFUL OCCUPIERS OF TIKWELO

HOUSE, NO 48 AND 50 DAVIES STREET,

DOORNFONTEIN, JOHANNESBURG) 2nd to 98th Respondents

THE SOCIO-ECONOMIC RIGHTS INSTITUTE

OF SOUTH AFRICA Amicus Curiae

Neutral citation: *City of Johannesburg v Changing Tides 74 (Pty) Ltd and 97 others (The Socio-Economic Rights Institute of South Africa intervening as amicus curiae)*(735/2011) [2012] ZASCA 116 (14 September 2012)

Coram: MTHIYANE DP, LEWIS, TSHIQI, WALLIS and PETSE JJA.

Heard: 21 August 2012

Delivered: 14 September 2012

Summary: Eviction in terms of Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE) – relationship between ss 4(6) and (7) – joinder of local authority – whether required or permissible – power of court to make an order that is just and equitable – enquiry to be undertaken by court – obligations of applicant, local authority and respondents discussed.

ORDER

On appeal from: South Gauteng High Court (Wepener J sitting as court of first instance) it is ordered that:

1 The appeal is upheld and each party is ordered to pay its or their own costs of appeal.

2 Paragraph 2 of the order of the high court is declared to be legally ineffective.

3 Paragraphs 3 and 4 of the high court's order are set aside.

4 The application for eviction is remitted to the high court in order for it to determine the date upon which all of the occupiers of Tikwelo House are to be evicted from that building, the terms upon which the City is to provide temporary emergency accommodation to the persons referred to in paragraph 5(b) below of this order, any other conditions attaching to that eviction order and the costs of the application.

5 The remittal is subject to the following further orders:

(a) The attorneys for the occupiers, the Legal Resources Centre (the LRC), are directed on or before 30 September 2012

to furnish the attorneys for the City of Johannesburg with a list of those of its clients who, as a result of their eviction from Tikwelo House, will require temporary emergency accommodation, together with their names, ages, family circumstances, sources of income and appropriate proof of identity. The list and those details shall be confirmed by an affidavit of information and belief from a representative of the LRC and where possible by affidavits from the occupiers referred to therein.

(b) It is declared that the City of Johannesburg is obliged to provide all of the persons whose names appear on that list with temporary emergency accommodation by no later than two weeks prior to the date of the eviction order to be determined by the high court.

c) The City of Johannesburg is directed, by no later than 31 October 2012, to deliver a report to the high court, confirmed on affidavit by an appropriate official of the City, detailing the accommodation that it will make available to the occupiers and when such accommodation will be available and containing an undertaking to make that accommodation available. That accommodation must be in a location as near as feasibly possible to the area where Tikwelo House is situated and the report must specifically deal with the issue of proximity and explain why the particular location and form of accommodation has been selected. It must also set out the steps taken during the two months before the report is filed to

engage with the occupiers through the LRC or any other means that may appear appropriate.

d) The occupiers are entitled by no later than 30 November 2012 to deliver affidavits dealing with the contents of the City's report and specifying any objections thereto and the City is entitled within two weeks thereafter to deliver such further affidavits as it deems appropriate.

e) The application must then be set down on the opposed roll for hearing. If at any stage there is non-compliance with the provisions of this order, Changing Tides (Pty) Ltd is authorised to set the matter down for hearing for appropriate relief.

JUDGMENT

WALLIS JA (MTHIYANE DP, LEWIS, TSHIQI and PETSE JJA concurring)

Introduction

[1] This case illustrates the difficulties that confront a court of first instance faced with an application for an eviction order and seeking to give effect to constitutional prescripts. As will emerge, the judge in the high court sought to address the issue by granting an order, at the instance of the applicant, that adapted an order made by this court in a similar case. By the conclusion of argument all counsel who appeared before us agreed that in doing so he erred. That is a view we share and results in the

appeal being upheld to some extent and a remittal of the case to the high court on terms set out in the order. But first it is necessary to set out the facts giving rise to the appeal.

[2] The first respondent, Changing Tides 74 (Pty) Ltd (Changing Tides), owns Tikwelo House. The building was formerly a factory or warehouse. Some years ago, when under different ownership and in circumstances that Changing Tides is unable to explain, people started to live there. The interior was divided into flats using rudimentary partitioning. Whether the original owners were party to this or whether its occupation occurred through people desperate for a roof over their heads simply taking possession of the building is not known. Whilst the building was in the hands of its previous owners, third parties took control of access to it and let rooms and collected rentals from the occupiers. They now maintain that control as against Changing Tides by force or the threat of force. This phenomenon is appropriately described as the hijacking of the building. Tikwelo House is unsuited to human habitation and in a state of disrepair, with no toilet or ablution facilities, no water supply or sewage disposal, illegal electricity connections, inadequate ventilation and refuse, including human waste, strewn in open spaces. Counsel who appeared for the occupiers said that they accept that it is a death trap and that it is in no-one's interests that they continue to live there. It is a health and fire hazard and the local police claim that it is a focus for illegal activities. The appellant, the City of Johannesburg (the City), has given Changing Tides notice to comply with the public health and emergency service by-laws as well as the provisions of the National Building Regulations and Building Standards Act 103 of 1977 and has commenced proceedings against Changing Tides to compel compliance with its demands.

[3] Changing Tides has no responsibility for this situation. In late 2007 it acquired this property and three others in settlement of debts owed to associated entities by the previous owner and their shareholders. Its intention was to redevelop the four properties. Whilst it has tried to obtain control over the property the hijackers have prevented it from doing so. Its only presence on the property takes the form of a single security guard whose principal function is to observe what is happening there. A previous attempt in 2008 to obtain an eviction order was unsuccessful. On 6 April 2011 it commenced the present proceedings to obtain possession of the building. It cited as respondents all the occupiers of the building and furnished the names (often in truncated form) of 97 individuals in a list attached to the notice of motion, stating that, apart from those names, particulars of the respondents were not known to it. It also cited the City, contending that the latter had a direct and substantial interest and that in eviction proceedings of this nature the joinder of the City was inevitable.

[4] The application was not opposed. It came before Wepener J in the South Gauteng High Court on 14 June 2011. Both Changing Tides and the City were represented, the former by counsel and the latter by its attorney. Counsel for Changing Tides sought an amended order the principal purpose of which was to take account of the judgment of this court in *Blue Moonlight.*[1] The City opposed this on the grounds that the *Blue Moonlight* judgment was under appeal to the Constitutional Court,[2] but the judge held himself bound by the judgment of this court. He accordingly granted, in addition to an eviction order, a further order that the sheriff prepare a 'matrix' (more accurately a schedule) of information

1 *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd & another* 2011 (4) SA 337 (SCA).
2 The appeal was due to be heard on 11 August 2011.

concerning 'each occupier and their household members' as specified in the order and an order that the City provide the occupiers whose names appeared in that schedule with temporary emergency accommodation. The City was ordered to pay the costs of the sheriff in preparing the schedule of information.

[5] On 12 October 2011, shortly before the Constitutional Court delivered its judgment in *Blue Moonlight*,[3] the judge granted leave to appeal against the order for the provision of temporary emergency accommodation and the costs order against the City. Although the occupiers of the building had thus far played no part in the proceedings, counsel appeared on their behalf to oppose the grant of leave to appeal. They did not, however, seek leave to appeal against the eviction order nor did they signify an intention to seek the rescission of the eviction order. The matter before us is therefore an appeal against only those parts of the high court's order already mentioned. Prior to the appeal we received an application by the Socio-Economic Rights Institute of South Africa to intervene as amicus curiae and that was granted on the basis that they would make written submissions and address brief oral argument.

The order

[6] The limited ambit of this appeal occasioned considerable difficulties. It is therefore necessary to consider the full terms of the court's order. It reads:

'1. The First to Ninety Seventh Respondents and all persons occupying through them (collectively 'the occupiers') are evicted from the immovable property situated at numbers 48 and 50 Davies Street, Doornfontein, Johannesburg and described as Erfs 150 and 151 Doornfontein Township, Registration Division I.R., Gauteng more

3 The judgment was delivered on 1 December 2011 and is reported as *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd & another* 2012 (2) SA 104 (CC) (hereafter *Blue Moonlight CC*).

commonly known as Tikwelo House.

2. The Sheriff alternatively his duly appointed Deputy together with such assistance as he deems appropriate including the South African Police Services is ordered and authorised to enter into Tikwelo House at no 48 and 50 Davies Street Doornfontein Johannesburg in order to compile a 'matrix' of information in respect of each occupier and their household members including children ('the occupiers') consisting of the information listed below and to furnish a copy of such matrix to the Applicant and the 98th respondent as well as file a copy thereof in the Court file, within in 15 days of this order:

1.1 Full names;

1.2 Nationality and language preference;

1.3 Date on which they allege to have taken occupation in the building;

1.4 Occupation;

1.5 Identity number supported by copy of identity document or document which positively identify the occupier;

1.6 Income supported by payslip if possible;

1.7 Number and name of dependent occupiers;

1.8 Age

1.9 Whether the occupier has applied for State-assisted relief in terms of the RDP Programme or any other State sponsored programme, and proof of such application.

3. The 98th Respondent is ordered to provide those occupiers whose names appear in the matrix to be compiled by the Sheriff of the Court aforementioned with temporary emergency accommodation as decant in a location as near as feasibly possible to the area where the property is situated, provided that they are still resident at the property and have not voluntarily vacated it as of 14th August 2011, by which date the occupiers are to vacate, failing which the Sheriff of the court is ordered to evict them.

4. The 98th Respondent is to pay the costs of the Sheriff in respect of compiling, delivering and filing the matrix aforementioned.'

[7] The first difficulty is that as a result of a drafting error the eviction order in paragraph 1 appears to relate only to the persons named in the list

annexed to the notice of motion and not to all the occupiers of the building, although the application had been directed at all the occupiers. Counsel for Changing Tides informed us that the notices in terms of ss 4(2) and (5) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE) were directed at and served, in accordance with an order in terms of s 4(4) of PIE, on all the occupiers. Paragraphs 2 and 3 of the order are clearly directed at an eviction of all the occupiers, notwithstanding the apparently restricted ambit of paragraph 1. No-one appears to have noticed this and the heads of argument in the appeal were delivered on the basis that the order granted related to all occupiers and not simply those referred to as the first to ninety seventh respondents. There was accordingly an internal contradiction in the order itself.

[8] The next difficulty is that in terms of paragraph 2 of the order the sheriff was directed, with the assistance of the South African Police if required, to enter Tikwelo House and compile the schedule of information regarding the occupiers and their personal circumstances. This is not the proper function of the sheriff. Those functions are prescribed by statute.[4] In the high court it is to execute all sentences, decrees, judgments, writs, summonses, rules, orders, warrants, commands and processes of the court and make return of the manner of execution thereof to the court and any party at whose instance the sheriff was acting.[5] Paragraph 2 of the order of the high court requires the sheriff to procure and assemble information to enable the City to discharge its constitutional obligations to persons evicted from Tikwelo House and rendered homeless by their eviction. That is not a function of the sheriff and it cannot be made the function of the sheriff by incorporating the

4 Section 3(1) of the Sheriffs Act 90 of 1986 as read with other statutes defining those functions.
5 Section 36(1) of the Supreme Court Act 59 of 1959.

obligation in a court order.

[9] There is the further difficulty that, apart from any tacit coercion that may arise from the sheriff being accompanied by the police, there is no obligation on the occupiers to furnish the information required to draw up the proposed schedule. If this building is a centre for criminal activities and, as suggested by the City, houses a number of illegal immigrants, I fail to see on what basis it can be thought that, other than a few, the occupiers will meekly provide the sheriff with the information set out in paragraph 2 of the order. In addition those who have hijacked the building and have an interest in obstructing the eviction of the occupiers may threaten the occupiers or worse if they co-operate with the sheriff. That part of the order was accordingly improvidently sought and erroneously granted. It is therefore a nullity.[6]

[10] That conclusion on its own inevitably means that paragraphs 3 and 4 of the high court order cannot stand, as they are dependent on the fulfilment by the sheriff of the obligations set out in paragraph 2 of the order. There are, however, other reasons why that must be the outcome of this appeal. Whilst the judge was correct to accept that he was bound by and needed to apply the decision of this court in *Blue Moonlight*, he overlooked the fact that there were differences between that case and the one before him. There the occupiers were identified and represented and had placed undisputed information before the court regarding their personal circumstances that demonstrated that, if evicted, they would be rendered homeless. That type of information was not available to Wepener J in this matter. No doubt he relied on the knowledge that any reasonably perceptive person would have that, in a situation such as

6 Motala v The Master 2012 (3) SA 325 (SCA) paras 11-14.

prevailed at Tikwelo House, it was overwhelmingly probable that the occupiers would be extremely poor and might well be rendered homeless by eviction. However, without greater detail as to their circumstances and their needs if evicted – the needs of a family with three children being different from those of three young men sharing living quarters – he could not be satisfied that the order he was making was just and equitable, that the timing of the eviction order was just and equitable or that the conditions he was attaching to it were appropriate. Whilst he knew from the affidavits that there were children living in the building, and it was reasonable for him to assume that there might well be households headed by women, he lacked information relevant to the assessment of the factors specified in s 4(7) of PIE. The absence of that information precluded a proper exercise of his discretion.[7] For those reasons these two paragraphs of his order must be set aside. The debate before us centred on what should take their place. In order to determine that it is necessary to examine the current state of our law in regard to evictions.

The legal framework

[11] In terms of s 4(7) of PIE an eviction order may only be granted if it is just and equitable to do so, after the court has had regard to all the relevant circumstances, including the availability of land for the relocation of the occupiers and the rights and needs of the elderly, children, disabled persons and households headed by women. If the requirements of s 4 are satisfied and no valid defence to an eviction order has been raised the court 'must', in terms of s 4(8), grant an eviction order. When granting such an order the court must, in terms of s 4(8)(a) of PIE, determine a just and equitable date on which the unlawful

7 *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 32; *Occupiers, Shulana Court, 11 Hendon Road, Yeoville, Johannesburg v Steele* [2010] 4 All SA 54 (SCA) paras 11 and 14.

occupier or occupiers must vacate the premises. The court is empowered in terms of s 4(12) to attach reasonable conditions to an eviction order.

[12] There does not appear to have been a consideration of the precise relationship between the requirements of s 4(7), (or s 4(6) if the occupiers have been in occupation for less than six months), and s 4(8) in the context of an application for eviction at the instance of a private landowner. In some judgments there is a tendency to blur the two enquiries mandated by these sections into one. The first enquiry is that under s 4(7), the court must determine whether it is just and equitable to order eviction having considered all relevant circumstances. Among those circumstances the availability of alternative land and the rights and needs of people falling in specific vulnerable groups are singled out for consideration. Under s 4(8) it is obliged to order an eviction 'if the … requirements of the section have been complied with' and no valid defence is advanced to an eviction order. The provision that no valid defence has been raised refers to a defence that would entitle the occupier to remain in occupation as against the owner of the property, such as the existence of a valid lease. Compliance with the requirements of section 4 refers to both the service formalities and the conclusion under s 4(7) that an eviction order would be just and equitable.[8] In considering whether eviction is just and equitable the court must come to a decision that is just and equitable to all parties.[9] 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.

8 *ABSA Bank Ltd v Murray & another* 2004 (2) SA 15 (C) para 19.
9 Ibid, para 21; *Port Elizabeth Municipality v Various Occupiers*, supra, para 13.

[13] Two factors that have loomed large in our case law on evictions, both under PIE and otherwise, are the risk of homelessness and the availability of alternative land or accommodation. In the case of occupations of public land[10] and evictions at the instance of public bodies,[11] the emphasis has fallen on the constitutional obligations of the arms of government mandated to address the housing needs of the people affected by the eviction, and in particular to address the plight of those who face an emergency situation of homelessness. The starting point is the judgment in *Grootboom* where a declaratory order was made that the State was obliged to develop a programme, including the provision of relief for people who had no access to land, no roof over their heads and were living in intolerable circumstances. In *Port Elizabeth Municipality* the Constitutional Court upheld an order of this court that an eviction order from privately owned land, at the instance of the local authority, should not have been made when it was unclear whether the alternative accommodation being offered by the municipality would afford a reasonable measure of security of tenure. In *Olivia Road* it endorsed a settlement agreement concluded between the municipality and the occupiers of the building, after a process of mediation, that provided for the occupiers to vacate the building, and in *Joe Slovo* it crafted an elaborate eviction order under which the evictees were to be relocated elsewhere; there was to be engagement between the municipality and the residents and the entire process was subject to supervision by the court. The difficulties facing courts in this regard are illustrated by the fact that some 21 months later the Constitutional Court discharged the order in its

10 *Government of the Republic of South Africa & others v Grootboom* 2001 (1) SA 46 (CC).
11 *Baartman & others v Port Elizabeth Municipality* 2004 (1) SA 560 (SCA) and on appeal from it *Port Elizabeth Municipality v Various Occupiers*, supra; *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg & others* 2008 (3) SA 208 (CC); *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes & others (Centre on Housing Rights and Evictions & another, amici curiae)* 2010 (3) SA 454 (CC) (hereafter *Joe Slovo*).

entirety.[12]

[14] The disparate situations in each of these cases means that care must be taken in simply transposing either what was said in the judgments, or the orders that were made, to other different situations, where those statements may have less application and those solutions may be inappropriate. What is clear and relevant for present purposes is that the State, at all levels of government, owes constitutional obligations to those in need of housing and in particular to those whose needs are of an emergency character, such as those faced with homelessness in consequence of an eviction. Those obligations arise under s 26 of the Constitution and exist separately from any question of whether it is just and equitable for a court to grant an eviction order. As Harms DP said in *City of Johannesburg v Rand Properties (Pty) Ltd & others*,[13] in relation to persons in crisis with no access to land, no roof over their heads and living in intolerable conditions:

'Eviction, at the very least, triggers an obligation resting on the city to provide emergency and basic shelter to any affected respondent.'

[15] Where the eviction takes place at the instance of an organ of state in circumstances to which PIE is applicable the court can only order eviction if it is satisfied that it is just and equitable to do so after having regard to all relevant factors including those set out in s 6(3) of PIE, namely the circumstances in which the occupiers came to occupy the land and erect structures thereon; the period they have resided on the land and the availability of suitable alternative accommodation or land. The last of these has been held to be vital to the justice and equity evaluation and a

12 *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes & others (Centre on Housing Rights and Evictions & another, amici curiae)* 2011 (7) BCLR 723 (CC).
13 *City of Johannesburg v Rand Properties (Pty) Ltd & others* 2007 (6) SA 417 (SCA) para 47. The *Olivia Road* judgment (fn 10 ante) is the appeal from this decision.

crucial factor in the enquiry.[14] It cannot, however, be the sole enquiry nor, notwithstanding its importance, is it absolutely decisive. The Constitutional Court has on several occasions stressed that, in the present situation in South Africa, where housing needs are so great and resources so limited, there cannot be an absolute right to be given accommodation.[15] Specifically in regard to s 6(3)(c) of PIE, which requires the court to have regard to the availability of alternative accommodation or land, it has said that there is no unqualified constitutional duty on local authorities to ensure that there cannot be an eviction unless alternative accommodation has been made available.[16] The correct position appears to be, as explained by O'Regan J in *Joe Slovo*,[17] that an eviction order in circumstances where no alternative accommodation is provided is far less likely to be just and equitable than one that makes careful provision for alternative housing. Neither PIE nor s 26 of the Constitution provides an absolute entitlement to be provided with accommodation. In some circumstances a reasonable response to potentially homeless people may be to make permanent housing available and in others it may be reasonable to make no housing at all available.[18] In all of this the court will have to be mindful of all other relevant factors including the resources available to provide accommodation.[19]

[16] The issue of the availability of alternative accommodation is more difficult in the context of an eviction at the instance of an owner of property that is not an organ of state. There another constitutionally protected right, the right to property,[20] comes into play. As pointed out in

14 *Joe Slovo* para 105*(c)* per Yacoob J and para 161 per Moseneke DCJ.
15 *Grootboom* para 95
16 *Port Elizabeth Municipality* para 28.
17 *Joe Slovo*, para 313.
18 *Olivia Road* para 18.
19 *Grootboom* para 46.
20 Section 25 of the Constitution.

this court in *Ndlovu v Ngcobo: Bekker & another v Jika*[21] the effect of PIE is not to expropriate private property. What it does is delay or suspend the exercise of the owner's rights until a determination has been made whether an eviction would be just and equitable and under what conditions. The Constitutional Court endorsed that approach in *Blue Moonlight*.[22]

[17] That situation differs from the case where an organ of state seeks the eviction. In such a case it is almost always also the body responsible for providing alternative accommodation. The majority of cases where an organ of state asks for an eviction order will involve departments at various levels of government, that are either themselves responsible for the provision of housing or, if not, are nonetheless closely linked to departments that do bear that responsibility. In those circumstances to link the availability of alternative land or accommodation to the ability to obtain an eviction order is relatively straightforward. It will generally only be just and equitable to grant an eviction order at the instance of one arm of the state, if the related arm of the state bearing the obligation to attend to the housing needs of the population is able and willing to address the consequences of that eviction by ensuring that alternative land or accommodation is available to those evicted. Conversely eviction will ordinarily not be just and equitable in that situation if alternative land or accommodation is not made available.

[18] The position is otherwise when the party seeking the eviction is a

21 *Ndlovu v Ngcobo: Bekker & another v Jika* 2003 (1) SA 113 (SCA) para 17; *Wormald NO & others v Kambule* 2006 (3) SA 562 (SCA) para 15.

22 *Blue Moonlight CC* para 40. The right of property owners is not absolute. One can imagine cases where it would not be just and equitable to grant an eviction order at the instance of a private landowner, as in the case of a small portion of undeveloped land that the owner had allowed to be occupied for many years by former employees, who were now aged, in circumstances where the owner was not inconvenienced by their presence. But that situation has nothing to do with the availability of alternative land or accommodation.

private person or entity bearing no constitutional obligation to provide housing. The Constitutional Court has said that private entities are not obliged to provide free housing for other members of the community indefinitely, but their rights of occupation may be restricted, and they can be expected to submit to some delay in exercising, or some suspension of, their right to possession of their property in order to accommodate the immediate needs of the occupiers. That approach makes it difficult to see on what basis the availability of alternative land or accommodation bears on the question whether an eviction order *should* be granted, as opposed to the date of eviction and the conditions attaching to such an order. One can readily appreciate that the date of eviction may be more immediate if alternative accommodation is available, either because the circumstances of the occupiers are such that they can arrange such accommodation themselves, or because the local authority has in place appropriate emergency or alternative accommodation. Conversely, justice and equity may require the date of implementation of an eviction order to be delayed if alternative accommodation is not immediately available. It is, however, difficult to see on what basis it affects the question whether it is just and equitable to make such an order. Perhaps in a case, where the occupiers would be entitled to a lengthy period of notice before being required to vacate, the unavailability of alternative land or accommodation might operate as a factor to persuade the court that the issue of an eviction order, at the stage that the application came before it, would not be just and equitable, but such cases are likely to be rare.[23] This does not mean that courts may disregard the question of the availability of alternative land or accommodation – that would ignore the express requirements of s 4(7) – but the weight this factor will carry in making the initial decision

23 If the landowner had no immediate or even medium term need to use the property and it would simply be sterilised by an eviction order, the court could legitimately hold the view that it was not just and equitable at that time to grant an eviction order. That would be reinforced by a lack of availability of alternative land.

whether an eviction order is just and equitable may not be great.

[19] In most instances where the owner of property seeks the eviction of unlawful occupiers, whether from land or the buildings situated on the land, and demonstrates a need for possession and that there is no valid defence to that claim, it will be just and equitable to grant an eviction order. That is consistent with the jurisprudence that has developed around this topic. In *Ndlovu v Ngcobo*,[24] Harms JA made the point that ownership and the lack of any lawful reason to be in occupation are important factors in the exercise of the court's discretion. In the *Modderklip Boerdery* case[25] Marais J carefully weighed the different factors and granted an eviction order. His order was upheld by this court[26] and not questioned in the Constitutional Court.[27] The eviction order granted by this court in *Rand Properties*[28](not a PIE case, but one in which the circumstances relating to the building were similar) was set aside by the Constitutional Court in *Olivia Road*,[29] but on the grounds of the lack of engagement between the municipality and the occupiers, not its appropriateness. In *Blue Moonlight* an eviction order was granted at first instance and confirmed subject to different conditions in this court and the Constitutional Court.[30]

[20] Where the eviction is sought by a private landowner the

24 Para 17.
25 *Modderklip Boerdery (Pty) Ltd v Modder East Squatters & another* 2001 (4) SA 385 (W).
26 *Modderfontein Squatters, Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, Amici Curiae): President of the Republic of South Africa & others v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, Amici Curiae)* 2004 (6) SA 40 (SCA) para 48.
27 *President of the Republic of South Africa & another v Modderklip Boerdery (Pty) Ltd (Agri SA & others, Amici Curiae)* 2005 (5) SA 1 (CC).
28 Footnote 12, ante.
29 Footnote 10, ante.
30 See also *Occupiers of Skurweplaas 353 JR v PPC Aggregate Quarries (Pty) Ltd & others* 2012 (4) BCLR 382 (CC). At first instance there are the judgments in *ABSA Bank Ltd v Murray & another*, supra; *Davids & others v Van Straaten & others* 2005 (4) SA 468 (C) and *Jackpersad NO & others v Mitha & others* 2008 (4) SA 522 (D).

availability of alternative land or accommodation assumes greater importance in the second enquiry, namely, what is a just and equitable date for eviction? It is here that the constitutional obligations of the appropriate arm of government – in our cities this is inevitably the municipality – come into focus and assume their greatest importance. The reason is that, even if it is just and equitable to grant an eviction order that is not the end of the enquiry, because any eviction order must operate from a date fixed by the court and that date must be one that is just and equitable.

[21] Accordingly the availability of alternative land or accommodation is relevant to both enquiries into what is just and equitable. That link between the first and second stages of the enquiry underpins the numerous decisions in which our courts have held that, before determining whether an eviction order should be granted, the relevant authorities must be engaged in order to ensure that they will discharge their obligations to the evictees. I need mention only four of the leading decisions in that regard. The first in point of time is the *Port Elizabeth Municipality* case in the Constitutional Court. That stressed the need for courts to ensure that as far as possible they are fully informed of the relevant facts in order properly to discharge their function of determining whether an eviction order should be issued and if so on what terms.[31] It mandated a more active role of case management for courts hearing applications for eviction[32] including the need to consider whether mediation in terms of s 7 of PIE might be appropriate.[33]

[22] This court adopted the same approach in *The Occupiers of Erf 101,*

31 Para 32.
32 Paras 36-37.
33 See the discussion in paras 39-47. Mediation was not ordered in that case but a court mandated process of engagement led to a settlement in *Olivia Road.*

102, 104 and 112, Shorts Retreat, Pietermaritzburg v Daisy Dear Investments (Pty) Ltd & others.[34] There an eviction order was sought in relation to a well-established community of some 2000 people, who had indicated their willingness to move from the land and even identified a potential site to which they could possibly move. The local authority had demanded that the owner evict the occupiers, but was not joined and simply filed a report saying that it could not accommodate the potential evictees or identify other land to which they could move. This court, at the request of the parties, made an order setting aside the eviction order that had been granted; joining the municipality as a party and ordering the municipality to file a report, confirmed on oath, dealing with the availability of alternative land and emergency accommodation; the consequences of an eviction order if no alternative land or emergency accommodation could be made available and setting out the steps that could be taken to alleviate the effects of the occupation of the property if the occupiers were not immediately evicted. The court held that the absence of information in regard to these matters meant that relevant information was not taken into account in determining whether the eviction was just and equitable and accordingly 'the eviction order was premature'.[35] Clearly the court was concerned with both of the just and equitable enquiries required by s 4 of PIE in reaching that conclusion.

[23] The next case is that involving the occupiers of Shulana Court.[36] Here an application for eviction from a building similar to Tikwelo House was granted by default. An application for rescission of the default judgment was refused. The appeal against that refusal was upheld

34 Occupiers of Erf 101, 102, 104 and 112, Shorts Retreat, Pietermaritzburg v Daisy Dear Investments (Pty) Ltd & others [2009] 4 All SA 410 (SCA).
35 Para 10.
36 *Occupiers, Shulana Court, 11 Hendon Road, Yeoville, Johannesburg v Steele* [2010] 4 All SA 54 (SCA).

because the court dealing with the eviction application did not possess the information referred to in s 4(7) of PIE, nor did it know what alternative accommodation was available for evictees who might find themselves in an emergency situation in consequence of their eviction. The circumstances in which the occupiers were living indicated the likelihood that at least some of them might be rendered homeless as a result of their eviction. Accordingly the municipality should have been engaged in the process before granting an eviction order. For those reasons the court that granted the eviction order had not done what was required of it in terms of s 4(7) of PIE and, by failing to investigate matters further, in particular the issue of possible homelessness, it had failed to discharge its constitutional obligations.[37]

[24] Lastly there is the recent decision of the Constitutional Court in *Occupiers of Mooiplaats v Golden Thread Ltd & others*[38] handed down shortly after its judgment in *Blue Moonlight*. Again that was a case where the court had granted an eviction order without investigating the possibility of it resulting in homelessness, or whether mediation involving the owner, the occupiers and the municipality might have led to a resolution of the dispute or ameliorated the plight of the occupiers. The eviction order was set aside on the basis that it could not be said that an eviction order was just and equitable. The case was remitted to the high court to obtain a report from the municipality about the housing situation of the occupiers; the possibility of homelessness if they were evicted; the provision of alternative land or accommodation; the consequences of an eviction if no alternative land or accommodation was provided and the measures that could be taken to alleviate the situation of the owner if an

37 Paras 14 and 15. The obiter remark in the first sentence of para 16 is not supported by the authorities cited and cannot be accepted without qualification. The failure by the court of first instance to do what was required by PIE was the true reason for the appeal being upheld.
38 *Occupiers of Mooiplaats v Golden Thread Ltd & others* 2012 (2) SA 337 (CC).

eviction was delayed while alternatives were arranged. Whilst the court referred only to s 4(6) and not s 4(8) it is plain that it was concerned not only with the justice and equity of an eviction order, but also with the justice and equity of the timing of such an order. That emerges from its citation[39] of the passage from its judgment in *Blue Moonlight* where it had said that an owner's right to possession could be temporarily restricted whilst the justice and equity enquiry was undertaken; its comment that the owner had no immediate plans to use the property and from the requirement in the order that the municipality report on the impact on the owner of delay in granting an eviction order.

[25] Reverting then to the relationship between ss 4(7) and (8), the position can be summarised as follows. A court hearing an application for eviction at the instance of a private person or body, owing no obligations to provide housing or achieve the gradual realisation of the right of access to housing in terms of s 26(1) of the Constitution, is faced with two separate enquiries. First it must decide whether it is just and equitable to grant an eviction order having regard to all relevant factors. Under s 4(7) those factors include the availability of alternative land or accommodation. The weight to be attached to that factor must be assessed in the light of the property owner's protected rights under s 25 of the Constitution, and on the footing that a limitation of those rights in favour of the occupiers will ordinarily be limited in duration. Once the court decides that there is no defence to the claim for eviction and that it would be just and equitable to grant an eviction order it is obliged to grant that order. Before doing so, however, it must consider what justice and equity demands in relation to the date of implementation of that order and it must consider what conditions must be attached to that order. In that

39 Para 17.

second enquiry it must consider the impact of an eviction order on the occupiers and whether they may be rendered homeless thereby or need emergency assistance to relocate elsewhere. The order that it grants as a result of these two discrete enquiries is a single order. Accordingly it cannot be granted until both enquiries have been undertaken and the conclusion reached that the grant of an eviction order, effective from a specified date, is just and equitable. Nor can the enquiry be concluded until the court is satisfied that it is in possession of all the information necessary to make both findings based on justice and equity.

Procedural issues in eviction applications under PIE

[26] In order to discharge its function the court must be possessed of information regarding all relevant factors that bear upon its decision. Judges have been told[40] that they are:

'… called upon to go beyond [their] normal functions and to engage in active judicial management according to equitable principles of an ongoing, stressful and law-governed social process. This has major implications for the manner in which [the court] must deal with the issues before it, how it should approach questions of evidence, the procedures it may adopt, the way in which it exercises its powers and the orders it might make.'

That injunction must, however, be seen in the context that our courts are neither vested with powers of investigation nor equipped with the staff and resources to engage in broad-ranging enquiries into socio-economic issues. Nor, as already pointed out, can the courts circumvent that by delegating those tasks to the sheriff, who is likewise ill-equipped for that task. How then is the court to ensure that it is adequately informed in regard to the relevant factors that must be taken into account in making its decision?

40 *Port Elizabeth Municipality*, supra, para 36.

[27] There is nothing novel about a court taking a proactive approach to litigation in order to ensure that it is sufficiently informed to enable it to take a just decision in the context of cases where its task differs from that ordinarily encountered in adversarial litigation and the orders sought from it are discretionary. For example in *Clarke v Hurst NO & others*, [41] a case involving the removal of life support from a patient in a persistent vegetative state, Thirion J requested and secured that additional specialist medical investigations be undertaken before reaching a decision. In my view courts can, and must, properly address the issues arising in eviction cases within the framework of our existing law governing evidence and civil procedure, provided they are not overwhelmed by practical problems[42] and make use, where appropriate, of court ordered mediation or engagement, or structured interdicts. However, in exercising these powers judges must take care to ensure that they do not go beyond the proper bounds of judicial conduct. [43] A more active role in managing the litigation does not permit the judge to enter the arena or take over the running of the litigation. By way of illustration of the boundaries within which they must operate, it is permissible in an appropriate case to conduct an inspection in loco,[44] but it is impermissible to engage in private investigation. What they are obliged to do in eviction cases is ensure that all the relevant parties are before them, that proper investigations have been undertaken to place the relevant facts before them and that the orders they craft are appropriate to the particular circumstances of the case. If, despite appropriate judicial guidance as to the information required, the judges are not satisfied that they are in possession of all relevant facts, no order can be granted. In what follows I address some of the more important aspects of eviction applications in the

41 *Clarke v Hurst NO & others* 1992 (4) SA 630 (D).
42 Per Harms JA in *Modderfontein Squatters* supra, fn 24, para 42.
43 See *City of Johannesburg Metropolitan Council v Ngobeni* [2012] ZASCA 55 paras 29 to 33.
44 As was done at first instance in *Grootboom*.

light of the contentions advanced before us.

Onus

[28] The City submitted that it is the duty of the occupiers to place any necessary relevant information before the court. It contended that the common law position that an owner can rely simply on its ownership of the property and the occupation of the occupiers against its will is applicable to applications governed by s 4(7) of PIE. It relied on the cases where it has been held that the landowner may allege only its ownership of the property and the fact of occupation in order to make out a case, to which the occupiers must respond and establish a right of occupation if they wish to prevent an order form being made.[45] It argued that the only effect of PIE was to overlay the common law position with certain procedural requirements.

[29] This is not an issue that has been resolved in the cases and to some extent it has been obscured by cases in which a less conventional approach to the function of the court has been espoused. The enquiry into what is just and equitable requires the court to make a value judgment on the basis of all relevant facts. It can cause further evidence to be submitted where 'the evidence submitted by the parties leaves important questions of fact obscure, contested or uncertain'.[46] That may mean that 'technical questions relating to onus of proof should not play an unduly significant role'.[47] However, I do not think that means that the onus of proof can be disregarded. After all what is being sought from the court is an order that can be granted only if the court is satisfied that it is just and equitable that such an order be made. If, at the end of the day, it is left in

45 *Chetty v Naidoo* 1974 (3) SA 13 (A) approving the approach in *Graham v Ridley* 1931 TPD 476 at 479.
46 *Port Elizabeth Municipality*, supra, para 32.
47 Ibid.

doubt on that issue it must refuse an order. There is nothing in PIE that warrants the court maintaining litigation on foot until it feels itself able to resolve the conflicting interests of the landowner and the unlawful occupiers in a just and equitable manner.

[30] The implication of this is that, in the first instance, it is for the applicant to secure that the information placed before the court is sufficient, if unchallenged, to satisfy it that it would be just and equitable to grant an eviction order. Both the Constitution and PIE require that the court must take into account all relevant facts before granting an eviction order. Whilst in some cases it may suffice for an applicant to say that it is the owner and the respondent is in occupation, because those are the only relevant facts, in others it will not. One cannot simply transpose the former rules governing onus to a situation that is no longer governed only by the common law but has statutory expression. In a situation governed by s 4(7) of PIE, the applicant must show that it has complied with the notice requirements under s 4 and that the occupiers of the property are in unlawful occupation. On ordinary principles governing onus it would also have to demonstrate that the circumstances render it just and equitable to grant the order it seeks. I see no reason to depart from this. There is nothing unusual in such an onus having to be discharged. One of the grounds upon which it was permissible to seek a winding-up order in respect of a company under the Companies Act 61 of 1973 was that it would be just and equitable for the court to grant such an order. The law reports are replete with cases in which courts dealt with applications for winding-up on that basis. In cases where the applicant failed to discharge the onus of satisfying the court that it would be just and equitable to grant a winding-up order it was refused.

[31] The response to this may be to say that the applicant for relief will be unaware of the circumstances of the occupiers and therefore unable to place the relevant facts before the court. As a general proposition that cannot be sustained. Most applicants for eviction orders governed by PIE will have at least some knowledge of the identity of the persons they wish to have evicted and their personal circumstances. They are obviously not required to go beyond what they know or what is reasonably ascertainable. The facts of this case belie the proposition that an applicant, even in a case where a building has been hijacked, is unable to place information before the court in regard to the identity and circumstances of the occupiers. Changing Tides was able to describe in considerable detail the circumstances in which the occupiers were living. It had served notices to vacate on a number of them and managed to assemble a list, albeit incomplete and defective, of the names of 97 occupiers. It made it clear that the occupiers were people of extremely limited means, some at least of whom gathered rubbish from the streets for personal use or resale and left rotting garbage inside and outside the building. It specifically alleged that the occupiers were people who would, on eviction, qualify for emergency housing. It referred to earlier proceedings in which it had previously obtained an eviction order that had subsequently been set aside at the instance of occupiers. For some reason it did not provide the court with information about the occupiers' circumstances gleaned from the affidavits in those proceedings. That information might also have disclosed something of the circumstances in which the building came to be occupied originally. In that regard they could also presumably have made enquiries of the previous owners.

[32] In addition, there were a number of other potential sources of information that were not exploited. Security guards had been on site to

observe the comings and goings of the occupiers. They could have provided affidavits from their observations. The owner's representatives had been in communication with the police and could have procured more detailed information about the alleged criminal activities in the building from that source. In addition, in seeking to demonstrate that it was just and equitable that they be granted an eviction order, they could have explained why they had done nothing for some three years to pursue the eviction of the occupiers after the first order was set aside. They could also have given more detail regarding their redevelopment plans for the building, both as to the character of the proposed development and as to the proposed timeframe. All that was important information, both in regard to the grant of an order and in determining a just and equitable date for the eviction order they were seeking. It would have provided a substantial body of information to assist the court in reaching a decision on whether it was just and equitable to evict the occupiers.

[33] It is appropriate to mention one further issue that arises generally in these cases. Very often it seems that once an eviction is ordered the sheriff effects it, making use of assistance from security firms and the police. That may be necessary in a small number of cases where the occupiers actively resist their eviction and questions of the personal safety of the sheriff and his or her deputies may arise. However, in many instances all that happens is that the sheriff and his staff remove people and their belongings and dump them unceremoniously on pavements outside the building they have been occupying in scenes reminiscent of forced removals in the days of apartheid. The Constitutional Court has rightly said that the loss of a home, even ones as exiguous as these appear to be, is a painful and often degrading experience. It has charged courts with responsibility for infusing 'grace and compassion' into this situation.

One way in which that could be done would be if the property owner indicated a willingness to assist those displaced to move themselves and their meagre belongings to whatever new location they may have found or whatever emergency accommodation may be provided. That would ameliorate the situation of the evictees to some degree at some additional cost to the property owner. A tender to provide such assistance would help the court in determining whether the eviction and the date and conditions on which it is to be effected are just and equitable. I do not intend to lay down as a legal obligation that property owners must do this in order to obtain eviction orders. I mention it to illustrate one of the ways in which an applicant for an eviction order could seek to show that the grant of that order, its timing and the conditions to which it is subject are just and equitable.

[34] In my view, therefore, there are no good reasons for saying that an applicant for an eviction order under s 4(7) of PIE does not bear the onus of satisfying the court that it is just and equitable to make such an order. Cases where that onus affects the outcome are likely to be few and far between because the court will ordinarily be able to make the value judgment involved on the material before it. However, the fact that an applicant bears the onus of satisfying the court on this question means that it has a duty to place evidence before the court in its founding affidavits that will be sufficient to discharge that onus in the light of the court's obligation to have regard to all relevant factors. The City's contention, that the common law position continues to prevail and that it is for the occupiers to place the relevant facts before the court, is incorrect. Once that is recognised it should mean that applicants go to greater lengths to place evidence of relevant facts before the court from the outset and this will expedite the process of disposing of these

applications, particularly in cases that are unopposed as the need for the court to direct that further information be obtained will diminish.

Joinder

[35] Even if an applicant places reasonably comprehensive information before the court, there will nonetheless often be information not within its knowledge, especially in relation to the ability and willingness of the relevant local authority to address issues arising from the possibility of an eviction order giving rise to homelessness and a need for the provision of emergency accommodation. It is here that the issue of joinder arises. One of the fundamental arguments raised by the City was that its joinder in these proceedings was inappropriate. It contended that it was not appropriate for the property owner to join it with a view to ensuring that the constitutional rights of the occupiers were protected.

[36] An appeal is not the time to raise an argument of misjoinder. The City did not object to its joinder nor did it file affidavits in which it challenged the allegation by Changing Tides that it had a direct and substantial interest in the outcome of the proceedings and that its joinder was both necessary and inevitable. It also appeared before Wepener J at the time that the order under appeal was made to make submissions and protect its interests. One can ask rhetorically what it thought it was doing there if indeed it had no interest in the outcome of the application and had been improperly joined. Be that as it may, as the argument raises an important issue of principle on which the guidance of this court is desirable I shall deal with it.

[37] Joinder is called for whenever a party has a direct and substantial

interest in the outcome of litigation.[48] On the facts of this case, as contained in the founding affidavit, there was an overwhelming probability that the grant of an eviction order would result in at least some of the occupiers being rendered homeless. That allegation was specifically made and not challenged. Once that was the case the grant of an order would necessarily result in the City's constitutional obligations to such persons being engaged. Accordingly the availability of alternative accommodation provided by the City was an important issue in the proceedings. An eviction order could only be made on appropriate conditions, which would necessarily include conditions relating to the provision of temporary emergency accommodation. In those circumstances the City manifestly had a direct and substantial interest in the outcome of the litigation and had to be joined as a necessary party. The City's argument in regard to joinder was misconceived. It was not joined in order to protect the interests of the occupiers but in order to enable the court to discharge its functions in accordance with the requirements of PIE.

[38] Whenever the circumstances alleged by an applicant for an eviction order raise the possibility that the grant of that order may trigger constitutional obligations on the part of a local authority to provide emergency accommodation, the local authority will be a necessary party to the litigation and must be joined.[49] Where the applicant is doubtful about the position it would be a wise precaution for it to join the local authority.[50] That does not mean that the local authority will need to

48 *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A) at 659; *Standard Bank of South Africa Ltd v Swartland Municipality & others* 2011 (5) SA 257 (SCA) para 9; *Blue Moonlight CC* para 44.
49 *Occupiers of Erf 101, 102, 104 and 112, Shorts Retreat, Pietermaritzburg v Daisy Dear Investments (Pty) Ltd & others*, supra, para 11.
50 Such a joinder is a joinder of convenience that does not give rise to a misjoinder. *Rosebank Mall (Pty) Ltd & another v Cradock Heights (Pty) Ltd* 2004 (2) SA 353 (W) para 11.

become embroiled in every case in which an eviction order under PIE is sought. The question in the first instance is always whether the circumstances of the particular case are such as may (not must) trigger the local authority's constitutional obligations in regard to the provision of housing or emergency accommodation. If they are, the need for the local authority's direct involvement as a litigant will depend upon its response to those obligations. If, by way of example, it filed a report stating that it had adequate emergency accommodation available for all and any persons evicted from the premises and that the court could make an order that it provide such accommodation to all evictees that might suffice without more, subject to furnishing some details about the nature and locality of the accommodation and the means by which the occupiers could obtain access to it.

The local authority's procedural obligations

[39] Much of the litigation around evictions has dealt with contentions by various local authorities that they do not owe constitutional obligations to provide emergency accommodation to persons evicted from their existing homes and facing homelessness as a result. Contentions that they were not obliged to provide emergency housing (*Grootboom*); alternative land on a secure basis (*Port Elizabeth Municipality*); use their own funds to provide emergency accommodation (*Rand Properties*); and provide emergency accommodation to persons evicted at the instance of private property owners (*Blue Moonlight*) have all been advanced and rejected by this court and the Constitutional Court. Now that it is clearly established that local authorities do owe constitutional obligations to persons evicted from their homes who face homelessness as a result, it is appropriate to set out their obligations to the court in proceedings of this type. I deal only with cases where, on the

principles set out above, they are joined in the litigation and the applicant alleges that the circumstances of the eviction are such that it may result in homelessness and engage their constitutional obligations in regard to the provision of temporary emergency accommodation.

[40] The general approach of local authorities, so far as it can be discerned from the reported cases, has been to file with the court a general report detailing its current housing policy without addressing the facts of that particular case. That is inadequate. In addition to such a report it must deal directly with the facts of the particular case. That report must specify:

a) the information available to the local authority in regard to the building or property in respect of which an eviction order is sought, for example, whether it is known to be a 'bad building', or is derelict, or has been the subject of inspection by municipal officials and, if so, the result of their inspections. (It appears from some of the reported cases, like the present one, that the local authority has known of the condition of the building and precipitated the application for eviction by demanding that owners evict people or upgrade buildings for residential purposes.) The municipality should indicate whether the continued occupation of the building gives rise to health or safety concerns and express an opinion on whether it is desirable in the interests of the health and safety of the occupiers that they should be living in such circumstances;

b) such information as the municipality has in regard to the occupiers of the building or property, their approximate number and personal circumstances (even if described in general terms, as, for example, by saying that the majority appear to be

unemployed or make a living in informal trades), whether there are children, elderly or disabled people living there and whether there appear to be households headed by women;

c) whether in the considered view of the local authority an eviction order is likely to result in all or any of the occupiers becoming homeless;

d) if so what steps the local authority proposes to put in place to address and alleviate such homelessness by way of the provision of alternative land or emergency accommodation;

e) the implications for the owners of delay in evicting the occupiers;

f) details of all engagement it has had with the occupiers in regard to their continued occupation of or removal from the property or building;

g) whether it believes there is scope for a mediated process, whether under s 7 of PIE or otherwise, to secure the departure of the occupiers from the building and their relocation elsewhere and if so on what terms and, if not, why not.

[41] Those requirements have been distilled from the various orders made by the courts in cases of this type. Provided that this information is furnished to the court at the outset it should enable the court to deal with the application without much, if any, need for further investigation and possibly without the further involvement of the local authority. I have no wish to add to the burden of local authorities in these cases. However, the additional burden should not be undue as they are in any event enjoined by s 4(2) of PIE to file a report in all eviction proceedings. All that this requires of them is, in certain cases, to amplify that report in order to provide the court with the information it needs to decide whether to grant an eviction order. The more comprehensive the report furnished by the

local authority at the outset the less likely that it will become embroiled in lengthy and costly litigation, so that the additional effort at the outset should diminish costs in the long run and enable eviction cases to be dealt with expeditiously in the interests of all concerned.[51] Where, in response to that report, the applicant indicates that it intends to seek an order that imposes duties upon the local authority it goes without saying that the local authority must be furnished with the proposed order in sufficient time to enable it to consider its terms, suggest amendments and if no agreement is reached, to appear and make appropriate submissions to the court on its terms.

The present case

[42] It remains to apply these principles in the present case, adapting them appropriately to remedy the problems with the existing order. In that regard it must be borne in mind that the court has already decided that the grant of an eviction order against the occupiers is just and equitable and, most importantly, the occupiers do not appeal against that decision. The formulation of an appropriate order in the present case must therefore be undertaken on the basis that the first enquiry is over and the court is only concerned with the second enquiry into a just and equitable date for that order to take effect and the conditions to be attached to that order. This departs from the usual position outlined above where the court deals with both enquiries in one hearing and issues a single order covering all the issues in the case. We are, however, assisted in formulating the order by the fact that the City now accepts – as it did not before Wepener J – that it is under a 'duty to assist people who face homelessness upon eviction, through no fault of their own and which they can do nothing about'.[52]

51 *Blue Moonlight* took some six years of litigation to resolve. *Olivia Road* took five years, *Skurweplaas* over three years and *Mooiplaats* was referred back to the high court after three years of litigation.

52 The concession is taken from counsel's supplementary submissions on the terms of the order.

That means that we are principally concerned to formulate the relief in the most effective way in which to ensure that the City fulfils its constitutional obligations. The focus must thus fall on the best way of identifying the persons to whom the City owes those obligations and ensuring that their needs are catered for.

[43] Counsel for the City furnished us in the course of argument with a suggested order. That order was not acceptable to counsel for the occupiers or to counsel for the amicus. After the hearing the latter provided us with its proposed order adapting that suggested by the City. Counsel for the occupiers submitted a further draft order, accepting the proposals of the amicus, but adding orders in regard to costs and the application to lead further evidence on appeal that will be dealt with at the end of this judgment. We received submissions from the parties on these proposed orders. As the occupiers adopted the suggestions by the amicus as their own, subject to the additions I have mentioned, in what follows I need only compare the proposals of the City and the amicus.

[44] Both orders proceeded on the footing that the sheriff should prepare a schedule of information as contemplated in paragraph 2 of the order, although the amicus expressed reservations about this and said that it should be for the City to do this. The City's proposal would have required the sheriff, whilst preparing the schedule of information, to serve a notice on the occupiers informing them that if they required emergency accommodation as a result of their eviction they should apply to one of the City's ESP Centres, which deal with emergency accommodation, together with certain documents and that the City should be obliged to provide such accommodation to those whom it determined qualified for it. In the City's submissions it asked that this notice be amplified by a

requirement that anyone seeking such accommodation should telephone the ESP centre in question 'to arrange a date and time when they are to report and apply'. It was said that this would ensure that such applications would be dealt with in an orderly manner and expeditiously.

[45] The occupiers and the amicus submitted that it is for the court to determine the obligations of the City to potential evictees and not the City itself. The draft order of the amicus accordingly provided for the City to consider, evaluate and assess all applications for temporary emergency accommodation made to it by potential evictees and to submit a report to the court giving details of who was to be provided with accommodation, the nature and location of that accommodation and the date by which it would be provided. In addition the report had to deal with all applications for accommodation refused by the City and the reasons for that refusal. The amicus altered the terms of the notice that the City suggested should be served on the occupiers, most importantly by making it clear that applications for accommodation could be made even if a person lacked the documents required by the City; inserting contact details of people at the ESP centres and recording that the city would be obliged to report to the court on the outcome of applications for accommodation and details of the accommodation tendered by it. In line with its suggested order the suggested amended notice referred to the City lodging a report with the court.

Procuring information regarding the occupiers

[46] I agree with all parties that the court needs to have information about the needs of the occupiers in relation to temporary emergency accommodation. For the reasons set out in paragraph 8 of this judgment, the order that the sheriff prepare a 'matrix' of information in regard to the

occupiers was not proper and is ineffective. It cannot be used to provide a foundation for the order that must issue in place of that granted by the high court. Counsel for the amicus expressed reservations about the sheriff fulfilling this role and I understood him to suggest that it is desirable for the City to be required to obtain and place that information before the court. I disagree. The City is in no better position than the sheriff to obtain the suggested information from the occupiers and faces precisely the same difficulties in endeavouring to do so as would the sheriff. It has no right in law to demand that information from the occupiers and the court cannot confer that right upon it by requiring it to provide the information to the court. An order that it do so is ineffective or, to use the traditional expression, a *brutum fulmen*. I note that the court of first instance in *Blue Moonlight* made such an order and the City was unable to comply with it.[53]

[47] In considering the grant of an eviction order the court is concerned with the plight of those who, as a result of poverty and disadvantage, are unable to make alternative accommodation arrangements themselves and require assistance from the local authority to do so. It is particularly concerned to ensure, so far as possible, that those who face homelessness are provided at least with temporary emergency accommodation. The ancillary orders attaching to an eviction order will not affect those who are able to find a roof for their heads and a place of shelter without assistance, nor those who for reasons of their own, such as an unwillingness to have any involvement with a public authority, will not seek assistance, even if it means nights spent on the streets. The central task is therefore to identify those who require assistance from the local authority. What the City needs to know is who requires temporary

53 *Blue Moonlight CC*, para 6, fn 9.

emergency accommodation and the nature of their needs, for example, whether dormitory accommodation would suffice or whether a flat of some sort is required for a family with children or whether an aged or disabled person has some special needs. The question is how this information can most quickly and efficiently be communicated to the City so that it can formulate an appropriate plan to address the needs of these people.

[48] In the present case the answer, at this stage of the proceedings, is relatively straightforward. The Legal Resources Centre (the LRC), a public interest law firm with a lengthy and honourable record in cases of this type is now on record as representing all of the occupiers, not merely the 97 who were identified as respondents in the list annexed to the notice of motion. Its director has deposed to an affidavit saying that it represents the occupiers generally and counsel appeared at the application for leave to appeal and before this court on the basis that they represented all of the occupiers. Accordingly, the easiest way to obtain the necessary information and furnish it to the City is by the LRC preparing a list of those of its clients who require temporary emergency accommodation, with details of their names, ages, family circumstances, sources of income and having annexed to it appropriate proof of identity. The list and its details must be verified by an affidavit of information and belief and if possible by affidavits by the individuals concerned. There seems to be no reason why that list should not be furnished within one month of the date of this court's order. In cases where the occupiers have legal representation this will ordinarily be the most effective way in which to proceed. Where they are not represented, courts may consider issuing a rule nisi and causing it to be served on the occupiers (and if it is not present, the local authority), together with a suitably worded notice

explaining the right to temporary emergency accommodation; how they can access such accommodation and inviting them to come to court to express their views on that issue at least.

The City's obligations

[49] The next issue relates to the City's obligations in respect of the occupiers identified by the LRC. The argument before us claimed an entitlement on the part of the City to determine whether the persons seeking temporary emergency accommodation were entitled thereto before providing such accommodation. It was for this reason submitted that persons requiring that assistance should apply to one of the City's ESP centres, for their situation to be assessed and the City to decide whether to afford them the accommodation they seek.

[50] I do not think that the approach of the City, that the affected people must approach one of its ESP Centres for assistance and follow conventional procedures thereafter, is either correct or desirable. Its immediate disadvantage is that it sets in train a bureaucratic process that will inevitably involve delay and probably spawn further disputes and litigation. An example of that arose when the City advanced the contention in its heads of argument that it owed no obligation to provide temporary emergency housing to non-citizens. That provoked a response from both the representative of the occupiers and the amicus. In argument the City retreated somewhat from this stance and instead contended that it was not obliged to provide such accommodation to illegal immigrants. This contention was repeated in its submissions on the draft order. One can at once foresee, therefore, that disputes are likely to arise on this issue, bearing in mind that a large proportion of the occupiers appear to be foreign citizens and may well be in this country illegally. The

procedure the City proposed was clearly directed at weeding out those who in its view would not qualify for such assistance on grounds of income, need, ability to find accommodation elsewhere and the like. All of this is conducive to delay in a case where there is no challenge to the proposition that an eviction order is just and equitable, subject to determining a just and equitable date and suitable conditions concerning alternative accommodation.

[51] The City's stance is what prompted the amicus, in its draft order, to submit that the City should 'consider, evaluate and assess' each occupier who applied for assistance and report to the court on, inter alia, its reason for rejecting those to whom it did not propose to provide accommodation. There was then provision for the rejected occupiers to approach the court to secure their inclusion and for the occupiers generally to challenge the suitability of the accommodation being tendered by the City. The picture is one of move and counter-move with fresh fronts being opened constantly in a war of attrition between the City and the occupiers.

[52] Both approaches overlook the fact that the court is dealing with a situation in which people are living in a 'death trap'. Their situation is one of dire need. They should not be required to continue living in such circumstances, which pose a health and personal safety danger, any longer than is strictly necessary to enable the City to discharge its constitutional obligations to them. The question then is how to achieve this as a matter of some urgency. Unfortunately, none of the orders submitted by the parties addressed the matter from that perspective. The City wishes to follow its established procedures and exclude those whom it believes are not entitled to temporary emergency accommodation. The response is one that foreshadows disputes in some cases over a variety of

issues leading to further litigation and inevitable delay. In the meantime the occupiers will continue to live in squalid and unsafe conditions and Changing Tides will be prevented from obtaining access to its property. Resolution of the former situation is extremely urgent and Changing Tides should not be unnecessarily compelled to endure further delays over which it has no control.

[53] I accept that the City is entitled to review the claim of any person seeking temporary emergency accommodation as a result of an eviction. However, the relevant question, in cases of eviction creating an emergency, is whether the appropriate time to do that is before that person obtains such accommodation or afterwards. Where the facts point to the desirability of the eviction being effected as rapidly as possible, because the circumstances in which the occupiers are living pose a risk to life and health, the only answer must be that the review process should defer to the need for eviction and accordingly take place after the City has provided the evictees with temporary emergency accommodation. This gives rise to the possibility – not likely to be great – that some people not entitled thereto may obtain temporary access to temporary emergency accommodation, until their disqualification is discovered. However, that is preferable to a large number of people who undoubtedly are entitled to such accommodation being kept out of it and forced to live in unhealthy and potentially life threatening surroundings for longer than necessary, while the City weeds out the few who are not entitled to this benefit. That is especially so as it seems probable that any adverse decision by the City on an individual's right to temporary emergency accommodation may be subject to legal challenge.

[54] Infusing grace and compassion into the process of eviction does

not mean that an eviction should be postponed for as long as possible, but may mean that it should take place expeditiously. If delayed the property owner bears the burden of not having access to its property whilst the authority responsible for attending to the housing needs of the persons in unlawful occupation of the premises postpones the discharge of its obligations. Where, as here, the occupiers are living in conditions of the utmost squalor at the risk of their lives and health, the court should be concerned that the process is expedited so that they are moved away from that situation as soon as possible. It is noteworthy that local authorities are vested with statutory powers under other legislation to address situations such as these.[54] However, the City's report to the high court says that, since the judgment of this court in *Rand Properties*, the City no longer makes use of this provision to remove occupiers from unsafe and squalid buildings. That suggests that the City is no longer engaged directly in addressing this problem. What it does, as this case and *Blue Moonlight* demonstrate, is give notice to building owners under the relevant by-laws to remedy conditions in the buildings concerned, thereby prompting applications for eviction brought by the building owner. That is less than satisfactory. The City needs to be actively engaged in addressing the situation where people are living in squalid conditions such as these and should be as concerned as the owner and the occupiers to resolve that situation as soon as possible. The legal representatives of the parties must also be mindful that what is being sought is a solution to a social problem and conduct the litigation with that in mind.

[55] Not every eviction case will generate the same concerns regarding the disposal of the case and judges in the high court will need to assess whether the case before them is one which demands urgent disposal in the

54 Section 12(4)(b) of the National Building Regulations and Building Standards Act 103 of 1977.

interests of the health and safety of the occupiers. In the present case the position is clear. The eviction should be effected with the minimum delay compatible with the rights and human dignity of the occupiers and the need to provide many of them with temporary emergency accommodation.

[56] Accordingly it is appropriate to require the City on receipt of the list of occupiers requiring temporary emergency accommodation from the LRC, to report to the court, within one month of receipt of the list, setting out the accommodation that it will make available to all of those occupiers and when such accommodation will be available. That accommodation must be in a location as near as feasibly possible to the area where Tikwelo House is situated. The report must be supported by an affidavit from an appropriate official in the employ of the City verifying its contents and contain an undertaking that the City will provide the occupiers with accommodation in accordance therewith. It must deal specifically with the issue of proximity and explain why the particular location or locations of the accommodation have been selected. It must also set out the steps taken during the two months before it needs to be filed to engage with the occupiers through the LRC or any other means that may appear appropriate.

The response by the occupiers

[57] Once the City has delivered its report the occupiers should be given a period of one month to consider its contents. If in any respect they are not satisfied with the accommodation tendered, or any other aspect of the proposed provision of temporary emergency accommodation, they must deliver affidavits within that period setting out their difficulties, the reasons therefor and what they contend is necessary in order to resolve

those difficulties. The City can deliver such affidavits in response as it may be advised to file. A time of two weeks for that purpose should be adequate.

The remittal to the high court

[58] After the elapse of these time periods the application must be set down for hearing on the opposed roll. At the resumed hearing the court will consider the adequacy of the temporary emergency accommodation to be provided by the City and any objections from the occupiers. It will also determine the date upon which the eviction order is to take effect, the terms upon which the City is to provide temporary emergency accommodation to all those occupiers identified by the LRC as requiring it, and any other conditions that will attach to the eviction order. Obviously it is impossible for us to foresee and make provision for every eventuality that may arise in the process set in train by this court's order. It will be for the high court to deal with these as it deems appropriate having regard to the need for an urgent resolution of this case in the interests of all concerned.

Further evidence on appeal

[59] Before formulating the order to be made in this appeal it is necessary to resolve the issues arising from an application lodged on 9 March 2012 by the LRC, on behalf of the second to 98th respondents and the occupiers generally, to lead further evidence on appeal by way of the introduction of what were said to be 'their individual affidavits detailing their personal circumstances' as well as certain expert evidence. An order was also sought:

'Remitting the application to the High Court for a fresh determination of the question whether the eviction of the Second to Ninety Eighth respondents would be just and equitable.'

Although that does not appear from the notice of motion, the Director of the LRC said in her affidavit that this was only sought in the alternative to the admission of the affidavits.

[60] Both the City and Changing Tides opposed this application. However, they did so under a misapprehension as to its purpose. The deponent to the City's affidavit said that by seeking the admission of this evidence the deponents were trying to place reliance on their personal circumstances as a defence to the eviction order. That was also the thrust of the heads of argument filed by the City in respect of this issue. However, that was not the purpose of the application. The proposed evidence was directed at supporting the order made by the court below in regard to the provision of emergency housing for those who were subject to eviction in terms of the unchallenged eviction order granted by the high court. It was only in the event of it not being admitted that it was submitted that the application should be remitted to the high court to reconsider the eviction order.

[61] Fresh evidence on appeal is only admitted sparingly. The applicant must give a reasonable explanation for the failure to tender the evidence at first instance; the evidence must be credible and materially relevant to or decisive of the outcome of the proceedings.[55] The explanation for the occupiers not having been represented before the high court is unsatisfactory. In addition, of the 57 affidavits tendered only ten are identifiable as being deposed to by the 97 named respondents and one is

55 *De Aguiar v Real People Housing (Pty) Ltd* 2011 (1) SA 16 (SCA) paras 9 to 12.

by the partner of a named respondent. One or two of the remainder are possibly by respondents – for example there is one respondent who is identified solely as 'Moeketsi' and four of the deponents bear that name – but that is of little assistance. It does not appear to have been appreciated that what was being tendered might only be a partial picture and there was accordingly no endeavour to inform the court of how many people would be involved in any eviction and how many of them would indeed need temporary emergency accommodation.

[62] The affidavits were unsatisfactory in other respects. For example two of the deponents stated that they had alternative accommodation if evicted. In addition, the affidavits are standard in form, scanty in detail and say little more than any court – including the high court in this case – would already know, namely that almost all people living in the circumstances described at the outset of this judgment are desperately poor and live in a building such as Tikwelo House only because the alternatives are worse and almost certainly involve homelessness for many of them. Hence the affidavits will not be conclusive of the issues in this case. The application for their admission should be refused.

[63] The City sought an order that the costs of the application be paid *de bonis propriis* by the LRC. Whilst I agree that the application was misconceived and sloppily prepared, without any clear view of its purpose, one must bear in mind the difficulties facing public interest law firms that on a daily basis face demands for legal representation as a matter of urgency from unsophisticated people facing great personal hardship. In addition costs should only be ordered against legal practitioners in cases of flagrant disregard of their duties, causing undue and unnecessary expense to the other party. In the present case I do not

think that the failings on the part of the LRC justify an order against it.

Costs and the order

[64] It was submitted on behalf of the City that it had been compelled to come to this court to set aside the order sought by Changing Tides over its opposition. In those circumstances it was contended that Changing Tides should pay the City's costs on appeal. I do not agree. In many respects Changing Tides is a reluctant participant in these proceedings. Clearly it brought the eviction proceedings when it did as a result of the City serving notice on it to remedy the condition of the building and effectively make it habitable for the occupiers. The amended order was sought in the light of this court's decision in *Blue Moonlight*. It was opposed by the City on the basis of the untenable proposition that the judge should disregard this court's order because of the pending appeal to the Constitutional Court. It is true that it added that there was no evidence before the court, but in part that was due to its own failure to provide any information germane to the particular circumstances of this case. No doubt that was because of its stance in the *Blue Moonlight* litigation, but that stance was incorrect. The challenge to the order to provide temporary emergency accommodation is likely, if one examines the facts, to result in little effective change to the order that Wepener J granted. In those circumstances it is appropriate to order each party to pay its or their own costs in the appeal. The costs of the application will be dealt with by the high court on the remittal.

[65] The following order is made:

1 The appeal is upheld and each party is ordered to pay its or their own costs of appeal.
2 Paragraph 2 of the order of the high court is declared to be legally

ineffective.

3 Paragraphs 3 and 4 of the high court's order are set aside.

4 The application for eviction is remitted to the high court in order for it to determine the date upon which all of the occupiers of Tikwelo House are to be evicted from that building, the terms upon which the City is to provide temporary emergency accommodation to the persons referred to in paragraph 5(b) below of this order, any other conditions attaching to that eviction order and the costs of the application.

5 The remittal is subject to the following further orders:

(a) The attorneys for the occupiers, the Legal Resources Centre (the LRC), are directed on or before 30 September 2012 to furnish the attorneys for the City of Johannesburg with a list of those of its clients who, as a result of their eviction from Tikwelo House, will require temporary emergency accommodation, together with their names, ages, family circumstances, sources of income and appropriate proof of identity. The list and those details shall be confirmed by an affidavit of information and belief from a representative of the LRC and where possible by affidavits from the occupiers referred to therein.

(b) It is declared that the City of Johannesburg is obliged to provide all of the persons whose names appear on that list with temporary emergency accommodation by no later than two weeks prior to the date of the eviction order to be determined by the high court.

c) The City of Johannesburg is directed, by no later than 31 October 2012, to deliver a report to the high court, confirmed on affidavit by an appropriate official of the City, detailing the accommodation that it will make

available to the occupiers and when such accommodation will be available and containing an undertaking to make that accommodation available. That accommodation must be in a location as near as feasibly possible to the area where Tikwelo House is situated and the report must specifically deal with the issue of proximity and explain why the particular location and form of accommodation has been selected. It must also set out the steps taken during the two months before the report is filed to engage with the occupiers through the LRC or any other means that may appear appropriate.

d) The occupiers are entitled by no later than 30 November 2012 to deliver affidavits dealing with the contents of the City's report and specifying any objections thereto and the City is entitled within two weeks thereafter to deliver such further affidavits as it deems appropriate.

e) The application must then be set down on the opposed roll for hearing. If at any stage there is non-compliance with the provisions of this order, Changing Tides (Pty) Ltd is authorised to set the matter down for hearing for appropriate relief.

M J D WALLIS

JUDGE OF APPEAL

Appearances

For appellant:	J Both SC (with him A W Pullinger) Instructed by: Kunene Ramapala Botha Law Firm, Johannesburg Claude Reid Inc, Bloemfontein
For first respondent:	Reg Willis (with him N A Mohonane) Instructed by: Esthe Muller Attorneys Johannesburg Kramer Weihmann & Joubert Inc. Bloemfontein.
For 2nd to 97th respondents:	T Ngcukakaitobi (with him Z Gumede) Instructed by: Legal Resources Centre Johannesburg. Webbers, Bloemfontein.
For Amicus Curiae	S Wilson (with him I de Vos) SERI Law Clinic, Johannesburg. Naudes, Bloemfontein.