



Republic of South Africa

**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)**

Case No: 10334/2011

Before: The Hon. Mr Justice Binns-Ward

In the matter between:

THE CITY OF CAPE TOWN

Applicant

and

RUWAYA HOOSAIN N.O.

First Respondent

SELWYN HOCKEY N.O.

Second Respondent

EDWIN JOHN PETERSEN N.O.

Third Respondent

ABDURAZAK OSMAN N.O.

Fourth Respondent

ALL THOSE ADULT MALES AND FEMALES

OCCUPYING ERF 9967 GUGULETHU a.k.a

SS MASONWABE PARK SCHEME NUMBER 9/1992,

SITUATED AT DR MOERAT ROAD, GUGULETHU

Fifth Respondent

THE MEC HUMAN SETTLEMENTS (WESTERN CAPE)

Sixth Respondent

THE MINISTER OF TRADE AND INDUSTRY

Seventh Respondent

CENTRE FOR APPLIED LEGAL STUDIES

(Amicus curiae)

Intervening Party

JUDGMENT DELIVERED: 24 OCTOBER 2012

BINNS-WARD J:

Introduction

1] This matter came before the court at the instance of the municipality of the City of Cape Town ('the City'), which was concerned about the living conditions in two apartment buildings at the Masonwabe Park sectional title scheme in Gugulethu. The buildings were erected several decades ago to provide hostel accommodation for workers employed by a major construction company. The property had subsequently been acquired by the Western Cape Housing and Development Trust in or about 1993, with financial assistance from a foreign government aid-donor. The acquisition had been made with the object of converting the hostel into sectionalised apartments to be sold in due course to persons in the local community in need of housing. A number of families had already taken occupation of the units, but, for various reasons, which it is not necessary to describe, the contemplated transfer by the Trust of the 40 flats in the complex to individual purchasers was never implemented. Many of the families that were in occupation of the buildings when the Trust had acquired the property had subsequently moved into newly built houses in the immediate vicinity of the complex and given possession of the units to friends and relatives, or had permitted third parties in need of accommodation to use the premises. Most of the 40 sectional title units had been informally compartmentalised to accommodate more than one family.

2] It is evident that the Trust has lost control over the property, and lacks the means to

implement the originally contemplated housing-ownership scheme. So hopeless has the position become that the Trust is willing to transfer ownership of the property to the municipality, against a write-off of the accumulated arrears in respect of rates and services.¹

3]It was common cause that the buildings have fallen into such an advanced state of disrepair that they are no longer safe for human habitation. The structural defects which affect the buildings are of such a nature that it is not feasible to restore them. The City gave notice to the Trust to address the position, or demolish the buildings. The Trust had, in turn, given notice to the occupants of the buildings to vacate. The occupants did not comply with the notice. The City thereafter sought to achieve the vacating of the building by engaging directly with the occupants about the necessity for them to move and the availability of temporary alternative housing. When the occupants failed to vacate the buildings pursuant to these initial engagements, the City instituted eviction proceedings. The process preceding the institution of litigation had stretched over a period of more than two years.² The trustees of the owner-Trust were cited individually as the first four respondents, and the members of the community occupying the buildings were cited collectively as the fifth respondent.

4]The City's application was expressly founded on the provisions of s 12(4) of the Building Act³, alternatively s 6 of the PIE Act⁴, and in the further alternative, 'the common law'.⁵ The fundamental basis for the City's legal interest in addressing the

1 The Trust caused a draft deed of 'sale' to be prepared for this purpose. The draft deed reflected the purchase price as 'nil rand', but provided for the 'purchaser' to pay all costs incidental to the transfer, including the costs of obtaining any 'rates or other clearance certificate'.

2 The City had in fact commissioned a report on the integrity of the buildings as early as 2006.

3 The National Building Regulations and Building Standards Act 103 of 1977. The text of s 12 of the Act is set out in full at n. 13, below.

4 The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998.

5 The papers did not explain what the common law basis of the application might be.

conditions at Masonwabe Park, however, lay in s 152(1)(d) read with s 152(2) of the Constitution, which provides the promotion of a safe and healthy environment as one of the objects of local government which every municipality must strive to achieve. The two statutes invoked by the City are amongst the instruments which are available, in appropriate circumstances, to assist municipalities to achieve the fulfilment of their constitutional objects.

5]The fifth respondent opposed the application and brought a counter-application in terms of which quite wide ranging declaratory and attendant structural interdictory relief was sought. The fifth respondent's opposition to the application was based, in part, on the allegation that the occupants of the buildings had not been given notice in writing by the City as required in terms of s 12(4)(b) of the Building Act; they also denied that they were 'unlawful occupiers' of the property within the meaning of the PIE Act.

6]The substantive relief sought by the City has been addressed in terms of a settlement agreement that was concluded in circumstances to be described presently. Consequent upon the settlement, the only aspect of the counter-application that is being persisted with is the fifth respondent's application for an order declaring the provisions of s 12(4) and (5) of the Building Act to be unconstitutional. In their answering affidavit, which also served as the supporting affidavit in the counter-application, the fifth respondent indicated that they would seek the impugnement of the statutory provisions only if the City would not withdraw its reliance on them. The City did not. (Indeed, by the stage its heads of argument were filed, it appeared from the submissions set out therein that the only basis on which the City was proceeding

was in terms of s 12(4).) The other matter that remains unresolved by the settlement is the issue of costs.

7]At an advanced stage of the proceedings the Centre for Applied Legal Studies ('CALS') applied for, and was granted, leave to intervene as an *amicus curiae*. CALS argued in support of the case for the impugment of the statutory provisions. The submissions made by CALS focussed especially on the influence which it was contended various international instruments should have on the issue, having regard to s 39(1) of the Constitution.⁶ The declaratory relief sought by the fifth respondent resulted in the joinder of the Western Cape Provincial Government and the Minister of Trade and Industry as the sixth and seventh respondents, respectively. Consequent upon the settlement, the issues in respect of which the sixth respondent was joined are no longer before the court. The seventh respondent is the member of the Cabinet currently responsible for the administration of the Building Act.

The history of the litigation

8]This judgment is directed at determining the issues that the parties have been unable to dispose of in the settlement. It is appropriate to begin by summarising the history of the litigation.

9]The matter was set down for hearing on 14 September 2011.⁷ It was evident at that stage, however, that it would not be appropriate for the case to be entertained until there had been more meaningful engagement between the parties. At the court's

⁶ Cf. *Jaftha v Schoeman and others; Van Rooyen v Stoltz and others* 2005 (2) SA 140 (CC), 2005 (1) BCLR 78, at para. 23.

⁷ There had been some earlier postponements. It is unnecessary to describe them.

urging, the parties agreed to terms of engagement which, with minor adjustments, were incorporated in a court order made on that date.⁸ The hearing was then postponed to 20 October 2011 so that the court could review the results of the further engagement process and decide how to proceed with the hearing.

10]The City and the fifth respondent made good progress in the engagement process. It became apparent, however, that a major sticking point in the way of an agreed solution to the issue of the resultant homelessness of the occupants when the buildings were vacated was the number of temporary housing structures to be made available by the City to accommodate the 81 family units (each comprised of between one and nine persons) of which the fifth respondent community was made up. The City proposed to make 80 structures available, while the community contended that 107 were needed. The parties asked the court to make a declaratory order on the issue, which they agreed to accept as binding for the purpose of their further negotiations. On 21 October 2011, an order was made declaring that the provision by the City of 80 temporary housing units would, subject to the fulfilment of certain conditions, fall within the bounds of reasonableness. Directions were also issued at the same time for the continuation of the extra-curial engagement process. Reasons for the declaratory order were furnished in a written judgment handed down at the time. The hearing was then postponed to 23 November 2011.

11.]It was at the commencement of proceedings on 23 November 2011 that CALS was admitted as an intervening party. I was then informed that the outcome of the continued engagement between the parties gave reason to believe that the occupants

⁸ Compare the approach of the Constitutional Court to meaningful engagement in analogous circumstances in *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and others* 2008 (3) SA 208 (CC), 2008 (5) BCLR 475.

of the building could feasibly be settled, at least temporarily, on vacant land nearby. Thereafter, and by agreement, the terms of a conditional settlement between the City, the Trust and the community were incorporated into an order of court.⁹ The court was, however, requested to hear argument on the two matters that remained unresolved.¹⁰ Taking an optimistic view that the conditions for the settlement of the other issues would be fulfilled, it seemed practical and cost-effective in the circumstances to accede to the request, notwithstanding that it would not be possible for judgment to be given until certainty on the settlement had been obtained.

^{12]}Happily, the optimism that informed the course taken on 23-24 November 2011 was not misplaced. I was informed in chambers at the end of July 2012 that the availability of the alternative land for the settlement of the displaced members of the fifth respondent had been confirmed after the successful completion of the required legal and administrative processes. A notice to this effect was also delivered by the City's attorneys. The intervening passage of time meant, however, that my recollection of the detail of the facts and the arguments addressed to me had faded somewhat. I could have prepared a judgment provisionally soon after the conclusion of argument in November, but had decided against that course; preferring rather not to be led by such an exercise into committing myself mentally to any conclusions on matters on which it would be better for me to keep an open mind lest the settlement unravelled. Time therefore had to be found to allow me to refresh myself. The immediate demands of the succession of other cases coming before me during the third term made it impossible to get back to the matter until the spring recess, hence the delivery of judgment only at this rather late stage on the issues that were argued

⁹ See the judgment handed down on 24 November 2011.

¹⁰ See para. , above.

almost a year ago. As will become apparent, there have been relevant developments in the pertinent jurisprudence in the intervening period. I have endeavoured to take appropriate account of these.

The challenge to the constitutionality of sub-sections 12(4) and 12(5) of the Building Act

13]The challenge to the constitutionality of subsections 12(4) and (5) of the Building Act was based primarily on their alleged incompatibility with s 26 of the Constitution, which enshrines the right of everyone to access to adequate housing and imposes a positive obligation on the state to take reasonable measures to achieve the progressive realisation of the right. The provision also provides that no person may be evicted from his home or have it demolished except pursuant to an order made by a court after consideration of all the relevant circumstances. The complaint is that subsections 12(4) and (5) are characterised by ‘a marked absence of any references to the need for affected parties to be granted hearings, for notices to be served by the sheriff or for local authorities to obtain court authorisation for ...[their] actions’. It was contended that s 12(4)(b) formed ‘part of a battery of provisions which confer upon local authorities extensive powers of self-help in respect of the erection, demolition and alteration of buildings, paying scant regard to affected parties’ rights to property, procedural fairness, access to courts or to housing.’¹¹ It was argued further that the ‘impact of these powers is exacerbated by the provision of criminal sanctions to enforce them’.¹²

11 The powers in s 12 concerning the demolition, alteration or securing of buildings and earthworks arise in subsection (1) thereof. Subsection 12(5) cross-references to s 12(1) as well as to s 12(4). Section 12(1) is, however, not impugned in these proceedings.

12 The quotations in this paragraph are from the fifth respondent’s heads of argument.

^{14]}Subsections 12(4) and (5) of the Building Act comprise part of the second of

1.5]two subsets which make up s 12.¹³ They fall to be read with sub-section 12(6), which completes the subset. The first subset, which is comprised of sub-sections 12(1)-(3), provides local authorities with powers to address the issues that can arise from dilapidated or unsafe buildings and unsafe earthworks and building activity. It also imposes a duty on the owner of any building or earthwork that is in a dangerous

13 Section 12 of Act 103 of 1977, as amplified by the Constitutional Court, provides as follows:

(1) If the local authority in question is of the opinion that-

- (a) any building is dilapidated or in a state of disrepair or shows signs thereof;*
- (b) any building or the land on which a building was or is being or is to be erected or any earthwork is dangerous or is showing signs of becoming dangerous to life or property,*

it may by notice in writing, served by post or delivered, order the owner of such building, land or earthwork, within the period specified in such notice to demolish such building or to alter or secure it in such manner that it will no longer be dilapidated or in a state of disrepair or show signs thereof or be dangerous or show signs of becoming dangerous to life or property or to alter or secure such land or earthwork in such manner that it will no longer be dangerous or show signs of becoming dangerous to life or property: Provided that if such local authority is of the opinion that the condition of any building, land or earthwork is such that steps should forthwith be taken to protect life or property, it may take such steps without serving or delivering such notice on or to the owner of such building, land or earthwork and may recover the costs of such steps from such owner.

(2) If the condition of any building or the land on which a building was or is being or is to be erected or any earthwork is such that it is dangerous to life or property, the owner of such building, land or earthwork shall forthwith notify the local authority in question thereof.

(3) (a) If the condition of any building or the land on which a building was or is being or is to be erected or any earthwork is such that it is dangerous or is showing signs of becoming dangerous to life or property, the local authority, irrespective of whether it was notified in terms of subsection (2), may by notice in writing, served by post or delivered, order the owner of such building, land or earthwork to instruct at the cost of such owner an architect or a registered person to investigate such condition and to report to such local authority on the nature and extent of the steps to be taken, in the opinion of such architect or registered person, in order to render such building, land or earthwork safe.

(b) The local authority in question may by notice in writing, served by post or delivered, order that any activities be stopped or prohibit the performance of any activities which may increase the danger or hinder or obstruct the architect or registered person referred to in paragraph (a) from properly carrying out the investigation referred to in that paragraph.

(c) If it is brought to the attention of a local authority or appears that an architect or registered person instructed in terms of paragraph (a) to perform certain duties is for any reason not competent to carry out the duties in question, the local authority may require such architect or registered person to submit evidence of his or her competence to carry out such duties.

(d) If the architect or registered person contemplated in paragraph (c) is unable to satisfy the local authority of his or her competence to carry out the duties in question, the local authority may order the owner of the building, land or earthwork in question to instruct another architect or registered person to carry out the duties.

(4) If the local authority in question deems it necessary for the safety of any person, it may by notice in writing, served by post or delivered-

- (a) order the owner of any building to remove, within the period specified in such notice,*

condition to notify the local authority. The second subset, in which the impugned provisions resort, is directed at providing local authorities with the powers to address the habitation or use by persons of buildings that are in an unsafe condition, and matters related thereto.

16]The powers afforded in terms of the second subset are clearly complementary to those afforded in terms of the first subset. The jurisdictional prerequisite to their exercise is the determination by the local authority that it is necessary for the safety of any actual or potential occupant or user of a building at whom an order made in terms of s 12(4) might be directed that they be prohibited from occupying or using the building for so long as the condition threatening their safety endures. It is beyond debate that the exercise of the powers has to be undertaken conformably with the requirements of lawful, reasonable and fair administrative action; see s 33 of the

all persons occupying or working or being for any other purpose in such building therefrom, and to take care that any person not authorized by such local authority does not enter such building;

(b) *order any person occupying or working or being for any other purpose in any building, to vacate such building immediately or within a period specified in such notice.*

(5) No person shall occupy or use or permit the occupation or use of any building in respect of which a notice was served or delivered in terms of this section or steps were taken by the local authority in question in terms of subsection (1), unless such local authority has granted permission in writing that such building may again be occupied or used.

(6) Any person who contravenes or fails to comply with any provision of this section or any notice issued thereunder, shall be guilty of an offence and, in the case of a contravention of the provisions of subsection (5), liable on conviction to a fine not exceeding R100 for each day on which he so contravened. This subsection applies only to people who, after service upon them of an order of court for their eviction, continue to occupy the property concerned. (Underlined wording read-in by the Constitutional Court.)

Constitution and the Promotion of Administrative Justice Act 3 of 2000 ('PAJA'),^{14 15} and cf. *Zondi v MEC for Traditional and Local Government Affairs and Others* 2005 (3) SA 589 (CC), 2005 (4) BCLR 347, at para.s 98-103. Thus it is not without significance that in *Schubart Park Residents' Association and Others v City of Tshwane and Another* [2012] ZACC 26 (9 October 2012),¹⁶ at para. 38, the Constitutional Court referred to the section as one directed at providing for 'the timeous removal of people living in unsafe buildings'. In context it is clear by this that the Court read the provision as one that would not ordinarily operate with immediate effect unless reasonably justified by conditions of urgent threats to human safety. A reasonable period of notice and opportunity for consultation with the affected parties will thus ordinarily precede the issue or coming into effect of an 'order' in terms of s 12(4). However, the very object of the provision and the diverse, but individually unique, considerations which are liable to invoke its application call for a wide measure of flexibility, which it would be difficult to accommodate within finitely prescribed procedural requirements.

^{17]}The argument by the fifth respondent's counsel that it is not permissible to use the provisions of PAJA to interpret the impugned subsections in the Building Act because

¹⁴ The fifth respondent's counsel submitted that s 12 fell to be read and construed in its context as a product of the apartheid era, and in particular with regard to the highhanded approach by the legislature of that period to the eviction and removal of people. It needs to be pointed out, however, that the provision has been legislatively revisited in the post-constitutional era. The provisions of s 12(3) were substantially revised in terms of s 3 of the National Building Regulations and Building Standards Amendment Act 49 of 1995. The nature of the revisions were directed at assisting local authorities to obtain the report of an architect or 'registered person' at the expense of a property owner on the state of buildings and earthworks under consideration. The evident purpose of that power was to assist local authorities to determine whether, and to what effect, to use the powers conferred in terms of subsections (1), (2) and (4). I have not overlooked the observations made in *Jaftha* supra, at para.s 25-29 about the appositeness of a sensitive approach to matters concerning security of tenure in the light of our history. It is not in issue in the current matter that s 26 of the Constitution must be construed generously and read as a whole, and recognised as a particularised manifestation of other rights, in particular the right to human dignity.

¹⁵ See *City of Johannesburg v Rand Properties (Pty) Ltd and Others* 2007 (6) SA 417 (SCA), 2007 (6) BCLR 643, [2007] 2 All SA 459, at para.s 54-56.

¹⁶ <http://www.saflii.org.za/za/cases/ZACC/2012>.

the latter statute preceded the former is misconceived. PAJA does not apply for interpretative purposes. It applies because any action by local authorities in terms of s 12(4) of the Building Act is ‘administrative action’ within the meaning of PAJA,¹⁷ and must therefore be undertaken conformably with its prescripts.

^{18]}The current proceedings are not the first in which a challenge has been made against the constitutional compatibility of s 12(4)-(6). A like attack was made in the matter of *City of Johannesburg v Rand Properties (Pty) Ltd and Others* 2007 (1) SA 78 (W), 2006 (6) BCLR 728, [2006] 2 All SA 240. That attack, which was made in a counter-application by the occupants of the inner city buildings in Johannesburg who were the subject of eviction proceedings at the instance of a local authority, was not determined by the court of first instance. The constitutionality challenge was addressed, however, on appeal to the Supreme Court of Appeal (‘the SCA’). The contention that the provisions were constitutionally incompatible was rejected and the counter-application consequently dismissed; see *City of Johannesburg v Rand Properties (Pty) Ltd and Others*.¹⁸

^{19]}The order made by the SCA in *Rand Properties* was set aside by the Constitutional Court in *Occupiers of 51 Olivia Road, Berea Township*.¹⁹ It appears from the judgment that none of the attacks on s 12(4)-(6) was expressly taken forward before the Constitutional Court, which found that it was not in the interests of justice to deal with them in the circumstances.²⁰ The court did, however, hold *mero motu* that s 12(6), in the form in which it had been promulgated, was unconstitutional. It read-in

¹⁷ See the definition of ‘administrative action’ in s 1 of PAJA.

¹⁸ Note 15, above.

¹⁹ Note 8, above.

²⁰ *Occupiers of 51 Olivia Road* supra, at para. 47.

the following proviso to the sub-section in order to save it: ‘*This subsection applies only to people who, after service upon them of an order of court for their eviction, continue to occupy the property concerned*’.²¹ The reading-in introduced a qualification to s 12(6) that appears to go further than meeting the requirements of s 26(3) of the Constitution, for it is not limited in effect only to the consequences of a failure of a person to comply with a notice in terms of the provision when the affected building is that person’s home. Its effect is to underline the fact that the provisions of s 12(4) do not permit a local authority to resort to self-help and expel persons who fail to comply with notices issued in terms of the sub-section; a court order is necessary in all cases where an eviction is required to enforce compliance. In this respect it confirms what was held by the SCA in *Rand Properties*, at para. 53. The reasoning for the finding of unconstitutionality in s 12(6) and the formulation of the remedial reading-in were, however, expressly premised on the requirements of s 26(3) of the Constitution.

^{20]}Despite its finding that the constitutionality of subsections 12(4) and (5) was not a matter deserving of its attention in that case, the Constitutional Court set aside the orders made by the SCA in *Rand Properties* in their entirety, including the order dismissing the counter-application. The result is that, notwithstanding the obviously persuasive influence of the reasoning in the SCA’s judgment - to the extent that it was not disturbed by the Constitutional Court – on any subsequent consideration of the provisions, the challenge to the statutory provisions in that case was effectively left undecided.

²¹ See n 13, above.

21]The City abided the judgment of the court on the issue of the constitutionality of s 12(4) and (5) of the Building Act. It did, however, file an affidavit by an official in its Department of Planning and Building Development Management confirming that the City had always understood and applied the provisions in a manner compliant with the import of the SCA jurisprudence in *Rand Properties* read with the Constitutional Court judgment in *Occupiers of 51 Olivia Road*.

22]The Minister of Trade and Industry, however, took as a preliminary point against the appropriateness of a determination of the issue, its mootness, because of the settlement between the City and the fifth respondent. In the event of his preliminary point not being upheld, he contended that the challenge to the constitutionality of the provisions should be dismissed.

23]It is necessary therefore first to determine whether this court should entertain the issue in the context of the settlement. As a general approach, courts are not readily disposed to deciding issues which are moot, hypothetical, or only of academic interest between the litigants; cf. *Compagnie Interafricaine de Travaux v South African Transport Services and Others* 1991 (4) SA 217 (A), at 230I-J; *Shoba v Officer Commanding, Temporary Police Camp, Wagendrift Dam, and Another*; *Maphanga v Officer Commanding, South African Police Murder and Robbery Unit, Pietermaritzburg, and Others* 1995 (4) SA 1 (A), at 14F, and *JT Publishing (Pty) Ltd and Another v Minister of Safety and Security and Others* 1997 (3) SA 514 (CC), at para. 15. Counsel for the Minister stressed this general approach, and submitted that it would be appropriate to apply it in the circumstances. Ms. Pillay cited a number of Constitutional Court judgments in support of her argument, including *Zantsi v*

Council of State, Ciskei and Others 1995 (4) SA 615 (CC), at para.s 2-5, *Ferreira v Levin NO and Others*; *Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC), at para 199, and *S v Bequintot* 1997 (2) SA 887 (CC), at para 12-13, and highlighted the observation made in note 18 to the judgment in *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC) that ‘*The general proposition is that a case is not justiciable if it no longer presents an existing or live controversy which should exist if the Court is to avoid giving advisory opinions on abstract propositions of law*’.

24]To that list might be added, of course, the example afforded by the Constitutional Court having declined to deal with the issue in *Occupiers of 51 Olivia Road*, also in the context of a settlement having been reached on the central issue of the evictions. However, I am mindful that a material factor in the court having adopted that approach appears to have been (as mentioned) the failure of the parties to carry the issue forward, which was not the position in the current matter. It is nevertheless not without significance, I think, that the Constitutional Court decided to deal *mero motu* with subsection 12(6) and to leave subsections 12(4) and (5) alone. This does tend to suggest that the need for intervention, if at all, in a context not dissimilar to the present, was perceived to be less evident in respect of the latter provisions.

25]Ms *Pillay* also pointed out that the attack on s 12(4) and (5) had been limited in the papers to its effect on the fifth respondent’s circumstances, and that the counter-application had not been brought on a public interest or class action basis.²² She stressed that there was no evidence before the court as to how the provision was being

22 In a supplementary affidavit, the fifth respondent did assert that its impugnement of sub-secs 12(4) and (5) of the Building Act was also advanced on a public interest basis.

applied generally. (The Director-General of Trade and Industry, who deposed to an affidavit on behalf of the Minister in opposition to the fifth respondent's constitutional challenge, averred that to the best of his knowledge the provisions were not being applied by local authorities to achieve evictions without a court order.)

26] Counsel for the fifth respondent and the *amicus* on the other hand argued that the issue was not moot. The counter-application for declaratory relief remained, notwithstanding any settlement of the issues pertaining to the vacation of the buildings and the temporary resettlement of the occupants. Moreover, the question of the ability of the City to competently rely on s 12(4) of the Building Act was relevant to the determination of the issue of costs. Recognising the discretionary character of declaratory relief, Mr *Hathorn* and Mr *Brickhill* also stressed the desirability of entertaining the counter-application for declaratory relief, even if the issue had become moot between the City and the fifth respondent. In this regard they invoked the approach of the Constitutional Court in *Independent Electoral Commission v Langeberg Municipality* 2001 (3) SA 925 (CC), 2001 (9) BCLR 883, at para. 11, and that - essentially to the same effect - adopted by the SCA in determining matters affected by s 21A of the Supreme Court Act 59 of 1959,²³ when, generally by reason of intervening events, the only live issue remaining between the litigants by the time the appeal is heard is that of costs. Those courts will determine an issue on appeal, notwithstanding that it has become moot, if the interests of justice require it. A pre-requisite for them to do so is that any resultant order must have a practical effect either on the parties, or on others.

23 Section 21A(1) of Act 59 of 1959 provides:

When at the hearing of any civil appeal to the Appellate Division or any Provincial or Local Division of the Supreme Court the issues are of such a nature that the judgment or order sought will have no practical effect or result, the appeal may be dismissed on this ground alone.

27]The SCA has used the discretion allowed in terms of s 21A of Act 59 of 1959 to decide matters, notwithstanding that the issues have become moot between the parties, in cases in which there was a lack of clarity on the meaning of a statutory provision originally in issue and it is evident that providing clarity by means of its judgment will be of practical use in the future. Compare, for example, *Minister of Trade and Industry and Another v EL Enterprises and Another* 2011 (1) SA 581 (SCA) at para. 2 and *Land en Landbouontwikkelingsbank van Suid-Afrika v Conradie* 2005 (4) SA 506 (SCA), [2005] 4 All SA 509, at para.s 6 and 7. Counsel for the fifth respondent and the *amicus* submitted that resort to s 12(4) of the Building Act by local authorities could be expected to be a common occurrence in the prevailing socio-economic conditions in the country, and that a determination of its constitutionality was thus desirable because the persons affected would all too frequently be ignorant of their rights and unable to obtain legal representation. There was a pressing need for certain procedural safeguards to be read-in. They contended that expressly stipulated safeguards were necessary to ensure that the power under s 12(4) was exercised in a constitutionally compatible manner. This was especially because of the potential impact of the power on the most vulnerable sections of society. It was ventured - no doubt with reference to the intended effect of the meaningful engagement principles laid down in *Occupiers of 51 Olivia Road* - that in those cases in which legal representation was obtained the chances of settlement being achieved before a court would be able to address the constitutionality of the provisions as a live issue were high, and that this consideration militated in favour of entertaining the application for declaratory relief.

28]Shortly after argument was heard in this matter analogous considerations

concerning mootness and constitutional materiality in the context of pertinent jurisprudence were weighed in the Constitutional Court's judgment in *Pheko and Others v Ekurhuleni Municipality (Socio-Economic Rights Institute of South Africa intervening as amicus curiae)* 2012 (2) SA 598 (CC), 2012 (4) BCLR 388. That case concerned the involuntary permanent removal by a local authority of a community which had settled on vacant land which was unsafe because of its susceptibility to sinkholes.²⁴ The local authority had purported to act in terms of the Disaster Management Act 57 of 2002 ('the DMA'). The members of the affected community accepted the need for them to move, but contended that their removal to a place further away from the place where they had been living than was considered reasonable, and without adequate and genuine prior consultation, was tantamount to an eviction within the meaning of s 26(3) of the Constitution. Their case was that the forced removal had thus been unlawful because it had not been authorised in terms of a court order made after consideration of all the relevant circumstances. The South Gauteng High Court nevertheless refused their urgent application for an interdict stopping the alleged eviction and giving them attendant spoliatory relief.

^{29]}The community then applied for leave to appeal against that refusal directly to the Constitutional Court. The interdictory relief that had been sought before the High Court was no longer feasible by the time the application for leave to appeal was argued. The local authority consequently argued that leave should be refused because the issues had become moot. The local authority also contended that, having acted administratively in terms of the applicable provisions of the DMA, its conduct in removing the community from the land on which they had settled did not constitute an

²⁴ The community was forcibly removed by a private security firm employed by the local authority for the purpose (the so-called 'Red Ants'). In the course of the removal the shelters in which the members of the community had resided were demolished.

eviction of the residents in the sense contemplated by s 26(3) of the Constitution. (In this respect the local authority relied on the treatment of the provisions of s 12(4)-(6) of the Building Act by the SCA in *Rand Properties* supra - failing to appreciate, apparently, that nothing in the *Rand Properties* judgment would serve to justify its resort to self-help, or had recognised a power in the local authority to permanently remove people from their homes without the sanction of a court order made after compliance with the requirements of s 26(3) of the Constitution.)

30]In addressing the mootness argument, the Constitutional Court cited the remarks of Yacoob J and Madlanga AJ in *Langeberg Municipality* supra, loc cit, and proceeded '*It is beyond question that the interdictory relief sought will be of no consequence as the applicants have already been removed from Bapsfontein. Although the removal has taken place, this case still presents a live controversy regarding the lawfulness of the eviction. Generally, unlawful conduct is inimical to the rule of law and to the development of a society based on dignity, equality and freedom. Needless to say, the applicants have an interest in the adjudication of the constitutional issue at stake. The matter cannot therefore be said to be moot. It is also live because if we find that the removal of the applicants was unlawful, it would be necessary to consider their claim for restitutionary relief*'; (at para. 32, footnote references omitted). The court decided that it was in the interests of justice to entertain the case because of the controversy over whether the rights of the members of the community had been infringed. It is evident, however, that it would not have entertained the application if it had considered the issues to be moot; see para. 31 of the judgment.

31]There are a number of features in the current case which materially distinguish it

from that in *Pheko*.

32]The interdictory relief sought in *Pheko* had become arguably moot because by the time the matter reached the Constitutional Court the community had already effectively been evicted (or ‘evacuated’ as the local authority preferred to term it), their homes had been destroyed, and no purpose would be served by their re-erection on land that was dangerous for habitation. Significantly, all those events had occurred without a court order because the local authority maintained that the removal did not constitute an eviction. In the current case, by contrast, the City at no stage apprehended, or gave reason to any party to understand that it apprehended, that the residents of the buildings could be forced to leave the property other than in terms of a court order. There was no forced eviction of the members of the fifth respondent community in the current case, and not even the threat of eviction without a court order first being obtained. The City dealt with the exigencies of a compulsory removal of the community pursuant to the requirements of s 12(4) at all times mindful of the need for compliance with s 26 of the Constitution. The City engaged with the community and made arrangements for their relocation to temporary emergency shelter. (That these arrangements were insufficient or inadequate, or that engagement with the community before the institution of proceedings might have been more meaningful than it was, are matters to which I shall give attention when determining the unresolved issue of costs.)

33]In *Pheko*, there was also the unresolved claim for restitutionary relief for an alleged breach of constitutional rights which kept the determination of the ambit and effect of the relevant provisions of the DMA very much alive as an issue. In the

current case the fifth respondent's defence to proceedings founded on s 12(4) was more centrally directed at the alleged failure by the City to give them, as distinct from the Trust, notice as required in terms of the sub-section. It was also founded on their contentions as to the City's obligations towards them in respect of emergency temporary housing and subsequent permanent resettlement. Those contentions are no longer live issues before the court by reason of the settlement.

^{34]}In *Occupiers of 51 Olivia Road*, while the Constitutional Court held that the right of a local authority to act under s 12(4)(b) and the right of the persons affected by a notice given under the provision to access to adequate housing were not reciprocal, it emphasised, however, that this did not imply that the local authority, when determining upon the exercise of the power to give notice in terms of s 12(4) of the Building Act, was relieved of the duty to consider and appropriately address the consequences of homelessness that might foreseeably result upon the implementation of its order. The Constitutional Court unambiguously identified the practical interrelationship between s 12(4) and s 26(2) of the Constitution when homelessness was a possible result of the exercise of the power under the Building Act. The Court stated that any exercise of the power thus had to be undertaken in an appropriately integrated or 'holistic' way. It was in this context that Yacoob J commented that the SCA's characterisation of the case as 'only peripherally about the constitutional duty of organs of state towards those who are evicted from their homes and are in a desperate condition' was 'unfortunate'.²⁵ The Constitutional Court also stressed that that any court considering any application for the eviction of a person from their home was required in terms of s 26(3) to consider all relevant circumstances. In my view it

²⁵ See para.s 43-46 of the judgment.

is thus evident that the interrelationship between the rights in terms of s 26 and those under other provisions of the Bill of Rights mandates an enquiry by any local authority contemplating acting in terms of s 12(4) broader than one merely into whether the jurisdictional prerequisite for the exercise of the s 12(4) power has been satisfied, as the judgment in *Rand Properties* might be read to suggest; it also enjoins an enquiry into the manner and consequences of the implementation of a s 12(4) order affecting a person's home.

35] Although there was no challenge to the constitutionality of the pertinent provisions of the DMA in *Pheko*, the judgment implicitly underscored the effect of that in *Occupiers of 51 Olivia Road* as to the practical interrelationship of provisions such as s 12 of the Building Act and s 26 of the Constitution. The City's conduct in the current matter was at all times consistent with an understanding that a holistic approach to the application of s 12(4) of the Building Act was required when the permanent loss of the affected parties homes was entailed; in other words its reading of the provision was plainly reconcilable with that of the Constitutional Court.

36] A further distinguishing feature, in this instance between the current proceedings and the attack previously mounted in *Rand Properties*, is that the fifth respondent's counter-application was brought in circumstances in which the proviso read into s 12(6) of the Building Act by the Constitutional Court in *Occupiers of 51 Olivia Road* has rendered the prohibition in terms of s 12(5) toothless – certainly to the extent that it might be relied upon by any authority to purport to *permanently* deprive a person of the right to return to his or her home, unless supported by a court-granted eviction order. The result is that it seems quite certain that s 12(5) can be availed of

for enforcement purposes only where it is reasonable to do so, and never in a manner that effectively trumps s 26 of the Constitution. There is in any event nothing on the facts of the current case to demonstrate the practical application of s 12(5). On my reading of the provision, its intended effect is in any event merely to make it clear that a vacating order in terms of s 12(4), or any order with similar effect in terms of s 12(1), shall be of continuing effect until permission is granted by the local authority for the re-occupation or resumed use of the building in question.

37]The reading-in by the Constitutional Court has also, by necessary implication, eroded the imperative or coercive effect of the use of the verb ‘order’ in s 12(4), upon which counsel for the *amicus* placed emphasis. The contextual effect of the reading-in militates against the ability of anyone to properly construe subsections 12(4) and (5) in a manner that renders them incompatible with s 26 of the Constitution; cf. *Pheko*, at para.s 37-38.

38]It is also now clearly determined by Constitutional Court jurisprudence that the immediate removal of persons from their homes in terms of s 12 of the Building Act or comparable provisions in the DMA cannot, by itself, lawfully deprive them permanently of their rights to those homes. That can be achieved lawfully only by means of a court order obtained in the circumstances contemplated by s 26(3) of the Constitution; see *Schubart Park*, at para. 20.

39]Any local authority applying s 12(4) of the Building Act in circumstances which would occasion the persons affected by a notice in terms of s 12(4)(b) to be despoiled of their homes, however inadequate they might be, would also know that it would

have to act in a manner compliant with its responsibilities as explained in *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169. This much is confirmed in the cross-references to that judgment in *Occupiers of 51 Olivia Road*, especially at para. 10 (with an emphasis on the inextricable interrelationship between the rights in s 26 of the Constitution and those of reasonable governmental action and the respect for and protection of human dignity in s 10), and para.s 16 and 21 (with regard to the importance and significance of prior meaningful engagement). Any local authority that purports to apply s 12(4) with disregard of these requirements should know that it will be acting unlawfully. It is authoritatively established that no-one has to submit to the coercive effect of an unlawfully made administrative decision; and its litigious enforcement may be resisted by means of collateral challenge; see *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA) [2004] 3 All SA 1, at para.s 32-36. (The nature of the challenge I have in mind would be to the legality of the action, not to the constitutionality of the empowering provision.)

^{40]}There is nothing in the facts of the current case to indicate that local authorities will not be cognisant of this when determining to issue an order in terms of the provision. There is certainly no longer any reason for uncertainty on their part as to their duties in this respect. Although *Schubart Park* affords an instance of a local authority inappropriately seeking to rely *ex post facto* on the provisions of s 12 to justify its removal of the occupants of a tenement complex, it is evident that the municipality was astute to the unfounded nature of that reliance by the time the case was argued in the Constitutional Court. There was nothing, however, to suggest that the urgent removal of the occupiers had not been necessary in the circumstances of

that case, or that the provisions of s 12 of the Building Act had operated in the circumstances to infringe anyone's rights in terms of s 26 of the Constitution.

41.] The context of the application for their eviction under whatever label – that is, that it was brought by the City before a competent court - made the fifth respondent's impugnement of s 12(4) as incompatible with s 26 of the Constitution somewhat academic in character from the very outset,²⁶ particularly because it was not supported by any evidence of the application of the provision by any municipality, post-*Rand Properties*, in a manner in conflict with s 26.

42.] I have described these features of the case in an historic jurisprudential context at some length because I consider that the single most important factor in making the determination as to whether to entertain the counter-application for declaratory relief is whether it would be in the interests of justice to deal in this case with the constitutionality of subsections 12(4) and (5). I have done so fully astute to the consideration that mootness, by itself, is not a bar to the propriety of entertaining the application for declaratory relief; cf. *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development and Others* 2009 (4) SA 222 (CC), 2009 (7) BCLR 637, at para. 40. But unless there is evidence, rather than hypothesis, that the application of s 12(4) of the Building Act is currently occasioning, or likely to occasion an infringement of persons' fundamental rights in terms of the Constitution, or that the state of the applicable law is giving rise to unwholesome

²⁶ This may also have been a factor that weighed with the Constitutional Court when it declined to deal with the impugnement of s 12(4) and (5) in *Occupiers of 51 Olivia Road*. Proceedings for the eviction of the occupiers in that matter consequent upon a notice given in terms of s 12(4)(b) were instituted by the local authority before a court and had been settled; see para. 39 of the judgment. The local authority in that matter, as in the current case, did not construe the provisions of s 12 to afford it the power to enforce its order without the sanction of a court.

uncertainty on how the provisions fall to be applied, it does not seem to me to be in the interests of justice to entertain the constitutional challenge.

43] The state of the law when it comes to use of the provision does not appear to be uncertain and the facts of the current case do not support the conclusion that the wording of the impugned provisions had conduced to a breach of their rights.

44] The argument that there is a pressing need for procedural safeguards to be expressly read-in into s 12(4) to render it constitutionally compatible is not convincing; and certainly, if appropriate regard is had to the guidance already provided, especially in the judgments in *Occupiers of 51 Olivia Road and Rand Properties*, there is nothing about the evidence in the current case that makes out a compelling case for this court to go into the matter. The authorities upon which counsel for the fifth respondent and the *amicus* relied to press this part of their argument (*Abahlali baseMjondolo Movement SA and Another v Premier of the Province of KwaZulu-Natal and Others* 2010 (2) BCLR 99 (CC) and *Centre for Child Law v Minister for Justice and Constitutional Development and Others* 2009 (6) SA 632 (CC), 2009 (11) BCLR 1105) were decided with reference to legislation of a quite distinguishable character.

45] The provisions of s 16 of the KwaZulu-Natal Elimination and Prevention of Re-emergence of Slums Act 6 of 2007 that were in issue in *Abahlali* entailed a very different coercive power from that entailed in s 12(4) of the Building Act. Section 16 of the KwaZulu-Natal statute obliged landowners, and failing them, municipalities, to evict unlawful occupiers from land when instructed to do so by the MEC in a notice.

Compliance with the notice would take the form of the institution of eviction proceedings in terms of the PIE Act. Those at whom a notice by the MEC was directed were obliged to institute eviction proceedings even if it they were of the view that the justice and equity requirements for eviction in terms of the PIE Act could not be met. The basis for the finding of constitutional incompatibility, as I understand the majority judgment, was not the absence of express procedural safeguards , but rather that the coercive effect of the provision was premised on an overly broad power invested in the MEC, which, according to the plain and undiscriminating language of the section, was open to being exercised in a manner irreconcilable with ‘the dignified [legislative] framework that has been developed for the eviction of unlawful occupiers’ pursuant to s 26(2) of the Constitution. The impugned provision afforded the MEC an unrestrained policy-directed power, the use of which could override safeguards built into the other applicable legislation of the character contemplated by s 26(2) of the Constitution. The majority judgment held that the approach in the minority judgment, which sought to construe the language of the impugned provision in a manner that would render it constitutionally compatible, was untenable because such a construction had ‘the effect of re-writing section 16 in a manner that is not apparent on its face and that is in conflict with the coercive design of section 16 to eliminate slums and informal settlements’.²⁷ A procrustean treatment of the text in accordance with the approach in the minority judgment, so held the majority, would also be inimical to the rule of law requirement that the law be certain and accessible.

⁴⁶]By contrast with s 16 of the KwaZulu-Natal statute, s 12(4) of the Building Act affords an expressly circumscribed administrative power to local authorities, which,

²⁷ *Abahlali* at para. 115.

on a proper reading of the provision, can be enforced, when its effect is to evict people from their homes, only through a court order of the nature contemplated in terms of s 26(3) of the Constitution. The power of local authorities in terms of s 12(4) can thus be exercised only if the jurisdictional prerequisites are satisfied and, even then, subject to the overriding constitutional provisions pertinent to reasonable and procedural fair administrative action set out in PAJA. The court order necessary to enforce the administrative action will, in general, not be obtainable unless there has been meaningful prior engagement by the local authority with the affected persons. As I have sought to describe, a detailed jurisprudential context has already been provided for the application of the provision in a constitutionally compatible manner.

^{47]}The observations made by Moseneke DCJ at para. 124 of *Abahlali*, on which Mr *Brickhill* laid emphasis, to the effect that it is important for the rule of law that the effect of legislation should be clear from its language, fall to be understood in this context.²⁸ The effect of the jurisprudence, in my view, is such that it is not evident that persons affected by the impugned provisions (certainly if advised by their lawyers), or the local government functionaries empowered to apply them, will not be clear on how the provisions should operate in a constitutionally compliant way. I mention these distinctions not to reject the constitutionality challenge on its merits, but only to explain why I do not consider that the *Abahlali* judgment advances the argument that there is sufficient need in the context of the current matter to entertain

28 In para. 124 of *Abahlali*, Moseneke DCJ, writing for the majority, held ‘*The rule of law is a founding value of our constitutional democracy. Its content has been expanded in a long line of cases. It requires that the law must, on its face, be clear and ascertainable. To read in one qualification to achieve constitutional conformity is very different from reading in six. Indeed, reading in so many qualifications inevitably strains the text. This is all the more so when the legislation in issue affects vulnerable people in relation to so vital an aspect of their lives as their security of tenure. It will be impossible for people in the position of the applicants, even if advised by their lawyers, to be clear on how this provision will operate. The same will indeed apply to others affected by the law, such as owners, and the bureaucrats charged with applying it.*’

it.

^{48]}*Centre for Child Law* concerned the constitutionality of prescribed minimum sentencing provisions that treated children between the ages of 16 and 18 indistinguishably from adults. The provisions were found to be incompatible with 28(1)(g) of the Constitution.²⁹ The aspect of the majority judgment upon which counsel for the *amicus* relied was its rejection of the approach adopted in the minority judgment (of Yacoob J) that the provisions could be read so not to conflict with s 28. Cameron J, writing for the majority, stated in this regard (at para. 67) ‘...*the approach of Yacoob J entails serious operational perils for the sentencing of child offenders. Because it equivocates in the way I have shown, it does not adequately explain how far the minimum sentencing regime can legitimately push sentences upwards. It therefore leaves an especially vulnerable group with a significant degree of uncertainty about the content of their constitutional rights. As this Court said in Richter*.[³⁰] “a law that regulates a fundamental right should be expressed in a manner which will enable citizens to determine with relative clarity what rights they have and do not have.”’ It is apparent from what I have said earlier in this judgment that I am not persuaded that there is such a degree of uncertainty attending the exercise by local authorities of their powers in terms of s 12(4) in a constitutionally compatible manner as to make it evident that it would be in the interests of justice to entertain the constitutional challenge in the circumstances of the current case.

29 Section 28(1)(g) of the Constitution provides: ‘Every child has the right- not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be-
i) kept separately from detained persons over the age of 18 years; and
treated in a manner, and kept in conditions, that take account of the child's age’.

30 *Richter v Minister for Home Affairs and Others (with Democratic Alliance and Others Intervening, and with Afriforum and Another as Amici Curiae)* 2009 (3) SA 615 (CC), 2009 (5) BCLR 448, at para. 64.

⁴⁹]Mr *Brickhill* submitted that the contended for constitutional incompatibility of s 12(4) could be cured by reading-in the following underlined words ‘*If, after notice to and consultation with the owner and occupiers of the relevant building, the local authority...*’. I think it is evident from my review of the pertinent jurisprudence, however, that it is clear enough that fulfilment of those procedural requirements would ordinarily be implied unless the exigencies of a situation made it reasonable to dispense with them. Mr. *Brickhill* also sought to suggest that the facts of the current case demonstrated that the local authority could, by dealing with the owner of a building and not its occupants, unlawfully impinge on the occupants’ security of tenure. I am not persuaded that the facts do afford such demonstration. On the contrary, it is evident that when it became apparent that the owner was unable to clear the building, the City engaged directly with the occupiers. Nothing in the City’s dealings with the owner would support the notion that the owner could effect an eviction of the occupants, should they not voluntarily move out, other than by authority of a court order of the nature contemplated by s 26(3) of the Constitution.

⁵⁰]The application of s 12(4) of the Building Act is undoubtedly an important feature in the armoury of municipalities – especially those in the bigger urban centres - confronted with the consequences of urban decay, frequently characterised by the abandonment of rundown tenements by their owners and their appropriation for housing by the poor and desperate, who are unable to afford to restore or maintain them in a safe and habitable condition. Like any weapon it can be misused. Whether in a particular case it is indeed misused to unconstitutional effect will fall to be determined, I would think, from the factual context. Thus it is more readily conceivable, at least in abstract, that any infringement of rights would arise from the

peculiar application of the impugned provisions rather than from their language construed correctly.

51.] When it declined to enter into the question of the constitutionality of s 12(4) of the Building Act in *Occupiers of 51 Olivia Road* in comparable circumstances to those of the current case, the Constitutional Court was astute to the likelihood that the provision would be regularly used by local authorities and of the desirability that they be assisted by some guidance in respect of the use of the procedure.³¹ The Court's unwillingness, in the face of its consciousness of those considerations, to go into the constitutionality of subsections 12(4) and (5) counts against some of the submissions on behalf of the fifth respondent and the *amicus* that there is a pressing need in the interests of justice that this court should entertain the constitutionality challenge. Mr. *Brickhill* submitted that the Constitutional Court's refusal to deal with the constitutional compatibility of the provisions had given rise to uncertainty. I do not accept this to be so. On the contrary, it is evident that the Court was at pains to give guidance so as to achieve the opposite effect.

52.] To sum up on this issue: It will be apparent that I have not found obvious merit in the challenge against the constitutionality of subsections 12(4) and (5) of the Building Act. I have decided, however, that rather than reject the challenge on the merits, it would be preferable to leave the way open for the question to be considered, if required, in a factual context, should one arise, which might lend more practical support to the arguments counsel for the fifth respondent and the *amicus* have sought to advance. I am not persuaded that such a degree of uncertainty attends the

³¹ See *Occupiers of 51 Olivia Road*, at para. 39.

application of the provisions that it is in the interests of justice that a determinative decision is required in the context of the current case concerning their constitutionality. (This should not be misread to imply an application by me of the misguided approach that an enquiry into the constitutionality of a statutory provision should be dependent on its effect on a particular litigant. Rather, it is an approach which suggests that a case in which the operation of the impugned provisions has arguably resulted in an infringement of rights would afford a better basis for a constitutionality challenge to be determined. This, in essence, conforms to the principle that a court should not readily decide constitutional questions unless the facts of the case require it, and then only as a last resort.) For these reasons the relief sought in terms of paragraph 8 of the notice of counter-application, as amended, will be refused.

Costs

^{53]}As mentioned, the City's heads of argument suggested that the only basis upon which it sought to argue its entitlement to an order for the eviction of the fifth respondent was in s 12(4) of the Building Act. I do not think that it would have succeeded on that basis because of its omission to give the members of the fifth respondent notice in terms of s 12(4)(b). The City's papers did, however, establish, at least on their face, an alternative basis to obtain an eviction order; namely in terms of s 6 of the PIE Act. It is impossible to say what course the proceedings would have taken if the settlement had not intervened and if the City's vulnerability in founding its argument solely on s 12 of the Building Act had become apparent. It might have been that the City would, if the matter had proceeded, shifted back to the PIE Act. It

might have sought leave to have the contentious issue of the legal status of the fifth respondent's occupation of the buildings determined with reference to oral evidence. If it were determined on the basis of such evidence that the members of the fifth respondent were in unlawful occupation of the property, an eviction order in terms of s 6 of the PIE Act would have been a quite conceivable result. I am thus unable to find that the City's application would probably have failed, or that the fifth respondent's opposition would necessarily have succeeded. This militates in favour of an order that each party should pay its own costs.

^{54]}The fifth respondent's counsel argued, however, that the City had failed in its duty to engage meaningfully with the occupants of the buildings before instituting proceedings and that its offer of emergency alternative accommodation had been demonstrably inadequate. He submitted that these factors, by themselves, justified a costs order in the fifth respondent's favour. Mr *Hathorn* sought support for his contentions in the costs orders made against the City of Johannesburg in *Occupiers of 51 Olivia Road*.

^{55]}In my judgment the facts of the two cases are materially distinguishable. In the current case it is evident that the City did engage with the fifth respondent community and indeed almost achieved agreement with its representatives that those in need of emergency alternative accommodation would move to the Blikkiesdorp transitional relocation area. The adequacy of the engagement process was bedevilled by understandable suspicion and hostility by some members of the fifth respondent community when they perceived their security of tenure to be imperilled by the City's actions. It is also evident that the City was confronted with a practical difficulty in

offering alternative accommodation in that, through no fault of its own, it was unable to reliably determine the composition of the fifth respondent community. Matters were not assisted by the fifth respondent community's insistence that any relocation should occur to the Site 5 transitional relocation area. That site is reserved for the purposes of accommodating people temporarily displaced in the context of work on the N2 Gateway housing project. Equally - and the statement is made mindful of the practical constraints under which it has to operate - the City's position was, at times, objectively not beyond reproach. So, for example, the units made available at Blikkiesdorp did not conform to the applicable minimum standards; and the tenor of its letter to the fifth respondent, dated 13 December 2010, was unfortunate.

^{56]}The housing question is one of the most pressing socio-economic issues with which our developing country is confronted. The enormity of the challenges it presents is especially manifest in the metropolitan centres to which large numbers of people from the rural areas have been moving over a period of many years now in the universal trend to urbanisation. The legacy of apartheid policies of racially determined land reservation and influx control continues to compound, and will do for years to come, the difficulties in the way of an expeditious realisation of adequate housing to which everyone in South Africa is entitled to aspire under the Constitution.³² No-one can be unaware that resources and capacity are limited; and the demands on them beyond the state's ability to deliver, other than incrementally. Dealing with the challenges in a workable order is a complex and demanding process for all concerned. It would be unrealistic to pretend that the going can be smooth.

³² Cf. *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others (Centre on Housing Rights and Evictions and Another, amici curiae)* 2010 (3) SA 454 (CC) (2009 (9) BCLR 847), at para.s 191-198.

57]It is evident, if one takes an armchair approach, that certain issues could have been dealt with in a better and more constructive way on both sides in the current case, but it cannot be said that there was bad faith or unconscionable conduct by anyone involved. On the contrary, both the residents of Masonwabe Park and the City's officials, as well as all the parties' respective legal representatives, conducted themselves in a commendably constructive manner in eventually resolving the main issue in the case. Ideally, litigation should not have been unnecessary, but in the final analysis I think it is evident that the litigious process actually assisted in allowing them to find each other under the court's supervision.

58]I do think, however, that there is some cogency in Mr. *Hathorn*'s argument that the fifth respondent has succeeded in obtaining a better standard of alternative accommodation than that tendered by the City and that this represents a substantial measure of success that deserves to be reflected in the costs order. This is so especially because the character of the accommodation offered did not meet the minimum standard stipulated in terms of the National Housing Code. This has to be balanced by the consideration that considerable time was devoted in argument to the constitutionality challenge, which has not been successful. Assessed by itself, the ordinary consequence of the result in the constitutionality challenge would be that each party would bear its own costs; cf. *Biowatch Trust v Registrar, Genetic Resources, and Others* 2009 (6) SA 232 (CC), 2009 (10) BCLR 1014.

59]In the result, I have concluded that it would be fitting overall that the City should pay thirty per cent of the fifth respondent's costs of suit in the proceedings. For this purpose no distinction is drawn between the application and the counter-application.

As far as the other parties are concerned, there shall be no order as to costs.

^{60]}The following orders are made:

1. The declaratory relief sought in terms of paragraph 8 of the fifth respondent's notice of counter-application, as amended, dated 22 September 2011,³³ concerning the constitutionality of subsections 12(4) and (5) of the National Building Regulations and Building Standards Act 103 of 1977 is refused.
2. The applicant is ordered to pay thirty per cent of the fifth respondent's costs of suit in the proceedings.

³³ At p. 810 ff of the papers.

3. Save as provided in paragraph 2 there shall be no order as to costs.

A.G. BINNS-WARD
Judge of the High Court

FOR THE APPLICANT	:	Adv. A. Katz SC
	:	Adv. N. Mayosi
INSTRUCTED BY:		Fairbridges.
FOR THE 5 TH RESPONDENT:		Adv. P. Hathorn
INSTRUCTED BY:		ChennellsAlbertyn
FOR THE 6 & 7 TH RESPONDENTS	:	Adv. K. Pillay
INSTRUCTED BY:		State Attorney
DATE OF HEARING	:	14SEPTEMBER 2011
		19 OCTOBER 2011
		23 NOVEMBER 2011
		24 NOVEMBER 2011
DATE OF JUDGMENT	:	24 OCTOBER 2012