CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 23/12
[2012] ZACC 26

In the matter between:

SCHUBART PARK RESIDENTS' ASSOCIATION	First Applicant
ANITA WATKINS	Second Applicant
VARIOUS RESIDENTS OF SCHUBART PARK APARTMENT BLOCKS	Third to One Thousand and Sixty-Seventh Applicants

and

CITY OF TSHWANE METROPOLITAN MUNICIPALITY	First Respondent
MINISTER OF POLICE	Second Respondent

and

SOCIO-ECONOMIC RIGHTS INSTITUTE OF SOUTH AFRICA	Amicus Curiae

Heard on : 23 August 2012

Decided on : 9 October 2012

JUDGMENT

FRONEMAN J (Mogoeng CJ, Moseneke DCJ, Cameron J, Jafta J, Khampepe J, Nkabinde J, Skweyiya J and Van der Westhuizen J concurring):

Introduction

[1] The broad issue to be determined in this case is what order is justified when residents approach a court for the re-occupation of their homes after they had been removed from them in a situation of urgency.

[2] Schubart Park is a residential complex close to the city centre of Pretoria in the City of Tshwane Metropolitan Municipality. It consists of four high rise blocks, A, B, C and D. The complex was erected in the 1970s as part of a state-subsidised rental scheme for the benefit of civil servants. In July 1999, the first respondent (City) took over Schubart Park. Initially, the City continued to rent out units in the complex to civil servants. But over time, increased urbanisation and the resultant decay took their toll. By the time the events that led to the litigation in this matter occurred, the condition of the buildings had markedly deteriorated, the buildings were occupied by many persons not known to the City and, approximately 10 days before 21 September 2011, the water and electricity supply to Schubart Park was stopped. Some 700 families were living at Schubart Park in blocks A, B and C at that time. Block D was unoccupied.

[3] On 21 September 2011, a number of residents started a protest about living conditions at the complex. The protest involved the burning of tyres, the lighting of fires and the throwing of stones and objects from the buildings at vehicles and the

police. Two localised fires broke out in block C. The police cordoned off the streets around Schubart Park, removed the residents of block C from the building and denied access to all other residents returning to Schubart Park after work on that day. Residents in blocks A and B were not removed that day. The police were assisted by the City Metropolitan Police and fire brigade officers. The fires were extinguished later in the evening and by the next day the police operation relating to the protest was effectively over.

[4] During the evening of 21 September 2011, the legal representatives of the applicants engaged City officials in an effort to come to an agreement on various matters, including temporary accommodation for the people who were put out on the streets by police action. These negotiations came to nought. By late morning the next day, 22 September 2011, it became apparent that the occupants of block C of Schubart Park would not be allowed to return to their homes.

[5] At 5pm that evening, the applicants brought an urgent application before Prinsloo J in the North Gauteng High Court, Pretoria (High Court), seeking an order allowing them to return to their homes. The City and the Minister of Police (Minister) were cited as respondents.

[6] The application for re-occupation of their homes was dismissed that night, but the High Court ordered the City and the Minister to ensure that the temporary accommodation offered in terms of a tender made by the City was available. In

addition, the parties were ordered to meet at the earliest opportunity so as to propose a draft order to meet the further needs of the applicants and to re-approach the Court the next day.

[7] The next day, 23 September 2011, the matter was postponed to 3 October 2011. A second order was made, keeping in place the temporary arrangements of the previous night's order, but it directed the parties to take further steps in an attempt to reach agreement on unresolved issues.

[8] During the following week the residents of blocks A and B who had remained in the buildings during the police operation on 21 September 2011, were also removed. By the end of September between 3000–5000 people were either on the streets or in temporary shelters.

[9] The parties were unable to reach agreement on a further order. On 3 October 2011 the High Court issued an order that confirmed some of the arrangements for immediate assistance. In addition, it provided that any resident of Schubart Park who had been affected by the dismissal of the application could accept the tender made by the City and that, upon acceptance, the tender would operate as an order between the City, the Minister and that person.[1]

[1] That part of the order is set out in [12] below.

[10] The applicants seek leave to appeal to this Court after leave to appeal was refused by both the High Court and the Supreme Court of Appeal. They also seek leave to introduce further evidence relating to the structural condition of the buildings. In the event of leave to appeal being granted, they ask for the High Court orders to be set aside; for declaratory orders that the refusal to allow them to return to Schubart Park, and their removal, were unlawful; that they be allowed to return to their homes; that the City be ordered to reconnect the water and electricity services; and for a costs order against the City on a punitive scale.

The High Court orders

[11] Although three separate orders were granted on 22 September, 23 September and 3 October 2011, it will be convenient to deal with them as essentially comprising two parts, namely the dismissal of the application for immediate re-occupation of the homes of the residents (dismissal order) and the subsequently finalised order of 3 October 2011 relating to the implementation of the City's tender (tender implementation order).

[12] The relevant parts of the tender, which were incorporated in the tender implementation order made on 3 October 2011, read:

> "1. That the First Respondent will provide and if necessary further construct for those individual residents, who were forced to vacate the Schubart Park block of flats because of the fire at the aforesaid property and who still require same, temporary habitable dwellings, that afford shelter, privacy and amenities at least equivalent to those that were destroyed . . . .

2. The First Respondent is to immediately assist the individual members . . . with removing of all their belongings . . . from the aforesaid property.
3. The requirements of paragraph 2 will be accomplished by means of the individual members . . . accompanied by members of the Second Respondent . . . .
4. The First Respondent will provide storage facilities . . . for the aforementioned belongings . . . .
5. The First Respondent is to place security personnel at the storage facilities.
6. The First Respondent is to forthwith commence with the refurbishment and renovation of the flats known as Schubart Park in Central Pretoria, subject to the recommendation of structural engineers and subject to the building reasonably being capable of refurbishment and/or renovation.
7. The aforesaid refurbishment and renovation of the flats known as Schubart Park shall be completed by the First Respondent within a period not exceeding 18 (eighteen) months, which period may be extended from time to time by agreement or Order of Court.
8. In the event that the technical advice referred to in the aforementioned paragraph dictates that the buildings known as Schubart Park must be demolished and/or cannot be refurbished and/or renovated then the First Respondent will furnish those qualifying residents who may choose to accept this tender with alternative habitable dwellings, that afford shelter, privacy and amenities of life.
9. Subsequent to the refurbishment and renovation of the Schubart Park block of flats referred to in paragraph 6, the First Respondent will relocate the Applicants to Schubart Park, central Pretoria, subject to the following:
    9.1 The Applicants providing proof of their rights, and based on the merits and qualification, to occupy the property known as Schubart Park;
    9.2 The Applicants' right of occupancy in the Republic of South Africa".

[13] At the hearing on the evening of 22 September 2011, the City was allowed to present oral evidence on the basis of urgency. The effect of this evidence was described in the following terms in the High Court judgment delivered that night:

> "It turns out . . . that on judging the evidence as a whole, and the weight thereof, all these experts agree that to allow this application and to send these people, including elderly people and children found abandoned in locked rooms by the police, and the Metro Police, back into this building in the shocking condition in which it is, would be playing with their lives and endangering their very existence.
>
> I am asked by these applicants to sanction such a state of affairs and I am not prepared to do so."

[14] The judgment later continues:

> "[T]he order that I propose making . . . in my opinion, is in line with the provisions of section 38 of the Constitution, which allows a court, where the infringement of fundamental rights is at stake, to grant appropriate relief.
>
> In my opinion the appropriate relief in these particular circumstances cannot be an order allowing these people to go back into life threatening circumstances."

[15] The dismissal order set in motion the process that culminated in the tender implementation order.

Leave to appeal

[16] The Socio-Economic Rights Institute of South Africa (SERI) was admitted as a friend of the court to the proceedings without objection from the applicants or the City. The Minister chose not to be represented in this Court.

[17] The matter concerns a constitutional issue of major importance, namely the right, under section 26(3) of the Constitution, not to be evicted from one's home

without an order of court, made after considering all the relevant circumstances.[2] Reasonable prospects of success exist. There are no material countervailing factors that militate against a finding that it is in the interests of justice to grant leave. Leave to appeal should thus be granted.

The appeal

a. Contentions of the parties

[18] The applicants and SERI make common cause in the appeal. They contend that the dismissal order was not justified in that it amounts to an order of eviction of the applicants without any lawful foundation. They also argue that it contravenes section 26(3) of the Constitution and disregards the provisions of the various statutory instruments that may allow the removal, evacuation or eviction of people from their homes.[3] The applicants, in particular, also attack the factual basis relied upon for the dismissal order and seek leave to introduce further evidence to counter the evidence presented by the City about the state of the buildings. The applicants and SERI further contend that the tender implementation order was not relief that could appropriately have been granted under section 38 of the Constitution.

[2] Section 26(3) provides:

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

[3] The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE); section 54 of the Disaster Management Act 57 of 2002 (DMA); section 12 of the National Building Regulations and Building Standards Act 103 of 1977 (NBRA); Regulation A15 of the NBRA, GN R 2378 GG 12780, 12 October 1990; and section 11(2) of the City of Tshwane Metropolitan Municipality, Fire Brigade Services By-Laws, published under LAN 267 in *Gauteng Provincial Gazette* 42 of 9 February 2005.

[19] Although the City in its written argument sought to rely on various statutory bases for the removal of the residents from their Schubart Park homes, this line of argument was not pursued in oral argument. The City confined its oral argument, in justification of the dismissal order, to a defence of the factual findings made in the High Court. It contended that those facts supported a conclusion that the defence of impossibility raised by the City in the High Court was properly proved. It also accepted that the tender implementation order was premised on an acceptance that the applicants were entitled to re-occupation of their homes in Schubart Park if that were indeed possible. These concessions were responsibly and properly made.

[20] The only defence raised by the City to the dismissal order in its opposing affidavit is impossibility. The oral evidence of the witnesses called by the City in the High Court proceedings, although at times straying beyond the ambit foreshadowed in their answering affidavit, remained factual in nature and did not purport to found lawful authority for the removal beyond reasons of safety and temporary impossibility in the circumstances that existed at the time of the application. And persistence in an argument that the immediate removal of residents on grounds of safety and temporary impossibility could result in the permanent lawful deprivation of the occupation of their homes, would have foundered on the authority of the decisions in this Court in *Pheko*[4] and *Olivia Road*.[5]

[4] *Pheko and Others v Ekurhuleni Metropolitan Municipality* [2011] ZACC 34; 2012 (2) SA 598 (CC); 2012 (4) BCLR 388 (CC) (*Pheko*) at paras 38, 40 and 45.

[5] *Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg v City of Johannesburg and Others* [2008] ZACC 1; 2008 (3) SA 208 (CC); 2008 (5) BCLR 475 (CC) (*Olivia Road*) at para 49.

[21] Thus narrowed down, the crucial issues for determination revolve around the effect of the orders granted in the High Court.

b. Issues

[22] The applicants sought an order in the High Court for restoration on the ground that they were despoiled of possession of their homes. This immediately added the dimension of section 26(3) of the Constitution to what would otherwise have been a normal spoliation application. It is the interplay between the ordinary requirements of spoliation and the demands of section 26(3) of the Constitution that is at issue here.

c. Spoliation, restoration and reparation

[23] The remedy of spoliation, or the *mandament van spolie*, is aimed at restoration of possession. In *Tswelopele*[6] the Supreme Court of Appeal explained the remedy's effect:

> "Under it, anyone illicitly deprived of property is entitled to be restored to possession before anything else is debated or decided (*spoliatus ante omnia restituendus est*). Even an unlawful possessor — a fraud, a thief or a robber — is entitled to the *mandament*'s protection. The principle is that illicit deprivation must be remedied before the Courts will decide competing claims to the object or property."[7]

[24] A spoliation order, then, does not determine the lawfulness of competing claims to the object or property. For this reason there are, under the common law, only a limited number of defences available to a spoliation claim, impossibility being one of

[6] *Tswelopele Non-Profit Organisation and Others v City of Tshwane Metropolitan Municipality and Others* 2007 (6) SA 511 (SCA) (*Tswelopele*).

[7] Id at para 21.

them.[8] In *Rikhotso*[9] it was held that a spoliation order may not be granted if the property in issue has ceased to exist and that it is a remedy for the restoration of possession, not for the making of reparation. This was confirmed as correct by the Supreme Court of Appeal in *Tswelopele*:[10]

> "The doctrinal analysis in *Rikhotso* is in my view undoubtedly correct. While the *mandament* clearly enjoins breaches of the rule of law and serves as a disincentive to self-help, its object is the interim restoration of physical control and enjoyment of specified property — not its reconstituted equivalent. To insist that the *mandament* be extended to mandatory substitution of the property in dispute would be to create a different and wider remedy than that received into South African law, one that would lose its possessory focus in favour of different objectives (including a peace-keeping function)."[11]

[25] In *Tswelopele*, the Supreme Court of Appeal had to deal with a situation where about one hundred people were removed from their homes on a vacant piece of land in Garsfontein, a suburb of Pretoria. They approached the High Court for a spoliation order. In the process of removal the materials used in the construction of their dwellings had been destroyed, with the result that these people could not be restored to the possession of their homes. The High Court, following *Rikhotso*, held that because of this destruction it could not order restoration under the *mandament van spolie*. On appeal the difficulty confronting the Supreme Court of Appeal was whether this meant that the people whose homes had been destroyed must be left remediless. And, if not, whether the remedy lay in the development of the common

[8] See *Law of South Africa* (1st reissue) vol 27 at 190, para 270 (LAWSA).

[9] *Rikhotso v Northcliff Ceramics (Pty) Ltd and Others* 1997 (1) SA 526 (WLD) at 535A-B.

[10] Above n 6.

[11] Id at para 24.

law of spoliation, or in some other way. In holding that the people should not be left remediless, the Supreme Court of Appeal chose the latter course.

[26] It reasoned and concluded:

> "It is correct . . . that the rule of law is a founding value of the Constitution. This would suggest that constitutional development of the common law might make it appropriate to adapt the *mandament* to include reconstituted restoration in cases of destruction. And counsel is certainly correct in submitting that the absence of a remedy mandating substitution of unlawfully destroyed property could create a perverse incentive for those taking the law into their own hands to destroy the disputed property, rather than leaving it substantially intact.
>
> But as already indicated, I do not think that formulating an appropriate constitutional remedy in this case requires us to seize upon a common-law analogy and force it to perform a constitutional function. For there is a further dimension to the case, which takes the matter beyond even a developmentally enhanced *mandament*: the relief we give must vindicate the Constitution. As Kriegler J noted in *Fose*, 'the harm caused by violating the Constitution is a harm to the society as a whole, even where the direct implications of the violation are highly parochial. The rights violator not only harms a particular person, but impedes the fuller realisation of our constitutional promise':
>
> > 'Our object in remedying these kinds of harms should, at least, be to vindicate the Constitution, and to deter its further infringement.'
>
> Vindication, Kriegler J noted, 'recognises that a Constitution has as little or as much weight as the prevailing political culture affords it.' Essentially, the remedy we grant should aim to instil recognition on the part of the governmental agencies that participated in the unlawful operation that the occupiers, too, are bearers of constitutional rights, and that official conduct violating those rights tramples not only on them but on all. The remedy should instil humility without humiliation, and should bear the instructional message that respect for the Constitution protects and

> enhances the rights of all. It is a remedy special to the Constitution, whose engraftment on the *mandament* would constitute an unnecessary superfluity.
>
> The occupiers must therefore get their shelters back."[12] (Footnotes omitted.)

[27] *Fose*[13] was decided under section 7(4)(a) of the interim Constitution. The counterpart under the Constitution is section 38, which in relevant part reads:

> "Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights."

[28] Although *Tswelopele* upheld the distinction between the common law requirements for spoliation and that of constitutional relief under section 38 of the Constitution, it must be remembered that it granted the eventual constitutional relief in a matter that was brought purely as a spoliation application. Here the applicants raised the section 26(3) aspect in their founding papers.

[29] I agree that it is conducive to clarity to retain the "possessory focus"[14] of the remedy of spoliation and keep it distinct from constitutional relief under section 38 of the Constitution. This is because the order made in relation to factual possession in spoliation proceedings does not in itself directly determine constitutional rights, but

[12] Id at paras 25-8.

[13] *Fose v Minister of Safety and Security* [1997] ZACC 6; 1997 (3) SA 786 (CC); 1997 (7) BCLR 851 (CC).

[14] *Tswelopele* above n 6 at para 24.

merely sets the scene for a possible return to the *status quo*, in order for the subsequent determination of constitutional rights in relation to the property.[15]

[30] The implication of this is that spoliation proceedings, whether they result in restoration or not, should not serve as the judicial foundation for permanent dispossession – that is, eviction[16] – in terms of section 26(3) of the Constitution. Neither the dismissal order of 22 September 2011 nor the later tender implementation order could serve as justification for the eviction of the applicants from their homes for the purposes of section 26(3) of the Constitution. But could the dismissal order, and the later tender implementation order, legitimately count as "appropriate relief" under section 38 of the Constitution?

d. Appropriate relief under section 38

[31] The applicants contend that the dismissal order was in any event wrongly refused because the High Court erred in its assessment of the facts relating to the dangerous condition of the buildings. That contention does not, however, raise a constitutional issue that requires adjudication in this Court.[17] The application for leave to introduce further evidence on the condition of the buildings suffers the same defect and must be dismissed.

[15] This is no different to the purpose it served in our pre-constitutional common law: see LAWSA above n 8 at 182, para 265.

[16] *Pheko* above n 4.

[17] *S v Boesak* [2000] ZACC 25; 2001 (1) SA 912 (CC); 2001 (1) BCLR 36 (CC) at para 15.

[32] SERI accepted that the matter had to be determined on an acceptance of the facts found by the High Court. However, it argued that those facts do not justify a conclusion that impossibility, a valid defence to spoliation,[18] had been established. That might be so, but properly read the orders made in the High Court were not based on a finding that impossibility had been established. As noted above,[19] the Judge considered that the orders he made, including dismissal of the order seeking immediate restoration, were justified by the provisions of section 38 of the Constitution.

[33] In *Hoffman*[20] the determination of appropriate relief under section 38 was approached in the following manner:

> "The determination of appropriate relief, therefore, calls for the balancing of the various interests that might be affected by the remedy. The balancing process must at least be guided by the objective, first, to address the wrong occasioned by the infringement of the constitutional right; second, to deter future violations; third, to make an order that can be complied with; and fourth, of fairness to all those who might be affected by the relief. Invariably, the nature of the right infringed and the nature of the infringement will provide guidance as to the appropriate relief in the particular case. Therefore, in determining appropriate relief, 'we must carefully analyse the nature of [the] constitutional infringement, and strike effectively at its source'."[21] (Footnote omitted.)

[34] The High Court orders were challenged in this Court on the basis that they disregarded the infringement of the applicants' rights not to be evicted without a court

[18] LAWSA above n 8 at 191, para 271.

[19] [14] above.

[20] *Hoffmann v South African Airways* [2000] ZACC 17; 2001 (1) SA 1 (CC); 2000 (11) BCLR 1211 (CC).

[21] Id at para 45.

order and, in effect, condoned a profoundly illegal act. They did not provide the applicants with any effective relief. I think that there is merit in the argument that the relief granted falls short of what is required, but the criticism is overstated.

[35] The initial order granted on 22 September 2011 was made under very difficult circumstances. It was made late at night after hearing oral evidence in relation to violent protest action that was finally brought under control only that same day. The factual assessment of immediate danger resulting from the fires to the lives of the residents, including elderly people and children, made by the Judge cannot be second-guessed in this Court. Even if it could, I would find it difficult to fault the immediate effect of the order.

[36] The important question, however, is whether that immediate order pronounced in a final way upon the lawfulness of the applicants' removal from their homes. If it did, it was legally incompetent, as explained earlier.[22] But what emerges from the orders is not as clear-cut as that. The first order of 22 September 2011 included a provision that the parties should meet to prepare a draft order "aimed at meeting the needs of the applicants as best as possible under the circumstances" and to approach the Court again the next day. The draft presented the next day was premised on the assumption that those residents who accepted the City's tender would be returned to Schubart Park after refurbishment or renovation. The final order of 3 October 2011[23] made that even clearer. It provided for the immediate commencement of the

[22] [28]-[30] above.

[23] Quoted in [12] above.

refurbishment or renovation of Schubart Park, to be completed within 18 months, with a provision for an extension of this period by agreement or by order of Court. Only if that could not happen would permanent alternative accommodation come into the picture.

[37] There are deficiencies in the order that I will return to presently. For the moment, however, I point out that the assumption in the orders – that the residents are entitled to return to Schubart Park – is not readily compatible with an interpretation that the orders finally disentitle the residents from restoration of occupation to their homes. Nonetheless, there is ambiguity and contradiction in the order.

[38] In a spoliation application, where the alleged dispossession involves the removal of people from their homes, great caution must be exercised in making an order under section 38 of the Constitution. Where urgency dictates that immediate restoration will not be ordered it must be made clear, preferably by a declaratory order to that effect, that the refusal to order re-occupation does not purport to lay the foundation for a lawful eviction under section 26(3) of the Constitution. The order must be temporary only, and subject to revision by the court. Urgent orders of this kind will be rare: there is legislation providing for the timeous removal of people living in unsafe buildings,[24] for temporary evacuation in disaster situations[25] and for eviction in the normal course.[26]

[24] NBRA above n 3.

[25] DMA above n 3.

[26] PIE above n 3.

[39] It is a matter of concern that the City, until oral argument before this Court, attempted to justify the removal of the residents as lawful under this legislation when it was clearly not the case. This attitude lends some credence to the assertion by the applicants that the City used the crisis as an excuse to evict the residents without complying with the law.

[40] As the order stands, it falls short of the protection provided for in section 26(3) of the Constitution in the following respects:

(a) It provides for occupation of the property only for those residents who accept the tender. Those who do not accept are left without a remedy.

(b) Restoration to Schubart Park is made conditional upon proof of their rights of occupancy to the property and their right of occupancy in the Republic of South Africa.

(c) Although it provides for court access in relation to extensions of time, it does not do so in respect of the vitally important eventuality where restoration is stated to be impossible.[27] In that case residents only have "alternative habitable dwellings"[28] as an alternative. The lack of provision for a court order for what effectively will be an eviction order is in breach of section 26(3).

[27] Para 7-8 of the order, quoted in [12] above.

[28] Id at para 8 of the order.

[41] In summary, I read the order as accepting: (1) that the removal of the residents was not a lawful eviction; (2) that the removal was instead temporarily necessary in order to save lives; (3) that the residents were entitled to re-occupation once it was safe to do so; and (4) that if it could not be made safe, those who accepted the tender must be provided with alternative accommodation, without the City having to come to court to effect what would then be an eviction that does not comply with section 26(3) of the Constitution. In the particular circumstances of this case I accept that (1), (2) and (3) were legally permissible, but (4) was not.

e. Supervision and engagement

[42] Normally supervision and engagement orders accompany eviction orders where they relate to the provision of temporary accommodation pending final eviction. But there is no reason why they cannot be made in other circumstances where it is appropriate and necessary – section 38 is wide enough to accommodate that. In the particular circumstances of this matter the High Court used these provisions to ensure that the needs of residents were seen to. Although I consider some of the provisions inadequate in view of the conclusion reached earlier, I think that reason for making provision for engagement and supervision existed, and still does. It is now more than a year after the residents were removed from their homes. Finding out who they were, where they are, and what they still need to re-occupy their homes will require co-operation between them and the City.

[43] Many provisions in the Constitution require the substantive involvement and engagement of people in decisions that may affect their lives.[29] This Court has recognised this in relation to political decision-making,[30] access to information,[31] just administrative action,[32] freedom of expression,[33] freedom of association[34] and socio-economic rights.[35] Of particular relevance here are the cases dealing with the right to have access to adequate housing[36] and protection from arbitrary eviction or demolition of their homes under the Constitution.[37]

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[29] For a critical discussion see Liebenberg "Engaging the paradoxes of the universal and particular in human rights adjudication: The possibilities and pitfalls of 'meaningful engagement'" (2012) 12(1) *African Human Rights Law Journal* at 1.

[30] *Doctors for Life International v Speaker of the National Assembly and Others* [2006] ZACC 11; 2006 (6) SA 416 (CC); 2006 (12) BCLR 1399 (CC) at para 55 and *Albutt v Centre for the Study of Violence and Reconciliation, and Others* [2010] ZACC 4; 2010 (3) SA 293 (CC); 2010 (5) BCLR 391 (CC) at para 65.

[31] *South African Broadcasting Corp Ltd v National Director of Public Prosecutions and Others* [2006] ZACC 15; 2007 (1) SA 523 (CC); 2007 (2) BCLR 167 (CC) at paras 27-9.

[32] *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as* Amici Curiae*)* [2005] ZACC 14; 2006 (2) SA 311 (CC); 2006 (8) BCLR 872 (CC) at para 113.

[33] *Khumalo and Others v Holomisa* [2002] ZACC 12; 2002 (5) SA 401 (CC); 2002 (8) BCLR 771 (CC) at para 21 and *The Citizen 1978 (Pty) Ltd and Others v McBride (Johnstone and Others,* Amici Curiae*)* [2011] ZACC 11; 2011 (4) SA 191 (CC); 2011 (8) BCLR 816 (CC) at para 141.

[34] *South African Transport and Allied Workers Union and Another v Garvas and Others* [2012] ZACC 13 at para 66.

[35] *Government of the Republic of South Africa and Others v Grootboom and Others* [2000] ZACC 19; 2001 (1) SA 46 (CC); 2000 (11) BCLR 1169 (CC) (*Grootboom*); *Port Elizabeth Municipality v Various Occupiers* [2004] ZACC 7; 2005 (1) SA 217 (CC); 2004 (12) BCLR 1268 (CC) (*PE Municipality*); *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd and Others (Agri SA and Others,* Amici Curiae*)* [2005] ZACC 5; 2005 (5) SA 3 (CC); 2005 (8) BCLR 786 (CC); *Olivia Road* above n 5; *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others (Centre on Housing Rights and Evictions and Another,* Amici Curiae*)* [2009] ZACC 16; 2010 (3) SA 454 (CC); 2009 (9) BCLR 847 (CC); *Abahlali baseMjondolo Movement SA and Another v Premier of the Province of KwaZulu-Natal and Others* [2009] ZACC 31; 2010 (2) BCLR 99 (CC); *Pheko* above n 4; *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* [2011] ZACC 33; 2012 (2) SA 104 (CC); 2012 (2) BCLR 150 (CC) (*Blue Moonlight 1*); and *Occupiers of Saratoga Avenue v City of Johannesburg Metropolitan Municipality and Another* [2012] ZACC 9 (*Blue Moonlight 2*).

[36] Section 26(1) and (2).

[37] Section 26(3).

[44] What these provisions and cases have enabled us to appreciate is, first, the interrelation between different rights and interests[38] and second, that the exercise of these often competing rights and interests can best be resolved by engagement between the parties.

[45] In *PE Municipality*[39] the Court expressed this realisation:

> "In seeking to resolve the above contradictions, the procedural and substantive aspects of justice and equity cannot always be separated. The managerial role of the courts may need to find expression in innovative ways. Thus, one potentially dignified and effective mode of achieving sustainable reconciliations of the different interests involved is to encourage and require the parties to engage with each other in a proactive and honest endeavour to find mutually acceptable solutions."[40]

[46] The importance of engagement without preconceptions about the worth and dignity of those participating in the engagement process should also be recognised:

> "Thus, those seeking eviction should be encouraged not to rely on concepts of faceless and anonymous squatters automatically to be expelled as obnoxious social nuisances. Such a stereotypical approach has no place in the society envisaged by the Constitution; justice and equity require that everyone is to be treated as an individual bearer of rights entitled to respect for his or her dignity. At the same time, those who find themselves compelled by poverty and landlessness to live in shacks on the land of others, should be discouraged from regarding themselves as helpless victims, lacking the possibilities of personal moral agency."[41]

[38] See, for example, *Blue Moonlight 1* above n 35 at paras 34-41 and *Grootboom* above n 35 at para 23.

[39] Above n 35.

[40] Id at para 39.

[41] Id at para 41.

[47] This applies in particular to those who bear constitutional responsibility in providing access to adequate housing under the Constitution:

> "[M]unicipalities have a major function to perform with regard to the fulfilment of the rights of all to have access to adequate housing. Municipalities, therefore, have a duty systematically to improve access to housing for all within their area. They must do so on the understanding that there are complex socio-economic problems that lie at the heart of the unlawful occupation of land in the urban areas of our country. They must attend to their duties with insight and a sense of humanity. Their duties extend beyond the development of housing schemes, to treating those within their jurisdiction with respect."[42]

[48] In *Olivia Road*[43] these concerns were re-iterated:

> "It must be understood that the process of engagement will work only if both sides act reasonably and in good faith. The people who might be rendered homeless as a result of an order of eviction must, in their turn, not content themselves with an intransigent attitude or nullify the engagement process by making non-negotiable, unreasonable demands. People in need of housing are not, and must not be regarded as a disempowered mass. They must be encouraged to be pro-active and not purely defensive. Civil society organisations that support the people's claims should preferably facilitate the engagement process in every possible way.
>
> Finally it must be mentioned that secrecy is counter-productive to the process of engagement. The constitutional value of openness is inimical to secrecy. Moreover, as I have already pointed out, it is the duty of a court to take into account whether, before an order of eviction that would lead to homelessness is granted at the instance of a municipality, there has been meaningful engagement or, at least, that the municipality has made reasonable efforts towards meaningful engagement. In any eviction proceedings at the instance of a municipality therefore, the provision of a complete and accurate account of the process of engagement, including at least the reasonable efforts of the municipality within that process, would ordinarily be

[42] Id at para 56.

[43] Above n 5.

> essential. The absence of any engagement or the unreasonable response of a municipality in the engagement process would ordinarily be a weighty consideration against the grant of an ejectment order."[44]

[49] These remarks were made in cases relating to eviction orders, but they are equally, if not more, apposite in a case like the present. Here the applicants were as a matter of law entitled to restoration of their occupation but were nevertheless deprived of that restoration for a long period. Not only did their inherent right to dignity[45] entitle them to be treated as equals in the engagement process, but also their legal entitlement to return to their homes absent a court order for their eviction. It is so that the High Court could not immediately order restoration. But, as a matter of law, it could and should have issued a declaratory order indicating the residents' eventual entitlement to restoration.

[50] The City's tender was an inadequate basis for a proper order of engagement between the parties. It proceeds from a "top-down" premise, namely that the City will determine when, for how long and ultimately whether at all, the applicants may return to Schubart Park. Unfortunately the history of the City's treatment of the residents of Schubart Park also shows that they appeared to regard them, generally, as "obnoxious social nuisances",[46] who contributed to crime, lawlessness and other social ills. If there were individuals at Schubart Park who were guilty of, or contributed to, these

[44] Id at paras 20-1.

[45] See also *Grootboom* above n 35 at paras 23, 44 and 83 and *Olivia Road* above n 5 at para 16.

[46] *PE Municipality* above n 35, quoted in [45] and [46] above.

ills, they should have been dealt with in accordance with the provisions of the law relating to them.

[51] The engagement part of the order issued in terms of section 38 should thus provide for meaningful engagement with the applicants at every stage of the re-occupation process. It is, however, uncertain how long that process will be and it is necessary for supervision by a court of the progress in that regard.[47] Experience has shown that this should be done by the High Court.[48]

[52] There is no adequate reason for a punitive costs order.

Order

[53] The following order is made:

1. Leave to appeal is granted.
2. The appeal is upheld.
3. The orders made by the North Gauteng High Court, Pretoria, on 22 September 2011, 23 September 2011 and 3 October 2011 under case no. 53128/11 are set aside.
4. It is declared that the High Court orders did not constitute an order for the residents' eviction as required by section 26(3) of the Constitution and that the residents are entitled to occupation of their homes as soon as is reasonably possible.

[47] *Pheko* above n 4 at para 50.

[48] *Blue Moonlight 2* above n 35.

5. The applicants and the City of Tshwane Metropolitan Municipality must, through their representatives, engage meaningfully with each other in order to give effect to the declaratory order in paragraph 4 above. The engagement must occur with a view to reaching agreement on:

5.1. the identification of the residents who were in occupation of Schubart Park before the removals that started on 21 September 2011;

5.2. the date when the identified residents' occupation of Schubart Park will be restored;

5.3. the manner in which the City will assist the identified residents in the restoration of their occupation of Schubart Park;

5.4. the manner in which the identified residents will undertake to pay for services supplied to Schubart Park by the City on restoration of occupation;

5.5. alternative accommodation that must be provided to the identified residents by the City until restoration of their occupation of Schubart Park; and

5.6. a method of resolving any disagreements in relation to the issues mentioned in 5.1 to 5.5.

6. The parties must on affidavit report to the High Court by 30 November 2012 on what plans have been agreed upon to provide alternative accommodation to the identified residents in terms of paragraph 5.5 above.

7. The parties must on affidavit report to the High Court by 31 January 2013 on what agreement has been reached in respect of paragraphs 5.1, 5.2, 5.3, 5.4 and 5.6 above.

8. The Registrar of this Court is directed to furnish this order to the Registrar of the North Gauteng High Court, Pretoria.

9. The City of Tshwane Metropolitan Municipality is ordered to pay the applicants' costs in this Court and in the North Gauteng High Court, Pretoria, including, where applicable, the costs of two counsel.

For the Applicants:	Advocate R Jansen, Advocate M Dewrance and Advocate MM Majozi instructed by Lawyers for Human Rights.
For the First Respondent:	Advocate M Mphaga SC and Advocate PL Uys instructed by Gildenhuys Lessing Malatji.
For the Amicus Curiae:	Advocate S Wilson and Advocate I De Vos instructed by SERI Law Clinic.