CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 241/16

In the matter between:

ISAK BARON	First Applicant
DAVID BAILEY	Second Applicant
ERIC CUPIDO	Third Applicant
JONATHAN STOFFELS	Fourth Applicant
RICHARD FIGLAND	Fifth Applicant
ANTHONY MERRINGTON	Sixth Applicant
OTHER OCCUPIERS RESIDENT AT CLAYTILE JOOSTENBERG BRICK, HERCULES PLAAS ROAD, MULDERSVLEI, WHOSE OCCUPATION IS DERIVED FROM THE APPLICANTS	Seventh Applicant

and

CLAYTILE (PTY) LIMITED	First Respondent
CITY OF CAPE TOWN MUNICPALITY	Second Respondent

Neutral citation:	*Baron and Others v Claytile (Pty) Limited and Another* [2017] ZACC 24
Coram:	Nkabinde ADCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mhlantla J, Mojapelo AJ, Pretorius AJ and Zondo J
Judgments:	Pretorius AJ (majority): [1] to [54] Zondo J (qualified concurrence): [55] to [58]

Heard on: 23 March 2017

Decided on: 13 July 2017

Summary: Extension of Security of Tenure Act 62 of 1997 — section 26 of the Constitution — eviction by a private landowner — suitable alternative accommodation — constitutional obligations of organs of state to provide suitable alternative accommodation in evictions

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ORDER

On appeal from the Land Claims Court hearing an appeal from the Bellville Magistrate's Court the following order is made:

1. Condonation is granted for:
   (a) The late filing of the appeal record; and
   (b) The late filing of the first respondent's answering affidavit.
2. The application for leave to adduce further evidence is granted.
3. The application to amend the application for leave to appeal is granted.
4. Leave to appeal is granted.
5. The appeal is dismissed.
6. The eviction order of the Bellville Magistrate's Court is confirmed.
7. The applicants are ordered to vacate the first respondent's premises within three months of the date of this order.
8. The first respondent is ordered to transport the children, who are subject to this eviction order, from Wolwerivier to the school they are presently attending and back home every school day from the date of eviction to the end of the 2017 school year.
9. The City of Cape Town Municipality is ordered to pay the costs of the applicants up to 23 February 2017 including the costs of two counsel, where applicable.

JUDGMENT

PRETORIUS AJ (Nkabinde ADCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mhlantla J, Mojapelo AJ concurring):

Introduction

[1] This is an application for leave to appeal against the judgment and order of the Land Claims Court (LCC) granted on 23 March 2016. The LCC ordered the eviction of the applicants from private land in terms of the provisions of the Extension of Security of Tenure Act[1] (ESTA). The applicants amended their Notice of Application for Leave to Appeal to this Court by inserting an alternative appeal against the confirmation of the order on review in terms of section 19(3) of ESTA by the LCC. The Bellville Magistrate's Court (Magistrate's Court) order was confirmed on review in terms of section 19(3) of ESTA on 21 October 2015.

[2] Recently, this Court considered the effect of certain provisions of ESTA in *Daniels*[2] to establish what rights ESTA bestows on ESTA-occupiers. In the present matter, this Court must again consider the provisions of ESTA to determine when an eviction will be just and equitable and what it means that occupiers are granted "suitable alternative accommodation" under certain circumstances.

[3] In *Daniels*, the Court painstakingly set out the historical and social context in which ESTA must be understood to operate. The legislation cannot be severed from the purpose it was enacted to serve: "to facilitate long-term security of land tenure; to regulate the conditions of residence on certain land; to regulate the conditions on and

[1] 62 of 1997.

[2] *Daniels v Scribante* [2017] ZACC 13.

circumstances under which the right of persons to reside on land may be terminated; and to regulate the conditions and circumstances under which persons, whose right of residence has been terminated, may be evicted from land; and to provide for matters connected therewith".[3] ESTA forms part of the legislative measures envisaged in section 25 of the Constitution which is to form part of the land reform and redistribution program. Secure tenure on rural land is a vitally important part of the land reform scheme which is crucial to the balanced functioning of the property clause.[4]

[4] The main issue is whether there had been compliance with the provisions of section 10 of ESTA, read with sections 25 and 26 of the Constitution for the eviction. The Supreme Court of Appeal (SCA) dismissed the application for special leave to appeal, hence the present application.

Parties

[5] The first, second, third and fifth applicants were occupiers on Farm 1676, Muldersvlei (farm) on 4 February 1997. Section 10 of ESTA was therefore applicable when the eviction was considered. The fourth applicant became an occupier after 4 February 1997 and section 11 of ESTA applied. The sixth applicant has passed away and his family has voluntarily moved elsewhere. The seventh applicant includes the wives and relatives of the applicants, although they were not individually cited.

[6] The first respondent is a company that owns the farm on which it is conducting a brick manufacturing business. Mr Julian de la Hunt was appointed by the first respondent to represent it in the eviction proceedings. The second respondent is the City of Cape Town Municipality (City).

[3] See the long title to ESTA.

[4] Section 25(1) of the Constitution provides:

> "(1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property."

[7] Ms Jennifer Jonkers (Ms Jonkers) is the cousin of the first applicant and currently resides with him in his housing unit on the farm. She was not cited as a party before this Court, but is included in the ambit of the eviction order. It is evident, from the submissions made to this Court, that Ms Jonkers is still employed on the farm and her employment has not been terminated, although she lives in the same housing unit as the first applicant.

Background

[8] The applicants, except for Ms Jonkers, were all former employees of the brick manufacturing business on the farm. This entitled them to reside in housing units on the farm for the duration of their employment. It is common cause that some of the applicants had lived on the farm for some years before they were employed by the first respondent. Their employment was terminated during the period 2006 to 2011 pursuant to disciplinary enquiries premised on misconduct on their part. The termination of their employment was never challenged.

[9] The first, second, third, fourth and fifth applicants' housing was linked to their employment. They are still residing in the housing units on the farm, although they have not been employed by the first respondent for some years. On 3 November 2012 the first respondent gave them written eviction notices to leave the farm on or before 8 December 2012. The applicants failed to comply with the notices and continued residing on the farm. The first respondent instituted eviction proceedings in the Magistrate's Court in June 2013. The City, at the time, indicated to the Court that no suitable alternative accommodation was available due to a long waiting list. An eviction order was granted on 7 February 2014, which was found to be just and equitable in the circumstances. The applicants were ordered to vacate the farm by 30 October 2014, some eight months after the eviction order had been granted.

Constitutional and legislative framework

[10] Two provisions of the Constitution are directly implicated: sections 25 and 26. The preamble to ESTA sets out the purpose for which ESTA was enacted as being to provide for security of land tenure and to give effect to the provisions of sections 25 and 26 of the Constitution.[5] Section 25(1) protects the property of the landowner by guaranteeing that no person shall be arbitrarily deprived of their property. But this provision serves to protect the ESTA occupier too, albeit indirectly. How so? For ESTA occupiers to enjoy a strong form of secure tenure, as envisaged by the Constitution, we must recognise that ESTA occupiers enjoy rights and entitlements over the land they occupy, and that these rights and entitlements are every bit as worthy of protection as those of private landowners. This has most recently been established in *Daniels*, but is built on the jurisprudence leading up to it.[6] However, despite this acknowledgement, occupiers may not rely on section 25(1) directly to protect their interests, since the subsidiarity principle provides that where legislation was enacted to give effect to certain constitutional rights, reliance must first be placed on the provisions of the specific legislation, and challenged if they do not adequately give effect to the constitutional rights in question.[7]

[11] Section 26 of the Constitution protects persons from being evicted from their homes without an order of court after considering all the relevant circumstances.[8] One

[5] The preamble to ESTA provides:

> "To provide for measures with State assistance to facilitate long-term security of land tenure; to regulate the conditions of residence on certain land; to regulate the conditions on and circumstances under which the right of persons to reside on land may be terminated; and to regulate the conditions and circumstances under which persons, whose right of residence has been terminated, may be evicted from land; and to provide for matters connected therewith."

[6] *Agrico Masjinerie (Edms) Bpk v Swiers* [2007] ZASCA 84; 2007 (10) BCLR 1111 (SCA) at paras 29-31 and *Nhlabathi v Fick* [2003] ZALCC 9.

[7] Van der Walt *Property and Constitution* (PULP, Pretoria 2012) at 49-61.

[8] Section 26 provides:

> "(1) Everyone has the right to have access to adequate housing.
>
> (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.
>
> (3) 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."

of the purposes for which Parliament enacted ESTA was to regulate evictions from land.

[12] Previously occupiers of farmland were not protected under common law. They are currently protected by the provisions of ESTA. Section 8 of ESTA deals with the circumstances that may lead to the right of residence being terminated.[9] In the present instance, section 8(2) is applicable as the rights of residence of the applicants arose from their employment by the first respondent and these rights of residence were terminated when they resigned or were dismissed. Section 9 is titled "limitation on eviction" and sets out the procedure that had to be followed after the applicants' right of residence had been terminated. Section 10 applies to the eviction of occupiers before 4 February 1997 and is applicable to the first, second, third and fifth applicants. Section 11 applies to the eviction of occupiers after 4 February 1997, and is applicable to the fourth applicant. The fourth applicant will be dealt with simultaneously with the other applicants as section 11 sets a lower threshold for the grant of an eviction than section 10. He will not be prejudiced if his position is dealt with in the same way as the other applicants.

Litigation history

Magistrate's Court

[13] The eviction application was heard in the Magistrate's Court. The Court had to consider whether the provisions of sections 8 and 9 of ESTA had been complied with. In considering the interests of both parties, the Court dealt with the applicants' concerns as to the disruptions it would cause to their daily lives and also with the position of moving the 11 school-going children to another school. On 6 December 2013, in the supplementary housing report, the City indicated that people who qualified were allocated housing units at Delft Temporary Relocation Area (TRA), should any housing units become available. These housing units at

[9] *Klaase v Van der Merwe N.O.* [2016] ZACC 17; 2016 (6) SA 131 (CC); 2016 (9) BCLR 1187 (CC) and *Hattingh v Juta* [2013] ZACC 5; 2013 (3) SA 275 (CC); 2013 (5) BCLR 509 (CC).

Delft TRA, also known as Blikkiesdorp, consisted of "corrugated iron structures comprising one room, without electricity and shared toilet facilities". The applicants raised certain concerns including that they could not "see themselves moving from a brick dwelling to a corrugated iron structure", should it be made available to them. The two reports set out that the City had no available accommodation at the time and did not foresee having alternative accommodation available in future.

[14] The Court considered the first respondent's position – the applicants had lived on the farm for many years, free of charge, without working for the first respondent. This resulted in the current employees of the first respondent reporting late for work or being absent because of the lack of accommodation at their place of employment. The first respondent operates 24 hours a day for seven days a week. The Court found that the applicants' employment or occupation had been terminated fairly and lawfully. After considering all the evidence, which included the probation officer's report and the two reports from the City, the Court granted an eviction order on 7 February 2014. The applicants were ordered to vacate the housing units by 30 October 2014. The Court found it to be just and equitable to evict the applicants and, having regard to the disruption the eviction would cause to their lives, to grant them almost eight months' extension to vacate the housing units.

Land Claims Court

[15] In terms of section 19(3) of ESTA, the order of the Magistrate's Court had to be sent on automatic review to the LCC. The eviction order of the Magistrate's Court was confirmed on 21 October 2015 by the LCC on the ground that the proceedings in the Magistrate's Court had been in accordance with justice.

[16] The applicants subsequently appealed to the LCC on 3 December 2015, as they were dissatisfied with the eviction order. On 23 March 2016 the LCC dismissed the appeal and made no order as to costs. The Court held that the first respondent suffered undue hardship, as the applicants continued to reside on the farm for a period of three years and three months after their employment had been terminated. They

paid neither rent nor water and electricity in that time at all. Their continued residence caused the first respondent not to be able to accommodate its own employees on the farm, contrary to its employment policy. This caused hardship to both the first respondent and its employees.

[17] The LCC held that, although the availability of alternative accommodation was a consideration that had to be taken into account in terms of section 10(3),[10] as contended by the first respondents' representative, it remained but one factor a court should consider. In *Port Elizabeth Municipality*,[11] it was emphasised that to elevate the factor of alternative accommodation to a pre-condition for an eviction order would have far-reaching and chaotic consequences which could never have been envisaged by the Legislature. To this end, the LCC held that the constitutional obligation to ensure access to adequate housing lies solely on the State and not on private citizens. The LCC, placing reliance on *Changing Tides 74*,[12] found that the first respondent

[10] Section 10(3) of ESTA provides:

> "If—
>
> (*a*) suitable alternative accommodation is not available to the occupier within a period of nine months after the date of termination of his or her right of residence in terms of section 8;
>
> (*b*) the owner or person in charge provided the dwelling occupied by the occupier; and
>
> (*c*) the efficient carrying on of any operation of the owner or person in charge
>
> will be seriously prejudiced unless the dwelling is available for occupation by another person employed or to be employed by the owner or person in charge,
>
> a court may grant an order for eviction of the occupier and of any other occupier who lives in the same dwelling as him or her, and whose permission to reside there was wholly dependent on his or her right of residence if it is just and equitable to do so, having regard to—
>
> (i) the efforts which the owner or person in charge and the occupier have respectively made in order to secure suitable alternative accommodation for the occupier; and
>
> (ii) the interests of the respective parties, including the comparative hardship to which the owner or person in charge, the occupier and the remaining occupiers shall be exposed if an order for eviction is or is not granted."

[11] *Port Elizabeth Municipality v Peoples Dialogue on Land and Shelter* 2001 (4) SA 759 (E) at 769B-D.

[12] In *City of Johannesburg v Changing Tides 74 (Pty) Ltd* [2012] ZASCA 116; 2012 (6) SA 294 (SCA); 2012 (11) BCLR 1206 (SCA) (*Changing Tides 74*) at fn 23, the Court held the following—

undeniably had the immediate need to use the housing units to house its current employees.

[18] The LCC relied on *Theewaterskloof Holdings*[13] in concluding that the first respondent had shouldered the State's responsibility to house the applicants for many years. It found that it had been long enough and had been detrimental to the first respondent and its current employees. It stated that the appeal cannot succeed, especially given the first respondent's status as a private owner with a right to property.

[19] The LCC dismissed an application for leave to appeal to the SCA on 24 June 2016 on the ground that no other court would come to a different conclusion.

[20] While the LCC cannot be faulted for turning to established jurisprudence to assist with its assessment of whether suitable alternative accommodation was a pre-condition of eviction, and what it meant for determining the balance of equity, it should be pointed out that the statement in *Port Elizabeth Municipality* was about PIE, and not ESTA. This is significant. Not because what was said in *Port Elizabeth Municipality* regarding the "constitutional matrix" of evictions and the balancing of housing interests with property interests have no bearing on the ESTA context, but rather because it must be kept in mind that we are dealing with different pieces of legislation with different purposes. ESTA was enacted to strengthen the lawful occupation of persons residing on farms, as part of the land reform scheme envisaged in section 25 of the Constitution. It does not go without saying that legal principles developed with reference to PIE can apply to ESTA, or that the balance that must be struck will be struck in the same way.

> "If the landowner had no immediate or even medium-term need to use the property and it would simply be sterilised by an eviction order, the court could legitimately hold the view that it was not just and equitable at that time to grant an eviction order."

[13] In *Theewaterskloof Holdings (Edms) Bpk, Glazer Afdeling v Jacobs* 2002 (3) SA 401 (LCC) (*Theewaterskloof Holdings*) at para 18 it was held that:

> "Wat die posisie met betrekking tot alternatiewe akkommodasie ookal mag wees, dit kan nie van die applikant verwag word om die respondent *onbepaald* op sy plaas te huisves nie."

[21] It was decided by this Court in *Snyders*[14] that where the LCC had already reviewed an eviction order, it cannot thereafter decide an appeal on the same order.

Supreme Court of Appeal

[22] Aggrieved by the LCC's decision, the applicants petitioned the SCA on 21 July 2016. On 13 September 2016 the SCA ordered that the application for special leave to appeal be dismissed with costs on the ground that the requirements for special leave to appeal were not met.

In this Court

[23] All the applicants, save for the sixth applicant, who is deceased, sought leave to appeal to this Court.

Points in limine

Condonation

[24] The applicants seek condonation for the late filing of the record of the application for leave to appeal. The reasons for the delay are briefly that on 23 December 2016 they failed to serve the record on the City, when they filed same at this Court. They also failed to certify the record by the LCC. On 29 December 2016 the record was certified and Lawyers for Human Rights (LHR), the applicants' attorneys, was informed by the Registrar on 10 January 2017 that the certification was in order. The application for condonation was not opposed. The reasons for the delay are sufficient and there is no prejudice. It is in the interests of justice to grant condonation for the late filing of the record of the application for leave to appeal.

[25] The first respondent seeks condonation for the late filing of its answering affidavit as its attorney mistakenly relied on the 15-day period envisaged in rule 11 of

[14] *Snyders v De Jager* [2016] ZACC 55; 2017 (3) SA 545 (CC); 2017 (5) BCLR 614 (CC) at para 39.

this Court's Rules. As the current application is an appeal, the provisions of rule 19 apply, which stipulate a period of 10 days. This application was not opposed.

[26] The answering affidavit was filed five days out of time. It is in the interests of justice to condone the late filing of the answering affidavit, having regard to factors such as the extent of the delay, the explanation and effect of the delay, as well as the importance of the issues to be raised in the appeal.[15]

Further evidence

[27] On 27 February 2017, the City filed an affidavit to place further evidence before this Court, relating to available alternative accommodation at Wolwerivier. The requirements for the admission of further evidence on appeal have been met in terms of rule 31(1)[16] of this Court's Rules. No party will suffer any prejudice and the applicants do not oppose the application. I am of the opinion that the application for leave to adduce further evidence should be granted as it is in the interests of justice.

Issues

[28] The principal issues remain the same as they are in the parties' submissions to this Court, except for the new issues raised for the first time in this Court which were:

- There was no meaningful engagement between the landowners and the occupiers;

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[15] *Van Wyk v Unitas Hospital* [2007] ZACC 24; 2008 (2) SA 472 (CC); 2008 (4) BCLR 442 (CC) at para 20 and *Brummer v Gorfil Brothers Investments (Pty) Ltd* [2000] ZACC 3; 2000 (2) SA 837 (CC); 2000 (5) BCLR 465 (CC) at para 3.

[16] Rule 31(1) provides:

> "Any party to any proceedings before the Court and as an *amicus curiae* properly admitted by the Court in any proceedings shall be entitled, in documents lodged with the Registrar in terms of these rules, to canvass factual material that is relevant to the determination of the issues before the Court and that does not specifically appear on the record: Provided that such facts—
>
> (a) are common cause or otherwise incontrovertible; or
>
> (b) are of an official, scientific, technical or statistical nature capable of easy verification."

- Interpreting section 4 of ESTA to require landlords, in co-operation with municipalities, to provide subsidies for on-site and off-site housing;
- The non-joinder of the Department of Rural Development and Land Reform; and
- The duty of a private landowner to provide alternative accommodation to evicted occupiers.

Leave to appeal

[29] During the hearing, counsel for both parties conceded that the issues had narrowed down to the single issue of "suitable alternative accommodation". Throughout the litigation the central thrust of the argument was homelessness. This matter raises a constitutional issue to determine the meaning of "suitable alternative accommodation", as defined in section 1 of ESTA.[17] This Court should address and bring about legal certainty regarding the duties of organs of state and private landowners in these and similar circumstances, where occupiers have been evicted in terms of ESTA. It is in the interests of justice to grant leave to appeal.

The City's constitutional obligations

[30] Events took a different turn on 27 February 2017 when the City made an offer of alternative accommodation. In the explanatory affidavit, the City indicated that it was in a position to secure suitable alternative accommodation for those applicants who required it. The City indicated that it was able to make five housing units available to the applicants at Wolwerivier. The applicants had to indicate by 17 March 2017 whether the offer was acceptable.

[17] Section 1 of ESTA defines "suitable alternative accommodation" as—

> "alternative accommodation which is safe and overall not less favourable than the occupiers' previous situation, having regard to the residential accommodation and land for agricultural use available to them prior to eviction, and suitable having regard to—
>
> *(a)* the reasonable needs and requirements of all the occupiers in the household in question for residential accommodation, land for agricultural use, and services;
>
> *(b)* their joint earning abilities; and
>
> *(c)* the need to reside in proximity to opportunities for employment or other economic activities if they intend to be economically active."

[31] On 20 March 2017 the applicants rejected the offer. According to the applicants the accommodation at Wolwerivier was unacceptable due to the distance from Wolwerivier to the applicants' places of employment and the children's school. They further submitted that the housing units at Wolwerivier were inadequate structures as the units had been constructed with corrugated cladding.

[32] The applicants urged this Court to make a value judgment as to what is just and equitable, which includes consideration of the distance from the applicants' places of employment and the distance from social amenities, such as schools, clinics and shopping centres. The applicants failed to deal with the objection that Wolwerivier was far from their places of employment, but relied on a bald allegation, without setting out any particulars as to where they were employed and the distance from Wolwerivier. They did not deal with any hardship they would suffer should they move to Wolwerivier.

[33] The housing unit at Wolwerivier was described by the City as "a 26.5m^2 emergency housing structure, which consists of the prefabricated light gauge steel structure with corrugated cladding". Here each unit will be fitted with an inside toilet and washbasin. In comparison with the previous, tentative offer by the City at Delft TRA, it is manifest that this present unit at Wolwerivier is a much better unit than that at Delft TRA. At Wolwerivier the plumbing installation, bulk water installation and electricity infrastructure have been completed and internal gravel roads have been provided, whilst the entire development will be fenced with a concrete palisade fence.

[34] At the hearing of the matter the first respondent offered to transport the children, being affected by the eviction of their parents, from their temporary housing at Wolwerivier to the school and back home again until the end of the 2017 school year. If we decide the matter in terms of section 26(2), read with sections 26(1) and

26(3) of the Constitution we need not deal with the other issues, as conceded by the applicants' counsel.

Duties of a private landowner

[35] In *Daniels* it was held that ESTA can, under certain circumstances, place a positive obligation on a private landowner. This does not mean that private landowners carry all or the same duties as the State to fulfil the obligations set out in the Constitution. However, it has long been recognised in our constitutional dispensation that ownership of land comes with certain duties or responsibilities, which may differ significantly from the duties and obligations that rested on private landowners in the pre-constitutional context. With this in mind, the applicants argued that the first respondent, as a commercially-able private landowner, was obligated to assist the applicants to obtain suitable alternative accommodation, and failing that, to provide such accommodation.

[36] Is this a case where it is justified to impose an obligation on private landowners? If in the end the result is such that what could be classified as a horizontal obligation is imposed it must be justified. But often adherence to a strict classification of horizontal or vertical application of the Bill of Rights obfuscates the true issue: whether, within the relevant constitutional and statutory context, a greater "give" is required from certain parties. Any "give" must be in line with the Constitution. This Court has long recognised that complex constitutional matters cannot be approached in a binary, all-or-nothing fashion, but the result is often found on a continuum that reflects the variations in the respective weight of the relevant considerations.

[37] The provisions of ESTA do not spell out, in section 10(2), who is responsible for making available suitable alternative accommodation. The logical role player would be the State. But where the State has been cited as a party and has meaningfully participated in the proceedings, and yet no suitable alternative accommodation could be found, is that necessarily the end of the matter? I think not.

Section 10(2) has a narrow scope: it only applies in circumstances where an owner wishes to evict an occupier where there has been no breach or breakdown of the employment relationship. Eviction under those conditions should therefore be allowed only in exceptional circumstances. Within this narrow scope, it might therefore be appropriate to expect the private landowner to assist with the finding of, or, failing that, in truly exceptional circumstances, to provide suitable alternative accommodation. This must be a contextual enquiry, having due regard to all relevant circumstances.

Suitable alternative accommodation

[38] There is no longer any issue between the parties that the requirements of ESTA regarding the eviction were fulfilled. The only question is whether the City has fulfilled its duty to provide suitable alternative accommodation. Section 26 of the Constitution applies. In *Goedgelegen,* Moseneke DCJ held that ESTA is "remedial legislation umbilically linked to the Constitution".[18] Therefore, in this instance, it is incumbent on the City to provide suitable housing to the applicants. It must however be within the City's available resources in terms of section 26(2) of the Constitution.

[39] The applicants submitted that the latest offer by the City, that of 23 February 2017, was not an offer which they were willing to accept. This is the second offer the applicants were dissatisfied with, as they had been unwilling to consider moving to Delft TRA during 2013. The housing units at Delft TRA were much less favourable than the units presently being offered. Each unit at Wolwerivier consists of two rooms with a toilet and a basin inside the house.

[40] The question is thus whether the City has an obligation to continue offering accommodation until the applicants are satisfied. The State is obliged, in terms of section 26 of the Constitution to take "reasonable legislative and other measures, within its available resources" to achieve the right to adequate housing.

[18] *Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd* [2007] ZACC 12; 2007 (6) SA 199 (CC); 2007 (10) BCLR 1027 (CC) (*Goedgelegen*) at para 53.

[41] In *Blue Moonlight*[19] this Court dealt with the provisions of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act[20] (PIE). Although *Blue Moonlight* dealt with provisions of PIE and more in particular with the obligation of a landowner, in similar conditions as the present, the Court held:

> "Of course a property owner cannot be expected to provide free housing for the homeless on its property for an indefinite period. But in certain circumstances an owner may have to be somewhat patient, and accept that the right to occupation may be temporarily restricted."[21]

[42] This Court in *Blue Moonlight* further held that—

> "The duty regarding housing in section 26 of the Constitution falls on all three spheres of government – local, provincial and national – which are obliged to co-operate. In *Grootboom* this court made it clear that 'a co-ordinated State housing program must be a comprehensive one determined by all three spheres of government in consultation with each other . . . Each sphere of government must accept responsibility for the implementation of particular parts of the program'."

[43] The City is before court. The first respondent argued that the City was acting unconstitutionally when it indicated in the Magistrate's Court that it had no temporary or emergency accommodation available. The first respondent has been accommodating the applicants for several years. This is a factor that weighs heavily against imposing a further obligation on the first respondent. *Blue Moonlight* is applicable, although it deals with the provisions of PIE, in as far as it cannot be expected of the first respondent to accommodate the applicants indefinitely when an offer of alternative accommodation has been made by the City.

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[19] *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* [2011] ZACC 33; 2012 (2) SA 104 (CC); 2012 (2) BCLR 150 (CC) (*Blue Moonlight*).

[20] 19 of 1998.

[21] *Blue Moonlight* above n 19 at para 40.

[44] In *Changing Tides 74*[22] the SCA held that—

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

[45] In *Molusi*[23] it was held that in eviction applications the Constitution is the starting point, specifically section 26(3). The first respondent agrees with the applicants that a constitutional duty rests on the local authority to provide suitable alternative accommodation in this instance, where the applicants have been evicted and face homelessness as a result of the eviction.

[46] It is quite clear that a constitutional duty rests on the City, where occupiers are legally evicted and rendered homeless, to provide suitable alternative accommodation.[24] The City cannot escape this obligation by simply submitting reports indicating that there are no TRA housing units available. The City is

[22] *Changing Tides 74* above n 12 at para 39.

[23] *Molusi v Voges N.O.* [2016] ZACC 6; 2016 (3) SA 370 (CC); 2016 (7) BCLR 839 (CC) at para 6.

[24] Section 10(2) of ESTA provides:

> "Subject to the provisions of subsection (3), if none of the circumstances referred to in subsection 1 applies, a court may grant an order for eviction if it is satisfied that suitable alternative accommodation is available to the occupier concerned."

constitutionally obliged, not only in terms of the provisions of ESTA, but even more so in terms of section 26 of the Constitution, upon the eviction of the applicants and their families as occupiers, to provide the applicants with suitable alternative accommodation.

[47] *Changing Tides 74* held that eviction is ordinarily just and equitable if alternative accommodation is made available. In this matter the alternative accommodation at Wolwerivier was made available. The first respondent allayed the applicants' concerns regarding the interruption of the children's schooling by offering to provide transport to school and back from Wolwerivier for the rest of the 2017 school year.

[48] It must be emphasised that the preamble to ESTA does not deal only with the rights of occupiers, but similarly recognises the rights of landowners to apply for eviction under certain conditions and circumstances.

[49] The applicants have enjoyed free accommodation since 8 December 2012, when their right of occupation was terminated, until 2017, almost five years. The first respondent has had a temporary restriction on its property rights for that period and it cannot, in fairness, be expected to continue granting free accommodation to the applicants where its current employees are disadvantaged. Therefore, the applicants must be evicted to enable the first respondent to accommodate its current employees.

Conclusion

[50] The applicants' concerns about what made the initial accommodation ill-suited have been addressed by the City to the best of its abilities. Cognisant that the duty is one of progressive realisation, I accept that the housing units at Wolwerivier qualify as suitable alternative accommodation which is provided by the City within "its available resources". The applicants cannot delay their eviction each time by stating that they find the alternative accommodation offered by the City unsuitable. Specifically, their

remaining concerns regarding the schooling of the children have also been addressed by the offer of transport by the first respondent. This Court has to dismiss the appeal.

Appropriate relief

[51] Having regard to all the facts, it is just and equitable that all the applicants be evicted, save for Ms Jonkers, after three months from the date of judgment. Should the applicants not comply with the order, the Sheriff is authorised to execute the eviction and if necessary, to request the assistance of members of the South African Police Service.

[52] It is not necessary for this Court to deal with the other issues raised by the applicants because of the finding regarding suitable alternative accommodation.

Costs

[53] The first respondent should not be mulcted in costs as it has been housing the applicants for years without receiving any compensation or benefit. However, the first respondent is not asking for costs. The tedious litigation proceedings and costs involved before this Court, as well as the Magistrate's Court and LCC, would have been obviated if the City had complied with its constitutional duty to provide housing from the start. Given the equally important and urgent nature of this eviction matter, it is astounding that the City waited to inform this Court of its offer on alternative accommodation until only a few days before the hearing of the matter in this Court. The City has had more than five years to fulfil its constitutional obligation to provide alternative accommodation, but waited until the last minute when the matter was before this Court before making an offer. The City should be liable to pay the costs in this Court, including the costs of two counsel, where applicable, up to the date when the offer of alternative accommodation was made to the applicants.

Order

[54] The following order is made:

1. Condonation is granted for:
   (a) The late filing of the appeal record; and
   (b) The late filing of the first respondent's answering affidavit.
2. The application for leave to adduce further evidence is granted.
3. The application to amend the application for leave to appeal is granted.
4. Leave to appeal is granted.
5. The appeal is dismissed.
6. The eviction order of the Bellville Magistrate's Court is confirmed.
7. The applicants are ordered to vacate the first respondent's premises within three months of the date of this order.
8. The first respondent is ordered to transport the children, who are subject to this eviction order, from Wolwerivier to the school they are presently attending and back home every school day from the date of eviction to the end of the 2017 school year.
9. The City of Cape Town Municipality is ordered to pay the costs of the applicants up to 23 February 2017 including the costs of two counsel, where applicable.

ZONDO J (qualified concurrence):

[55] I have read the judgment prepared by my Colleague, Pretorius AJ, in this matter. Subject to what I say below, for the reasons she gives I agree with the conclusion she reaches that the application for leave to appeal should be granted but that the appeal should be dismissed.

[56] I prefer not to express any view on the duties of private landowners as discussed in the first judgment under the heading: "Duties of the private landowner".

Bearing in mind the basis upon which we decide the matter, I am of the view that expressing a view on that topic is not necessary for our decision.

[57] I am also unable to agree that the City of Cape Town Municipality should be ordered to pay the applicants' costs. The applicants have been unsuccessful in the appeal and the respondents, including the Municipality, have successfully opposed the applicants' appeal. In ordinary litigation, this would have meant that the applicants should be ordered to pay the respondents' costs. However, because of *Biowatch*[25] the respondents are deprived of such costs and the applicants do not need to pay such costs. To then go further and order that the Municipality must pay the applicants' costs seems to me to be "double punishment" on a successful party which I consider to be unwarranted. I think that it is sufficient that the Municipality is deprived of its costs. I also do no not think that the Municipality has conducted itself in a manner that warrants such a measure. It also seems to me that the Municipality was not afforded any proper opportunity to be heard on why they should be ordered to pay the applicants' costs.

[58] I am, therefore, of the view that we should not make any costs order against the Municipality. Subject to this qualification, I agree with the order proposed in the first judgment.

[25] *Biowatch Trust v Registrar Genetic Resources* 2009 ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC).

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For the Second Respondent:	A Katz SC instructed by Fairbridges Wertheim Becker