SACHS J ABRIDGED JUDGMENT

Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others

Introduction

327. Some years back, the government embarked on an ambitious programme to upgrade the conditions of 18 000 to 20 000 people living in informal habitations in an area known as Joe Slovo. The settlement abutted on the N2 highway as it approached Cape Town, and the programme, designated the N2 Gateway Project (the Project), was undertaken to serve as a pilot scheme for the progressive ending of all informal settlements in the country. In the beginning, the members of the community embraced the project with enthusiasm. Yet before it could get into full swing, relations between the residents and the government broke down. Dissatisfied with the manner in which they felt the upgrading of the area was being conducted, the residents marched to Parliament to hand over a petition, and some of them later blockaded the highway with burning tyres. As they saw it, their dream had turned into a nightmare. From the government's point of view, on the other hand, a project filled with high hopes and involving considerable investment was facing collapse. The government approached the Western Cape High Court, Cape Town, seeking an order to compel the residents to leave the area so that permanent houses could be built in Joe Slovo to enable insubstantial and fire-prone shelters to be replaced with adequate housing.

328. There were three applicants. The first was Thubelisha Homes, a company established by the government to undertake various of its housing functions, and which had been required to see the Project through. The second was the national Minister for Housing and the third was the MEC for Local Government and Housing, Western Cape. The respondents were referred to as Various Occupants. The Community Law Centre and the Centre on Housing Rights and Evictions were jointly admitted as amici curiae.

329. The High Court upheld the application, noting that temporary alternative accommodation was being provided for the residents about 15 kms away in an area called Delft. The residents have now applied directly to this Court for leave to appeal against this decision. As the judgment of the Court indicates, all the members of the Court who heard the matter are agreed on the outcome and the order to be made. There are differences, however, in relation to certain aspects of the reasoning. In particular there is disagreement on the question of whether the occupation of the land was ever lawful. Thus, after elegantly setting out the facts of the case in a manner that managed to be both comprehensive and synoptic, Yacoob J comes to the conclusion that the residents had never at any stage been in lawful occupation. Moseneke DCJ, Ngcobo J, O'Regan J and I come to a different conclusion. In our view the community lawfully occupied the land with the knowledge, acquiescence and support of the Council, but on the understanding that their occupation would be of a temporary nature pending the provision by the state of adequate housing. The differences do not affect the outcome because we all accept that the occupation was unlawful when eviction proceedings commenced. Nevertheless, important jurisprudential issues are raised that affect the status, and in my view, the dignity, of a vast number of people throughout the country living in informal settlements. My reasons follow.

Preliminary observations

330. I start with two preliminary and inter-linked observations. The first concerns the general manner in which I believe courts are called upon to approach a case like this. The second deals with how this particular matter should be located within the trajectory of this Court's evolving jurisprudence on the constitutional right of access to adequate housing.

331. This is not a matter in which formal legal logic alone can solve the conundrum of how to do justice to the one side without imposing a measure of injustice on the other. Thus, in the present matter, if the application for leave to appeal is upheld and the appeal succeeds, the Project goes back to square one, time is lost, costs escalate and people who have already moved to temporary accommodation are left in limbo.

If, on the other hand, the eviction order of the High Court is upheld, then desperately poor families, whose lives have been spent in systematised insecurity on the fringes of organised society, would feel that they are being further marginalised. Once more they must pick up their belongings and move, this time to a distant place without firm guarantees of being able to return.

332. It is necessary, then, not to seek an unattainable solution that is "correct", but to aim for an outcome that, in keeping with the objectives and spirit of the Constitution and relevant statutory provisions, seeks to reconcile the competing considerations and to minimise as far as is reasonably possible any resultant injustice or disadvantage to either party.

333. The fact is that in a constitutionally-based, pluralistic society such as ours, the court's function will often move from simply determining the frontiers between "right" and "wrong", to holding the ring between "right" and "right". In many circumstances, instead of seeking to find a totally "right" or "correct" solution, the judiciary will be obliged to accept the intellectually more modest role of managing tensions between competing legitimate claims, in as balanced, fair and principled a manner as possible.

334. Moreover, in seeking to reconcile the competing interests the courts must give due weight to the overlap between the substantive and the procedural dimensions of the matter. As this Court said in *Port Elizabeth Municipality* in eviction proceedings against the homeless and the landless:

> "The court is thus called upon to go beyond its normal functions, and to engage in active judicial management according to equitable principles of an ongoing, stressful and law-governed social process. This has major implications for the manner in which it must deal with the issues before it, how it should approach the question of evidence, the procedures it may adopt, the way in which it exercises its powers and the orders it might make." (Footnote omitted.)

334. The second preliminary observation is that it is necessary to locate this case within the jurisprudence developed by this Court on the enforcement of housing rights and responsibilities under section 26 of the Constitution. This section states that:

> "(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 maybe 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."

336. The foundations of how this provision should be interpreted and applied were laid in the landmark decision of *Grootboom*. That matter dealt with the claims of about a thousand people who, after being evicted and having their shelters destroyed, found themselves on a dusty sports field with no shelter whatsoever and no land on which to erect new shelters. The judgment focused on the responsibility of government to take reasonable steps, within its available resources, progressively to realise the right of access to adequate housing. The emphasis on the reasonableness of the government's programme, both in its conception and in its implementation, has provided the bedrock of this Court's jurisprudence on the enforcement of social and economic rights. In my view, it should constitute the analytical basis for dealing with the present matter.

337. In *Port Elizabeth Municipality*, a local authority acting at the behest of private landowners brought proceedings under the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (PIE) to evict 68 people, including 23 children living in shelters on the landowners' property. The problem was to reconcile the legitimate rights of the landowners not to be arbitrarily deprived of their property, with the equally legitimate rights of everyone to have access to adequate housing. The Court emphasised the new responsibilities of the judiciary when managing a process made particularly stressful by historically-created and racially-based distortions in relation to access to land. It went on to hold that ordinarily an eviction order would not be just and equitable if an attempt at mediation between the parties had not been made. The judgment accordingly highlighted the overlap between substance and procedure in achieving as just and equitable an outcome as possible.

338. *Olivia Road* took the interconnectedness of procedure and substance a step forward. In that case the municipality was acting in response to a request by developers to secure vacant possession of certain properties. The properties were over-crowded, unhygienic and unsafe apartment blocks in or near central Johannesburg, and the owners wished to have the buildings cleared for development purposes. Holding that the provisions of PIE were applicable, this Court introduced the concept of "meaningful engagement" between the occupiers and the City as a major pre-condition for determining whether an eviction order would be just and equitable. In this way the conundrum of how to balance competing claims is partly

resolved by getting the parties themselves to find functional solutions according to their respective needs and interests, with the court establishing the parameters of what is just and equitable.

339. The present matter involves an application by organs of government to secure an eviction in terms of PIE. This Court's jurisprudence, as referred to above, requires that certain fundamental principles must govern the manner in which applications for eviction orders should be approached. The first is to apply the over-arching principle that the governmental conduct be reasonable. The second is to give due weight to the obligation on the parties to engage as far as possible with each other. Within this matrix, the present case adds three distinctive elements. In the first place, the governmental authorities are not acting on behalf of private landowners seeking vacant possession of land they own or are about to acquire. The authorities are acting on their own behalf as owners of the land, and are attempting to secure governmental and not private interests. Secondly, the community is a relatively settled one, numbering between ten and twenty thousand people who over a period of 15 years have settled on the land, with the Cape Town City Council's knowledge, and, they aver, with its consent. Thirdly, the eviction is being sought not with a view to securing vacant possession to enable the owners to do with the land what they please, nor to open the way to private entrepreneurial activity. On the contrary, the objective is to secure the improvement of the housing conditions of most, if not all, of the occupiers themselves, and not to have them permanently expelled.

340. With these observations in mind I turn to a question which dominated much of the argument at the hearing, namely, whether the residents of Joe Slovo were "unlawful occupiers" of the Council's land and therefore liable to eviction in terms of PIE.

Lawfulness of the occupation

341. The foundation of the debate on the lawfulness of occupation lay in the definition of "unlawful occupier" in PIE. Section 1 provides that "unlawful occupier" means "a person who occupies land without the express or tacit consent of the owner or person in charge, or without any other right in law to occupy such land." A large part of this case was accordingly taken up with the question of whether the Council

had given tacit consent to the residents to live in the area, thereby rendering the occupation lawful. The Council contended that it had never given consent to the residents to live in the area. As far as its furnishing of electricity and water to the residents was concerned, the Council claimed that nothing more was involved than rendering humanitarian assistance. Yacoob J agrees. I see the matter differently.

342. Relying essentially on common law principles relating to land rights, Yacoob J sets out in some detail the factual and jurisprudential basis for his conclusion that the residents of Joe Slovo were never lawful occupiers. In his view, the fact that the Council provided water and electricity represented no more than the furnishing of humanitarian assistance in keeping with its civic responsibilities, and fell far short of proving consent to occupation.

343. In my opinion, the question of the lawfulness of the occupation of council land by homeless families must be located not in the framework of the common law rights of landowners, but in the context of the special cluster of legal relationships between the council and the occupants established by the Constitution and the Housing Act. The common law might have a role to play as an element of these relationships, but would not be at their core. The very manner in which these relationships are established and extinguished will be different from the manner in which these relationships might be created by the common law, for example, through contract, succession or prescription. They flow instead from an articulation of public responsibilities in relation to the achievement of guaranteed social and economic rights. Furthermore, unlike legal relationships between owners and occupiers established by the common law, the relationships between a local authority and homeless people on its land will have multiple dimensions, involve clusters of reciprocal rights and duties and possess an ongoing, organic and dynamic character that evolves over time. As this Court said in *Port Elizabeth Municipality*, quoting *FNB*:

> "When considering the purpose and content of the property clause it is necessary, as *Van der Walt* (1997) puts it,
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> '. . . to move away from a static, typically private-law conceptualist view of the Constitution as a guarantee of the *status quo* to a dynamic, typically public-law view of the Constitution as an instrument for social change and transformation under the auspices [and I would add 'and control'] of entrenched constitutional values'."

The Court went on to observe that the transformative public law view of the Constitution referred to by Van der Walt was further underlined by section 26.

> 344. A transformative view of section 26 makes it clear that in the present matter the Council was not just another landowner entitled to do what it pleased with the land, subject only to normal regulatory controls and, in relation to eviction, to the provisions of PIE. On the contrary, the Council was a landowner of a special type, obliged to use the land for purposes designated by the Constitution and the Housing Act. It owed a duty to the homeless who could not be treated simply as strangers waiting at the gate for charitable assistance. They had rights to adequate housing, and the state was obliged to take reasonable measures to enable them to realise these rights. It follows that in dealing with the rights of the homeless within its boundaries, the Council was called upon to act in a manner that in constitutional terms would be regarded as reasonable.
>
> *The right to adequate housing*
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> 344. The Constitution requires us to view the provisions of section 26 as constituting a comprehensive set of entitlements and obligations which govern the conduct of the Council right from the very beginning of its relationship with the residents. It is necessary, then, to anchor the analysis in an understanding of the affirmative housing rights granted to the homeless by section 26(1) and 26(2). Both chronologically and conceptually the defensive rights concerning eviction contained in section 26(3), and given statutory form by PIE, enter the picture not as the point of departure for the analysis, but as its end-point. The consequence is that the question of the lawfulness of the occupation of the land must be located within the complex, ongoing, mutable and two-way relationship established essentially by public law between the Council and the residents.
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> 346. There is no reason, of course, that the Council as owner of the land in question should not have the same rights as any other owner. Yet any rights the Council possessed had to be asserted within the framework of the Constitution and the restrictions of relevant legislation. More specifically, the government had to function in a manner compatible with duties prescribed for it by section 26 of the Constitution, and the Housing Act. Any inferences to be drawn from the conduct of the Council

should accordingly be based on the assumption that at all times it was aware of, and seeking to comply with, its constitutional and statutory obligations to the community.

347. Our Constitution is far from silent on how municipalities may use their land. It does not assume that we live in the best of all possible worlds in which all have equal opportunities to improve their lot. On the contrary, the Constitution acknowledges that we still inhabit a deeply-divided society that is heavily marked by the systemic inequalities of the past, and requires active forms of redress. Thus, the Constitution does not, as some constitutions do, simply prescribe limits on the way government exercises its authority. It imposes duties on government to play a proactive role in bringing about social transformation and facilitating enjoyment of human rights by all.

348. The Constitution deals expressly with the duties of councils towards the disadvantaged sections of our society. It states that the objects of local government include ensuring "the provision of services to communities in a sustainable manner" and "promot[ing] social and economic development", and that a municipality must "structure and manage its administration and budgeting and planning processes to give priority to the basic needs of the community, and to promote the social and economic development of the community".

349. The Constitution is even more specific in relation to housing. As set out above, section 26 provides that "[e]veryone has the right to have access to adequate housing"; "[t]he state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right"; and "[n]o one may be evicted from their home . . . without an order of court made after considering all the relevant circumstances".

350. The Housing Act, enacted pursuant to section 26, takes the responsibilities of the Council several steps forward. It lays down in great detail the approach the state must adopt when dealing with the claims of the homeless. Thus, section 2(1) ous requires all spheres of government to "give priority to the needs of the poor in respect of housing development". Municipalities are then given the following specific functions:

> "Every municipality must, as part of the municipality's process of integrated development planning, take all reasonable and necessary steps within the framework of national and provincial housing legislation and policy to—
> *(a)* ensure that—
> (i) the inhabitants of its area of jurisdiction have access to adequate housing on a progressive basis;

(ii) conditions not conducive to the health and safety of the inhabitants of its area of jurisdiction are prevented or removed;

(iii) services in respect of water, sanitation, electricity, roads, stormwater drainage and transport are provided in a manner which is economically efficient;

(b) set housing delivery goals in respect of its area of jurisdiction;

(c) identify and designate land for housing development;

(d) create and maintain a public environment conducive to housing development which is financially and socially viable;

(e) promote the resolution of conflicts arising in the housing development process;

(f) initiate, plan, co-ordinate, facilitate, promote and enable appropriate housing development in its area of jurisdiction".

350. In my view it is against this constitutional and statutory background, and not according to the precepts of private law, that the lawfulness of the occupation by the Joe Slovo community of public land must be determined.

351. As Yacoob J aptly put it in *Olivia Road*, every homeless person is in need of housing and this means that every step taken in relation to a homeless person must be reasonable. This observation followed on what he had said in *Grootboom* about the duties of all levels of government in the light of all the provisions of the Constitution:

"All implementation mechanisms and all State action in relation to housing falls to be assessed against the requirements of s 26 of the Constitution. Every step at every level of government must be consistent with the constitutional obligation to take reasonable measures to provide adequate housing."

He went on to state that the Constitution would be worth infinitely less than its paper if the reasonableness of state action concerned with housing was determined without regard to the fundamental constitutional value of human dignity, adding that:

"Section 26, read in the context of the Bill of Rights as a whole, must mean that the respondents have a right to reasonable action by the State in all circumstances and with particular regard to human dignity. In short, I emphasise that human beings are required to be treated as human beings. This is the backdrop against which the conduct of the [Council] towards the [occupiers] must be seen."

353. These are the injunctions that, in the light of the Constitution, this Court has established and which, I believe, should govern the processes under investigation in

the present matter. “Every step at every level” does not start with eviction proceedings. It begins with the initial tolerance of settlement on the land, proceeds to the devising of the Project, follows with the programme of actual implementation, and only concludes with the ultimate decision to institute eviction proceedings. The question to be asked in relation to each of these steps is: does the conduct of the Council measure up to the test of reasonableness as required by the Constitution?

354. The first step taken by the Council in relation to its obligations to promote the right of the homeless to have access to adequate housing was to enable homeless families to occupy vacant land which it owned at the side of the N2 highway. To have refused the families the right to erect their temporary shelters on that land would have been manifestly unreasonable. For people in desperate quest of some place on earth to lay their heads, the erection of rudimentary structures on land from which they would not be expelled represented more than just establishing a shelter from the elements. Their simple habitations on council land gave them a zone of personal intimacy and family security, and established relatively inviolable spaces of privacy and tranquillity in a turbulent and hostile world. Moreover, individuals who would otherwise have lived in insecure isolation became part of a community, with all the social interaction and organised facilities that living within a settled neighbourhood provides. They escaped the status of pariahs who had been historically converted by colonial domination and racist laws into eternal wanderers in the land of their birth.

355. Thus, in allowing the families to find a place of rest and a fixed spot from which to conduct their lives, the Council was making a crucial intervention of double significance: it was responding to the immediate human needs of homeless families, and it was establishing a relatively secure staging-point for the later development of programmes for the ultimate access of these families to adequate housing. In keeping with these objectives, and unlike its predecessors who had taken sporadic steps to drive homeless people off parts of the land now known as Joe Slovo, the new democratically elected Council did not seek to expel the residents. As far as I am aware, the record does not indicate any past attempt to wall off the area or evict the families. On the contrary, in the period 1994 to 2006 the Council not only offered no opposition to the establishment of a burgeoning community, it laid on access to potable water and installed a dense overhead grid of electrification cables for the benefit of the residents. In doing this, it was not acting as a non-governmental organisation providing forms of emergency relief or charitable assistance for people

in desperate need. It was functioning as government itself, fulfilling its specific constitutional and statutory responsibilities in the sphere of local government.

356. Had this case been brought by private landowners it might have been possible to contend that the evidence fell short of showing anything more than conduct of a good Samaritan animated by a spirit of good-neighbourliness. Yet even in relation to a private landowner, I believe that the prolonged character of the occupation, coupled with the creation of infrastructure to provide water and electricity, would have indicated to any objective observer that there was actual consent to the occupation. This was simply not a case of illicit, surreptitious or defiant adverse user against the will of the Council. Nor was the Council a mere passive bystander either uninterested or condemned to put up with a situation over which it had little control. On the contrary, the Council accepted the presence of the residents on the land, negotiated with community leaders over the provision of services and made the land available for being upgraded by other organs of state. The occupation could not be consensual and non-consensual at the same time; the consent was there, and the occupation was lawful.

357. This was the approach adopted, rightly in my view, in *Rademeyer*. In that matter the High Court had to decide whether homeless families residing on municipal land could be classified as unlawful occupiers liable to eviction at the behest of more affluent private neighbours who regarded them as a nuisance. The Court held that the families were occupying the municipality's property with the knowledge and acquiescence of the Council. It went on to state that the conduct of the municipality in permitting the occupiers to remain on its property and in resolving to provide them with water and sanitation constituted at the very least tacit consent to the occupiers to reside on the property.

358. I believe that the conduct of the Council in this case constituted at the very least tacit consent for the residents of Joe Slovo to stay there. Indeed, I would go further. The only inference that can reasonably be drawn from all the objective circumstances is that the Council actually consented to the occupation. It follows that from 1994 to 2006 the residents were lawful occupiers. In this respect, I fully agree with the eloquent judgments of Moseneke DCJ and Ngcobo J.

Conditional nature of the occupation

359. The consent given to homeless people to remain on the Council's property was, however, neither unqualified nor irrevocable. Built into it and foundational to its existence, was an acknowledgement of its temporary character. The very purpose of permitting the informal settlement to burgeon in that area was to establish a point of stability which could pave the way for the next step in a programme of realisation of the right of access to adequate housing. The right to enjoy relatively undisturbed occupancy of the Joe Slovo area, then, was conditional on the land not being needed for other legitimate council purposes, such as future development of formal housing. It was neither a real right as understood by common law principles of land law, nor a contractual right as created in terms of the common law. Rather it was an authorisation specific to its context, granted in terms of public law considerations enabling the residents to reside lawfully on the land for an indeterminate but terminable period. In this respect, the Council was not purporting simultaneously to permit and disallow occupation. It was permitting occupation, subject always to built-in conditions which could bring the permission to an end.

360. In this context, the fear expressed in argument that the authorities would be reluctant to provide any form of assistance to residents of land if this were to be seen as giving the residents permanent rights to stay on the land would be misplaced. The right to occupy the land will be dependent on the purpose for which, and the conditions under which, the occupation has been permitted. Thus, in the present matter occupation was permitted subject to the land one day being upgraded, and to reasonable measures being used to deal with the adverse consequences for the residents of the transformative process involved. Thus, while I fully accept Yacoob J's observation that occupation cannot be both lawful and unlawful at the same time, I see no reason why occupation that is lawful at one moment cannot at a later stage become unlawful.

361. The fact that no rent was paid to the Council is entirely consistent with the special legal regime that operated between the Council and the residents. The Council was fulfilling its responsibilities to enable desperately poor people to occupy land which the Council owned, pending eventual access on a subsidised basis to formal housing. Then, once the formal housing had been established, a new legal relationship based on individualised contracts for those gaining access could be created. It was logical that the interim relationship between the Council and the residents during the period when formal housing opportunities were still being created would have to be governed by these considerations. And the fact that older residents expected tribute

from newer arrivals had no bearing on the general consent of the Council, which was for the homeless families to take up abode on the land, to enjoy a certain degree of communal self-management, and to sort out allocations themselves.

362. To sum up: the Council first informally demarcated areas where the landless and the homeless could erect their shelters while they awaited formal housing. It then went a step further – it provided electricity and water, and a degree of waste collection, and entered into ongoing relationships with leaders of the new communities being established. This could not be characterised simply as the provision of humanitarian assistance to those in need. The term "humanitarian assistance" lends itself more to the granting of ad hoc support for occasional victims of war, persecution, or natural disasters, than to the fulfilment of constitutional and statutory obligations to furnish succour and redress to the long-standing casualties of history. What the Council was doing was providing focused civic action to help people achieve their constitutional right to enjoy dignified habitation. At the same time, however, the entitlement of the homeless to be in continuing occupation of the land was conditional on and subject to the exigencies of any reasonable programme for formal housing to be developed on that land.

Reasonableness of the upgrading programme

363. As I have mentioned, the nature of the relationship between the Council and the residents was on going and dynamic. The next step in the process of fulfilling the Council's responsibilities towards the homeless was to devise a programme for upgrading the area. The objective was to transform a sector of informal housing with minimal amenities, into a sustainable community graced with adequate formal housing. The fact is that the shelters erected by the homeless suffered from great material inadequacies. They were highly susceptible to devastating fires, and access for fire engines (and ambulances) was difficult. The need for radical improvement in housing conditions for all the residents, and especially for the children whose developmental horizons were being severely restricted by the harshness of the circumstances in which they were growing up, was self-evident. The question was how this should be done, and what should happen to the residents while it was being done.

364. In September 2004 Cabinet approved the "Breaking New Ground" National Housing Policy (*BNG*) with the express intention of eliminating informal settlements throughout the country. The document projected a forceful and optimistic vision for the progressive eradication of informal settlements: informal settlements were urgently to be integrated into the broader urban fabric to overcome spatial, social and economic exclusion. The Department would introduce a new informal settlement upgrading instrument to support the focused eradication of informal settlements. The new human settlements plan would adopt a phased in situ upgrading approach to informal settlements, in line with international best practice. The plan would support the eradication of informal settlements through in situ upgrading in desired locations, coupled with the relocation of households where such development was not possible or desirable. Upgrading policies would be implemented by municipalities and would commence with nine pilot projects, one in each province, building up to full implementation status by 2007/8. The document added that a joint programme by the National Housing Department, Western Cape Provincial Government and Cape Metropolitan Council, had already initiated the N2 upgrading from the Cape Town International Airport to Cape Town, as a lead pilot project. Thereafter a further eight projects were to be identified.

365. I have already held that the initial occupation of the area by the residents occurred with the permission of the responsible authorities, and was accordingly lawful. At the same time, however, the consent given was based on the understanding that the accommodation in self-constructed shelters would be of a temporary nature, and that residence in the area was to be seen as constituting a holding operation pending access to formal housing. Implicit in this was the fact that the Council would be entitled to undertake reasonable measures to progressively realise the promise of access to adequate formal housing. In this regard, the Council would be able to employ a wide range of strategies, subject only to the requirement that they fell within the range of options that were reasonable.

366. A court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent. The question would be whether the measures that have been adopted are reasonable. It is necessary to recognise that a wide range of possible measures could be adopted by the state to meet its obligations. Many of these would

meet the requirement of reasonableness. Once it is shown that the measure adopted falls within the range of reasonableness, this requirement is met.

367. On the papers, it cannot be said that the Project as originally conceived did not fall within this range. It might well be that other methods could have been used to secure the same objectives. In particular, *BNG* puts considerable emphasis on in situ upgrading, which minimises the amount of time people are away from their homes and encourages them to stay at or near the sites as they are being improved. This choice, however, was one which appropriately lay with the governmental authorities and their agents. The only limitation on the exercise of the discretion of the responsible authorities was that it should fall within the range of reasonable alternatives. Indeed, at its commencement and in the early months of its existence, the programme was enthusiastically welcomed by the Joe Slovo residents themselves. As a result, many of the occupiers voluntarily relocated to Delft. The programme was accordingly not suddenly sprung on the occupiers. Nor were they unaware that the upgrading programme would require them to relocate.

368. Accordingly, I hold that the programme constituted a reasonable measure undertaken with the view to fulfilling the governmental authorities' responsibilities to enable the residents to have access to adequate housing.

Reasonableness of implementation

369. The formulation of a programme, however, represents only the first step in meeting the state's obligations. The programme must also be reasonable in its implementation. An otherwise reasonable programme that is not implemented reasonably will not constitute compliance with the state's obligations. The main disputes that arose between the parties in fact stemmed from disagreement over the manner in which the Project was being implemented.

370. Many of the facts surrounding the implementation of *BNG* and the development of the Project are contested. The following facts, however, are common cause:

- In January 2005 a devastating fire struck the Joe Slovo area and destroyed the homes of 996 families. The fire victims were informed that they could not rebuild their homes, but would be catered for in terms of the Project.

- The public launch of the Project took place a month later. Joe Slovo was amongst the areas alongside the N2 that the Project covered. The state's overall objective was to provide a total of approximately 22 000 housing opportunities for beneficiary communities adjacent to the highway. It was targeted at the poorest people, with a view to engineering modes of urban development and informal settlement upgrading.
- In its early stages the Joe Slovo community and its leaders enthusiastically embraced the Project.
- The building of flats began at the Cape Town end of the settlement in what later came to be known as phase 1 of the Project.
- The area was again struck by a devastating fire in the early part of 2006, and most of the victims were transported 15 kms away to the suburb of Delft, where temporary accommodation was provided.
- In February 2006 Thubelisha Homes, the company established by the government to undertake its various housing functions, became involved in the Project. I will refer collectively to Thubelisha Homes, the national Minister for Housing and the MEC for Local Government and Housing, Western Cape as "the governmental authorities". The authorities strongly encouraged the residents of Joe Slovo to move and a considerable number voluntarily relocated to temporary relocation areas in Delft.

370. It is also agreed by all the parties that by the second half of 2006 the initial widespread enthusiasm of the residents for the Project had given way to disenchantment and a breakdown of cooperation between the residents and the authorities. Though the causes of and responsibility for the rupture are disputed, it is clear from the record that a strong precipitating factor was the announcement that instead of rentals in the flats being set to range from R150 per month for single units to R300 per month for double units, they would be R600 per month for single units and R1 050 per month for double units.

372. The papers suggest two reasons for this increase. The one is that the building costs had been higher than anticipated. The other is that *BNG* expressly sought to support the functioning of "a single residential property market to reduce duality within the [housing sector] by breaking the barriers between the first economy residential property boom and the second economy slump". The result was that eminently reasonable objectives of the authorities at the macro level, appeared to

come into conflict with what the residents had taken to be eminently reasonable and very specific commitments in their favour at the micro level.

373. The residents had envisaged that they would enjoy a right to return to upgraded versions of single dwellings on single plots. *BNG*, on the other hand, sought to avoid a perpetuation of the division of the city into areas of what are commonly known as "RDP houses" outside of the residential property market, and better-appointed homes supported by mortgages and located within the residential property market. It accordingly emphasised that the upgrading process should not be prescriptive, but rather support a range of tenure options and housing typologies. Where informal settlements were to be upgraded on well-located land, mechanisms were to be introduced to optimise the locational value, and preference would generally be given to medium-density social housing solutions.

374. This clash of perspectives and expectations appeared to be the genesis of what turned out to be a major bone of contention between the parties, namely, the decision by the authorities to promote access to a substantial number of bonded homes in Joe Slovo for families earning more than R3 500 per month. The residents claimed that less than 20% of the Joe Slovo households fell into that category, and that the scheme would shatter the expectation of the majority of the residents of being able to return to homes that would be more modest but more affordable.

375. A further cause for discontent was a decision by the authorities to allocate 30% of homes in the Joe Slovo area to "backyard dwellers" in the nearby Langa township. There were also strong complaints about the manner in which decisions were being communicated (or not communicated) to the residents. Above all, the residents were extremely disconcerted by what they saw as the transformation of a firm undertaking that all, or nearly all, of the residents who went into temporary accommodation in Delft, would be able to return to formal accommodation in Joe Slovo, into a more diffuse and open-ended commitment to apply "objective criteria" that would merely take their claims into account.

376. As a result of their dissatisfaction, in August 2006 the residents marched to Parliament and handed over a petition containing a list of their grievances to a representative of the Minister for Housing. The residents also established a Task Team to represent them, but in the end the attempts to find commonly-acceptable solutions failed. In August 2007 there was a further march to Parliament, and this time the protestors handed a memorandum directly to the Minister. Dissatisfied with

what they regarded as a lack of response, on 10 September 2007 a number of residents blocked the N2 highway and burnt tyres to prevent traffic from coming through.

377. Nine days later the authorities launched proceedings in the Western Cape High Court, Cape Town, seeking eviction of the residents of Joe Slovo. They claimed that the residents were in unlawful occupation and by refusing to move were impeding the realisation of a housing project designed to extend formal housing to thousands of homeless families, many of them included.

378. The unfortunate breakdown in what had once been an enthusiastic partnership, had now culminated in eviction proceedings. The result was the collapse of one of the key elements of *BNG*, which was to accomplish a shift "towards a reinvigorated contract with the people and partner organisations for the achievement of sustainable human settlements." There can be no doubt that there were major failures of communication on the part of the authorities. The evidence suggests the frequent employment of a top-down approach where the purpose of reporting back to the community was seen as being to pass on information about decisions already taken rather than to involve the residents as partners in the process of decision-making itself. As this Court has made clear, meaningful engagement between the authorities and those who may become homeless as a result of government activity, is vital to the reasonableness of the government activity.

379. Yet despite these inadequacies in the modes of consultation, it cannot be said that no meaningful engagement at all took place. If anything, there was a surplus rather than a deficit of acts of engagement. There were simply too many rather than too few protagonists on the side of the authorities. At different stages the occupants had to engage with national and then with provincial and finally with local entities. To complicate matters even further, Thubelisha, which had been created at national level to function at provincial and local levels, became forcefully involved as a protagonist. The difficulty of establishing an authoritative counterpart was aggravated by what appears to have been an incompatibility of objectives in relation to whether, and the extent to which, bonded housing for the somewhat better-off should be made available at Joe Slovo. The residents saw this as drastically cutting down on the

accommodation to be made available to the great majority of the families, namely those whose incomes were below R3 500 per month.

380. In testing the reasonableness of the implementation, the failure to maintain dependable and meaningful lines of communication would, however, not be the only factor to be considered. Extensive negotiations had in fact taken place over a long period of time. The inadequacies of the engagement towards the end appear to have been serious, but would not necessarily have been fatal to the whole process. What mattered was the overall adequacy of the scheme as it unfolded. Evaluation of the details of the scheme as it worked out in practice has to take account, amongst other things, of the benefits that the programme would bestow; the degree of disruption to the lives of the residents; the kind of alternative accommodation made available during temporary relocation; the opportunities that would exist for at least a substantial number of the residents ultimately to achieve access to adequate housing in the Joe Slovo area; the kind of accommodation that would await those who would not be able to return; the criteria that would be used for deciding who would be able to return and who not; and finally, the need to make fair provision for any other homeless people in the vicinity who might also be desperate for access to adequate housing.

381. In essence, these are largely operational matters in relation to which the state should ordinarily have a large discretion. Courts would not normally intervene to decide how well or badly programmes are being managed. In terms of examining the reasonableness of the implementation, courts will be particularly cautious about allowing the best to become the enemy of the good. In the present matter, if errors were made by the governmental authorities, they were of the kind that could crop up in any project and were committed with a view to pursuing legitimate civic and national objectives. In my view, the means used were not so disproportionately out of kilter with the goals of the meritorious Project as to require a court to declare them to be beyond the pale of reasonableness.

382. It is also important to bear in mind that a back-stop existed to prevent any defects there might be in implementation from leading to unjust and irreversible consequences for the residents. This safety net was provided by section 26(3) of the Constitution, and PIE. Ultimately, no resident could be compelled to leave Joe Slovo except in terms of a court order, which could only be granted after the court had taken

account of all the circumstances and decided that it would be just and equitable for an eviction to take place.

383. In considering the reasonableness of the implementation scheme, all the different aspects have to be considered in conjunction. Was the overall implementation conducted in a reasonable manner? In particular, were the deficiencies in the process of such a degree as to vitiate the reasonableness of the whole Project?

384. There may well have been serious faults in the mode of engaging with the residents. Indeed unilateral decision-making on important questions concerning who would in fact be able to return to the newly-built homes, appears to have caused a great deal of uncertainty. Yet, manifestly meritorious plans were well on track. Temporary accommodation was being provided in Delft. In one way or another, all of those who were entitled to a subsidy would end up with a home. The delay would not be too great. Relocation by its very nature presupposed a measure of inconvenience. The inconvenience resulting from restarting the whole process from square one, however, would be far greater. An eviction order made in terms of PIE could be constructed in such a way as to iron out many of the problems. In all the circumstances I cannot hold that the implementation as a whole was so tainted by inconsistency and unfairness as to fail the test of reasonableness.

385. This brings me to examine the reasonableness of the last step of the process of providing access to adequate housing, namely, the institution of proceedings for eviction under PIE to enable the upgrading programme to be completed. Wrapped up in this process was the question of whether the manner in which eviction was sought was procedurally fair.

Eviction proceedings under PIE

386. The manner and timing of the termination of the Council's consent to occupation of Joe Slovo cannot be separated from the way in which the overall relationship between governmental authorities and the residents had been initiated and had evolved over time. Implicit in this relationship from the outset was the understanding that occupation would be temporary, pending eventual access to formal

housing. Once the residents had embraced the Project, they implicitly undertook the obligation to allow it to work. This meant that the plan for temporary relocation on a staggered basis and the phased clearing of Joe Slovo for formal housing became dependent on voluntary relocation by the existing residents, at least on a temporary basis. This was fully comprehended by all the residents and, indeed, on this understanding many left of their own accord.

387. As this judgment has stressed, the lawfulness of the occupation was conditional on uses to which the Council and its partners in government could legitimately put the land. A reasonable upgrading programme had been established. For all its possible faults, it was being implemented in a manner that fell within the parameters of reasonableness. By its nature, the programme imposed a duty on the residents to cooperate. Their situation was not equivalent to that of families in the days of apartheid seeking to resist forced removal from ancestral land. They had been accommodated on Council property precisely with a view to overcoming the patterns of segregation and marginalisation to which they had been subjected. The objective was to enable them one day, in a planned fashion, to overcome their spatial, economic, social and spiritual isolation from the mainstream of society. Acquiring a dignified house of their own would represent more than getting a secure roof over their heads and access to water and electricity. It would mark an end to their life as permanent itinerants with a sword of eviction perpetually hanging over their heads. It would symbolise a degree, hitherto denied to them, of being accepted as members of organised civic society. However humble the home, it would be their own. The moral quality of their citizenship in terms of public acknowledgement and self-esteem, would be notably enhanced.

388. It was now incumbent upon the residents to cooperate in the achievement of these objectives. They were not being thrown back on to the street to fend for themselves. Alternative arrangements were being made to provide temporary shelter for each and every family. The process would inevitably be inconvenient, but the details would be open to amelioration through negotiation, and if that failed, by recourse to the courts. In these circumstances, a blanket refusal to move served to frustrate the further development of the Project, causing a great deal of inconvenience and expense to a large number of people, and delaying the implementation of a

programme from which the majority, if not all, of the residents themselves stood to benefit.

389. The refusal of the residents to cooperate was in conflict with the conditions under which consent to occupy had been given to them. As such, their failure to abide by the unwritten bargain between themselves and the Council served automatically to annul the consent originally given by the Council. They were in fact repudiating the conditions that were foundational to their stay. It could be said that it would have been more courteous and in keeping with the spirit of engagement for the authorities to have given them advance notice that they were planning to invoke the procedures of PIE to ensure that the upgrading process for Joe Slovo could proceed. I do not, however, see that it was necessary for formal notice of termination of consent to have been delivered prior to the institution of proceedings. The permission to occupy was given by conduct rather than formally. Similarly, the breach of the implicit undertaking made by the residents, was effected by conduct.

390. In this respect, it is instructive to look at what this Court said in *Kyalami* in connection with procedural fairness in relation to administrative action. The circumstances in that matter were by no means identical, but the approach adopted by the Court is helpful in the present matter. The state had a plan to accommodate victims of floods in Alexandra on public land adjacent to a prison and the issue was whether specific notice with an opportunity to object should have been given to all parties who had an interest. In responding to complaints by residents of an affluent suburb that neighboured on the prison that they had not been given a fair opportunity to object, this Court stated:

> "Where, as in the present case, conflicting interests have to be reconciled and choices made, proportionality, which is inherent in the Bill of Rights, is relevant to determining what fairness requires. Ultimately, procedural fairness depends in each case upon the balancing of various relevant factors including the nature of the decision, the 'rights' affected by it, the circumstances in which it is made and the consequences resulting from it." (Footnote omitted.)

391. After considering the facts of the case the judgment went on to conclude:

> "[P]rocedural fairness does not require the government to do more in the circumstances of this case than it has undertaken to do. That was to consult with the Kyalami residents in an endeavour to meet any legitimate concerns they might have as to the manner in which the development will take place. To require more, would in effect inhibit the government from taking a decision that had to be taken

> urgently . . . . It may have been better and more consistent with salutary principles of good government if the government had found an appropriate method to inform the neighbouring residents of its intentions before contractors went onto the site, and if it had engaged them in discussion and the planning at an early stage of the project. However . . . the absence of such consultation and the engagement did not invalidate the decision."

The emphasis on context and proportionality, rather than on abstract, mechanical rules, is relevant to the present matter.

392. In this case there was a need for the stalled upgrading process to be resumed. Costs were piling up, and construction was at a standstill. People who had voluntarily moved to Delft in the expectation of a swift return to dignified homes, were left stranded. Many other parties stood to be affected. And of special significance was the fact that no irreversible damage to the residents' interests would have been caused by the mere issuing of notices in terms of PIE.

393. PIE itself laid down notice procedures, and provided the residents with full opportunity to be heard on the one critical issue at stake, namely, whether it would be just and equitable to compel them to move. The procedures in PIE would ensure that the court would traverse all relevant circumstances and decide whether the provision of accommodation was just and equitable. Before coming to its conclusion, the court would be required to consider all relevant circumstances, and give a full hearing to the occupiers. In this way, an administrative decision based on the discretion of the officials concerned would be converted into a judicial decision. The court would not be acting as a judicial body reviewing an administrative decision. It would be hearing the matter *de novo* (from scratch), and making up its own mind whether the justice and equity requirements of PIE had been met.

394. The invocation of PIE procedures following on the public breakdown of the process, served in itself as a final statement that the occupation had been rendered unlawful. Invoking PIE in these circumstances was not unreasonable, nor was the notice unfair. On the contrary, the PIE procedures guaranteed that the matter would be looked at with utmost fairness in a judicial setting. And given that the residents knew all along that they were required to move somewhere to enable the upgrading process to continue, and that the Council was determined to go ahead, the issuing of a formal notice that consent no longer existed, would have been an exercise in pure formalism.

Indeed, it would have been a costly bureaucratic exercise with no meaningful practical significance.

395. In other circumstances it might be inappropriate for the owner of land simply to say: "See you in court, you may have your say there". But PIE is a unique piece of legislation with procedures that are specifically designed to prevent unjust removals. It expressly provides for an opportunity to make full representations. Moreover, it insists that even if the occupation is no longer lawful because consent has manifestly ceased to exist, no eviction shall be ordered unless in all the circumstances it would be just and equitable to issue it.

396. I now turn to the question of whether the issuing of an order authorising eviction was just and equitable.

The justness and equity of the eviction

397. The overall upgrading process must be seen as one that was manifestly beneficial in its objectives and that had already gone a considerable way in its implementation. To start again from scratch would not have furthered any of the constitutional interests at stake. One zone of Joe Slovo had already been developed. The accommodation was palpably superior to that available in the remainder of the area, and has been actively enjoyed for some time without the fire and flood hazards that characterise the rest of the zones. There are people at Delft waiting to get back to their promised homes in Joe Slovo, and others in Langa who have to endure backyard shelter because the building of their new homes has been put on hold. These considerations are highly relevant both to the reasonableness of insisting that the programme be allowed to resume, and to the justness and equity of requiring residents who are stalling development to accept temporary relocation.

398. The applicants' main challenge in this application for leave to appeal is directed at the order of eviction. To reinforce the challenge, they referred to many aspects of the High Court order which, they claimed, would lead to consequences that were manifestly unjust and inequitable. One critical feature, they contended, was that there was no guarantee that once the residents left Joe Slovo to take up temporary

accommodation 15 kms away, they would in fact be able to return to the area. They also stated that no specific arrangements had been made to ensure sufficient quantity and appropriate quality for the temporary accommodation in Delft. They submitted that engagement between the authorities and the residents had been wholly inadequate, and that no provision had been made to ensure that there would be appropriate individualised treatment for the people due to be removed.

399. As has been mentioned above, one of the functions of the Court in a case like the present, is to do what it can to manage an inevitably stressful process. In keeping with this consideration, after extensive argument at the hearing, the Court invited the parties to attempt to reach an agreed solution. As a starting point, the authorities were requested to furnish a proposed draft order which would go beyond the order granted by the High Court, in particular by ensuring individualisation of the relocation process, thereby respecting the dignity of those affected. As a result, the authorities produced a memorandum setting out detailed undertakings with regard to what they would do immediately to meet the Court's request, coupled with more general commitments in terms of how they would proceed as further information became available. They attached to the memorandum a draft order agreed to by all three respondents.

400. The terms of this draft order have, with small modifications, been incorporated into the order made by this Court. They include the following new provisions:

- that the authorities allocate 70% of the subsidised houses to be built at Joe Slovo to current and former residents who apply for and qualify for such housing;
- that the authorities engage with the affected residents in respect of each relocation prior to requesting the Sheriff to act. This engagement would include finalising precise details of the relocation and the transport needs before and after the relocation, and would cover transport facilities to schools, health facilities and places of work. The authorities would also provide specific information to inform the residents about where they stood in relation to the allocation of permanent housing; and
- that the authorities provide detailed specifications concerning the temporary accommodation being made available in Delft.

400. Three weeks after the draft order was lodged with the Court, the residents submitted an affidavit in response. It stated that they agreed that Joe Slovo should be upgraded and developed for poor people, and that a necessary consequence was that it would not be possible for them to remain where they were in their present structures. They also accepted that it would not be possible for all of the broader Joe Slovo community to be accommodated permanently at Joe Slovo. However, they did not accept that a legally valid case for eviction had been made out; that it was not possible for people to move to another part of Joe Slovo while development was taking place; that Delft was the only suitable location for temporary or permanent accommodation; or that it could be just and equitable for them to be evicted on the basis of vague promises where important information continued to remain uncertain. They accordingly urged the Court not to order eviction, but instead to require further engagement between the parties.

401. The concerns advanced by the residents merit serious consideration. In essence they boil down to asking the Court to replace the eviction order with an order requiring engagement between the parties with a view to finding mutually agreed mechanisms for resolving the impasse. The authorities accepted the need for engagement, but in a far more limited sense than that asked for by the residents. Assuming that eviction would be ordered, the order proposed by the authorities requires individualised engagement for the purposes of ensuring appropriate attention to individual needs when eviction takes place. The residents, on the other hand, state that engagement can only be meaningful if the parties meet as equals without the eviction order hanging over them. Engagement on substantive questions, they say, could well avoid the necessity for having an eviction order at all.

402. The authorities responsible for housing must have a wide discretion in respect of how they should best manage programmes that are eminently reasonable in their objectives. At the same time, they must deal with the people most affected in a fair manner that invites their participation and respects their dignity. The revised order in fact substantially fills in the gaps left by the High Court order, and deals in a balanced way with the intricacies of reconciling the competing considerations at stake.

403. No doubt, the process could be accomplished in other and possibly even better ways. But this Court is not called upon to decide whether the best means have been found to enable the upgrading programme to go ahead. The test is whether the mechanisms used to accomplish the objectives of the programme are reasonable overall; whether the procedures used have been fair; and whether an eviction order

would be just and equitable in relation to residents who are refusing to take up the temporary alternative accommodation available.

404. It is important to note that the order of this Court requires meaningful engagement in relation to the stage the process has now reached. This does not envisage re-opening the basic modalities of the upgrading and relocation scheme. But it does bring the community directly into helping to achieve maximum fairness in relation to potentially divisive features of the implementation.

405. That the Council and the residents need to engage in a two-way process must be emphasised. In *Port Elizabeth Municipality* and *Grootboom* this Court underlined the need for municipalities to attend to their duties with insight and a sense of humanity, adding that their duties extended beyond the development of housing schemes to treating those within their jurisdiction with respect. Officials seeking eviction should be encouraged not to rely on concepts of faceless and anonymous squatters automatically to be regarded as obstinate and obnoxious social nuisances. Justice and equity require that everyone be treated as an individual bearer of rights entitled to respect for his or her dignity.

407. At the same time, this Court has emphasised that those who have been compelled by poverty and landlessness to live in shelters, should be discouraged from regarding themselves as helpless victims, lacking the possibilities of personal moral agency. The tenacity and ingenuity they have shown in making homes out of discarded material, in finding work and sending their children to school, serves as a tribute to their capacity for survival and adaptation. The achievement of a just and equitable outcome required an appropriate contribution not only from the municipal authorities but from the residents themselves. They had a duty to show the same resourcefulness in seeking a solution as they did in managing to survive in the most challenging circumstances. In the same vein, when underlining the fact that the process of engagement would work only if both sides acted reasonably and in good faith, this Court in *Olivia Road* stated that people subject to eviction must—

"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."

408. This case compels us to deal in a realistic and principled way with what it means to be a South African living in a new constitutional democracy. It concerns the responsibilities of government to secure the ample benefits of citizenship promised for all by the Constitution. It expands the concept of citizenship beyond traditional notions of electoral rights and claims for diplomatic protection, to include the full substantive benefits and entitlements envisaged by the Constitution for all the people who live in the country and to whom it belongs. At the same time it focuses on the reciprocal duty of citizens to be active, participatory and responsible and to make their own individual and collective contributions towards the realisation of the benefits and entitlements they claim for themselves, not to speak of the well-being of the community as a whole. When all is said and done, and the process has run its course, the authorities and the families will still be connected in ongoing constitutional relationships. It is to everyone's advantage that they be encouraged to get beyond the present impasse and work together once more.

409. Not without some hesitation, I have come to the conclusion that, given the history of the matter and the negative consequences for all concerned from further delays to the housing programme, considerations of equity and justice require that the order for eviction, now suitably amplified to make it a great deal fairer, should be supported.