IN THE HIGH COURT OF SOUTH AFRICA
CAPE OF GOOD HOPE PROVINCIAL DIVISION

Case no A 5/2003

In the matter between

THE CITY OF CAPE TOWN Appellant

and

THE VARIOUS OCCUPIERS OF
THE ROAD RESERVE OF APPELLANT
PARALLEL TO SHEFFIELD ROAD IN PHILLIPI Respondents

JUDGMENT DELIVERED ON 30 SEPTEMBER 2003

BLIGNAULT J:

[1] Appellant is the City of Cape Town, a municipality established in terms of the provisions of the Local Government: Municipal Structures Act 117 of 1998. The area known as Phillipi falls within its area of jurisdiction. Respondents are described as various occupiers of the road reserve of appellant parallel to Sheffield Road in Phillipi.

The application for directions as to service

[2] On 17 December 1999 appellant applied in the Magistrate's Court for the district of Wynberg, in terms of the provisions of section 4(4) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 ("the PIE Act"), for specific directions as to the service of an application to be brought for the eviction of respondents from appellant's land described as the road reserve parallel to Sheffield Road in Phillipi. The affidavit in support of that application was deposed to by Mr J Strauss, the acting officer commanding of appellant's rapid deployment unit. He stated that as from 18 October 1999 various occupiers had commenced occupying appellant's land unlawfully. As at 1 December 1999 approximately 146 structures had been erected and occupied on the property.

[3] On 20 December 1999 an order authorising the following forms of service by the sheriff was granted by a magistrate:

(1) the handing of copies of the application and affidavits together with a notice by the court to all occupants then present;

(2) the reading out, by loudhailer, of the application:

(3) the affixing of a copy of the application and court notice to wooden boards to be erected at 300 metre intervals across the length of the property;

(4) the affixing of a copy of the application and court notice on the entrance of each structure on the land.

The application for the eviction of respondents

[4] On 13 April 2000 an application for the eviction of respondents was issued by the clerk of the Wynberg magistrate's court. The notice of application that was issued by the clerk of the court and served upon respondents in terms of the authorised forms of service, informed them that appellant intended applying to court on 15 May

2000 for their eviction from the land in question and the demolition of the structures built by them on the land. The principal founding affidavit was made by appellant's chief executive officer, Mr Andrew Michael Boraine. Mr Leon Bester, appellant's director, road and stormwater, deposed to a supporting affidavit. Appellant, he said, is the owner of the road reserve parallel to Sheffield Road, Phillipi as indicated on a plan annexed to the application marked "A ("the property"). The property is under the control of appellant's road and stormwater directorate and planning is underway for the upgrading of the road. On 16 October 1999 a report was received by appellant's rapid deployment unit that people intended moving on to the property but at an inspection that day they found that no structures had yet been erected. On 18 October 1999 they again inspected the property and found that 15 structures had been erected. On 22 October 1999 they counted about 30 structures that were not completed or occupied and these were demolished by appellant's employees. Appellant's representatives communicated with the occupiers and informed them that their occupation was unlawful. Mr David Masizi of appellant's housing division informed respondents' representatives that there was no alternative housing for them as all appellant's

available housing was allocated according to a strict system and a policy that entailed a lengthy waiting period. On 25 October 1999 there were about 45 structures on the property of which 25 were unoccupied and therefore demolished by appellant's representatives. On 27 October 1999 representatives of appellant met with representatives of respondents. They were told that respondents had previously lived in the backyards of people that were now building their own houses. In order to create space for the building contractors they were evicted from these backyards. On that day respondents were served with notices calling upon them to remove the structures erected by them. On 29 October 1999 appellant's representatives inspected the property and found 62 structures of which 22 were not occupied and therefore demolished by them. Thereafter more structures were being erected at a rapid pace. On 24 November 1999 appellant again served a notice on respondents to vacate the property. On 30 November 1999 representatives of appellant met with representatives of respondents and the Legal Resources Centre. No resolution of the situation was achieved at this meeting. On 1 December 1999 appellant's officials counted the structures on the property and found 146.

[5] Bester advanced the submission that it would be just and equitable to evict respondents from the property even though appellant was not immediately in a position to offer them alternative housing. There are many other people, he said, who live in dire conditions and their needs must also be taken into consideration. Appellant is attempting to carry out its housing policy in a just and equitable manner. Respondents, he submitted, should not be allowed to take the law into their own hands, as that would make it impossible for appellant to carry out its housing policy.

[6] Ms Nokhephu Florence Gwiji made an answering affidavit on behalf of the respondents. She is a female unmarried person, 35 years old, with three minor children. She is self-employed as a hawker. She has been residing in Cape Town since 1991. She moved on to the Sheffield Road road reserve on 16 October 1999. She was elected by a large number of respondents to represent them in this matter. She stated that she acted in this matter in her personal capacity and in her representative capacity and in terms of section 38(b) and 38(d) of the Constitution of the Republic of South Africa,

Act 108 of 1996 ("the Constitution") on behalf of other respondents and in the public interest. She also acted in the public interest to protect the children living on the property. There are among the respondents, she said, many female heads of households, approximately 300 children of which 9 are disabled and approximately 200 elderly pensioners of which 7 are disabled. There is at least, she said, an obligation upon appellant to provide basic shelter to respondents as part of its obligations in terms of sections 26 and 28(1)(c) of the Constitution.

[7] Ms Gwiji said that on 16 October 1999 she and 78 other households moved on to the land near Sheffield Road. On 16 October 1999 about 16 shacks were erected. Many of them had been lodgers at Village 3, Brown's Farm, Phillipi but they had been asked by the owners to leave. They moved to the vacant land nearest to them. They desperately needed roofs over their heads. At the time when she signed her affidavit there were approximately 500 houses on the property at Sheffield Road. They obtained water and toilet facilities from the neighbouring area, Village 3, Brown's Farm as there were no such facilities on site. On 22 October 1999 appellant's

rapid deployment unit destroyed incomplete shacks on the property. On 25 October 1999 they returned and destroyed more shacks. They returned on 29 October 1999 but by then there were about 200 shacks. Ms Gwiji submitted that at a minimum respondents have the right to alternative accommodation or land in the event of a crisis. She disputed the numbers of shacks said to have been erected on the property from time to time, saying there were more than those mentioned by Bester. At one stage respondents' legal representatives requested that the matter be referred to mediation in terms of the PIE Act but appellant's officials were not prepared to agree to it. She accordingly asked that appellant' application be dismissed, alternatively that a mediator be appointed, alternatively that appellant be ordered to find suitable accommodation for respondents.

[8] Ms Gwiji made a supplementary answering affidavit dated 13 June 2000. She mentioned that she had obtained various affidavits from fellow respondents, which were attached to her affidavit, in order to place full information of their personal circumstances before the court. She submitted that appellant had failed to make the necessary

enquiries and allegations mandated by section 26(3) and section 28(1)(c) of the Constitution. Appellant is further discriminating unlawfully in breach of section 9(3) of the Constitution. She submitted that the eviction of the respondents would simply result in a large number of people (about 800) unlawfully occupying land elsewhere. Appellant, she said, offers no solution to respondents' plight save for the saving scheme administered by the Cape Town Housing Company (Pty) Ltd which has become redundant due to the high demand. Many respondents are in any event unemployed and cannot afford to pay for their accommodation. Appellant, she repeated, is under an obligation to formulate a land plan that involves at least the making available of land and a water supply and basic sanitation. Appellant is also obliged under the Constitution to respect respondents' dignity and right to life. Respondents rely further on their right to freedom of movement and the freedom to reside anywhere in the Republic of South Africa, and their right to administrative action that is lawful, reasonable and procedurally fair. She also pointed out that the order sought by appellant cannot be made as all occupants of the land have not been identified or cited.

Respondents, she said finally, are relying on the legal doctrine of necessity.

[9] Bester deposed to a replying affidavit, dated 14 June 2000, on behalf of appellant. He reiterated that no structures had been erected on the property before 18 October 1999 as his staff had monitored the situation. He denied that it had been established that appellant was under any specific duty to maintain the children of respondents. Appellant, he said, had sympathy for the position of respondents but it was attempting, within its available resources and in terms of its housing policy, to provide access to housing for all its constituents. There is a waiting list of applicants for housing. Appellant created the Cape Town Community Housing Company (Pty) Ltd and land has been released to it. Applicants for housing are screened to ensure that they comply with national policies and guidelines and that they can save over a period of 6 months or longer. That company had an active base of 9 000 savers. Respondents, he submitted, are in no different situation than many tens of thousands of people throughout the Republic. It was a matter of concern, he said, that the community of unlawful occupiers was still growing. Appellant was concerned that

a precedent could be created whereby people who do not qualify for housing, may take the law into their own hands. He admitted that there were about 500 homes on the property at that stage. There are no toilet facilities or water on the property but no services could be installed there as it is a road reserve.

[10] Bester denied that the rapid deployment unit had destroyed any shacks. They dismantled incomplete and unoccupied structures and removed the materials to a place of safety in Ndabeni. The area is intended to be used as a road but that use is subject to the availability of funds. It is an important road and will provide access between different municipal areas. At the meeting held on 3 December 1999 (not 30 November 1999 as was mentioned in his supporting affidavit) representatives of respondents undertook to negotiate a date on which they would vacate the property. Bester denied that any of appellant's officials promised respondents that appellant would provide alternative accommodation.

The magistrate's orders

[11] The hearing of the application in the magistrate's court took place in two stages. At the first stage, on 4 October 2000, a number of points *in limine*, raised by respondents, were determined. The magistrate rejected all of them. The first point was that appellant had no *locus standi*. The second point was that Boraine had no authority from appellant to institute these proceedings. The third point was that the property had not been properly described. The next point was that there had not been proper service of the application on the respondents. An objection of non-joinder and a defence that mediation was a pre-requisite for bringing the application, were also rejected. An objection that the application had to be brought in terms of section 6 (and not section 4) of the PIE Act was similarly dismissed.

[12] At the second stage of the hearing the merits of the eviction application were argued. The magistrate gave judgment on 28 September 2001. He referred to the opposing contentions that had been advanced before him. He found that respondents had occupied the land for a period not longer than six months at the time when the present proceedings were instituted and that the court could therefore

proceed in terms of the provisions of section 4(6) of the PIE Act. He found that appellant was entitled to the eviction order sought by it but he directed that the order would be suspended pending the availability of alternative land for respondents' resettlement. He ordered respondents to pay the costs of appellant with regard to the points *in limine* but in regard to the merits he decided that there would be no order as to costs.

Appellant's submissions on appeal

[13] Appellant now appeals to this court against the magistrate's judgment. Ms Williams appeared on its behalf in the appeal. She submitted that appellant, although an organ of state, could bring the proceedings in terms of section 4 of the PIE Act. The magistrate, correctly, she argued, found that respondents' occupation of the property commenced on 16 October 1999 and that appellant was accordingly entitled to rely on sub-section 4(6) and not sub-section 4(7) of the PIE Act. These sub-sections provide as follows:

"(6) If an unlawful occupier has occupied the land in question for less than six months at the time when the proceedings are initiated, a court may grant an order for eviction if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances, including the rights and needs of the elderly, children, disabled persons and households headed by women.

(7) If an unlawful occupier has occupied the land in question for more than six months at the time when the proceedings are initiated, a court may grant an order for eviction if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances, including, except where the land is sold in a sale of execution pursuant to a mortgage, whether land has been made available or can reasonably be made available by a municipality or other organ of state or another land owner for the relocation of the unlawful occupier, and including the rights and needs of the elderly, children, disabled persons and households headed by women.

She submitted that, having made that finding, the magistrate should not have brought sub-section 4(7) of the PIE Act into consideration at all. The question of whether land has been made available or could reasonably be made available is not part of the enquiry in terms of sub-section 4(6) of the PIE Act.

[14] Ms Williams submitted that the following facts and circumstances favoured the granting of the eviction order sought by appellant in this matter:

(a) Appellant has limited housing resources;

(b) Appellant is not possessed of alternative accommodation which can reasonably be made available to respondents;

(c) The provision of alternative housing would prejudice many others who are in a similar or worse position and who are on a waiting list for housing;

(d) Appellant is the owner of the property;

(e) The property is a road reserve with municipal services beneath it; the structures have been erected in contravention of section 139 of the Municipal Ordinance 20 of 1974;

(f) If the structures are not removed appellant will not have access to its municipal services;

(g) Sheffield Road is earmarked for road-widening;

(h) The erection of the structures upon the road reserve is a contravention of section 17 of the Roads Ordinance 19 of 1976, the Land Use Planning Ordinance 15 of 1985 and section 13 of the National Roads Act 54 of 1971.

[15] Ms Williams submitted that the eviction order granted by the magistrate was correct and fully justified. The conditional suspension

of the eviction order, however, was irregular and should be struck down.

Respondents' submissions on appeal

[16] Mr Budlender appeared on behalf of respondents in the appeal. He dealt first with respondents' cross-appeal. It is based on the provisions of sub-section 4(2) of the PIE Act which, with sub-sections 4(1) and 4(5), read as follows:

> *"**4 Eviction of unlawful occupiers***
>
> *(1) Notwithstanding anything to the contrary contained in any law or the common law, the provisions of this section apply to proceedings by an owner or person in charge of land for the eviction of an unlawful occupier.*

(2) At least 14 days before the hearing of the proceedings contemplated in subsection (1), the court must serve written and effective notice of the proceedings on the unlawful occupier and the municipality having jurisdiction.

… … …

(5) The notice of proceedings contemplated in subsection (2) must—

(a) state that proceedings are being instituted in terms of subsection (1) for an order for the eviction of the unlawful occupier;

(b) indicate on what date and at what time the court will hear the proceedings;

(c) set out the grounds for the proposed eviction; and

(d) state that the unlawful occupier is entitled to appear before the court and defend the case and, where necessary, has the right to apply for legal aid."

This provision, he submitted, is peremptory. He referred in this regard to **CAPE KILLARNEY PROPERTY INVESTMENTS (PTY) LTD v MAHAMBA AND OTHERS** 2001 (4) SA 1222 (SCA) at para [11] :

"*Although s 4(2) could have been more clearly worded, it is obvious in my view that the Legislature did not intend physical service of the notice by the court in the person of a Judge or magistrate. On the other hand, mere issue of the notice by the Registrar or clerk of the court would not suffice. What is intended, I believe, is that the contents and the manner of service of the notice contemplated in ss (2) must be authorised and directed by an order of the court concerned.*"

In the present case, Mr Budlender argued, the notice of application was issued by the clerk of the court. It was not authorised by the court itself. The order of court, dated 20 December 1999, did not

indicate the date on which the matter was intended to be heard. Neither the court order, nor the notice of application issued by the clerk of the court, accordingly complied with the provisions of sub-section 4(2), read with sub-section 4(5), of the PIE Act. The application should accordingly have been dismissed by the magistrate on this ground.

[17] In regard to the merits of the appeal Mr Budlender argued that respondents are people who have nowhere to go. They fall into the category of people described in **GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA AND OTHERS v GROOTBOOM AND OTHERS** 2001 (1) SA 46 (CC) (“**GROOTBOOM”)** in para [52], at 75 DE, as follows:

> *“…people who have no access to land, no roof over their heads, for people who are living in intolerable conditions and for people who are in crisis because of natural disasters such as floods and fires, or because their homes are under threat of demolition. These are people in desperate need. Their immediate need can be met by relief short of housing which fulfils the requisite standards of*

> *durability, habitability and stability encompassed by the definition of housing development in the Act."*

The eviction of respondents, he submitted, would therefore be a *prima facie* breach of the Constitution. The question is whether it can be justified in terms of section 36 of the Constitution.

[18] Mr Budlender submitted that appellant's housing programme must be reasonable. To be reasonable it must be flexible and it must make provision for people in desperate circumstances. The problem in this case is that appellant has failed to recognize that respondents are in a desperate situation and that they have nowhere to go. Appellant's housing programme makes no provision for people who are in a desperate position whilst waiting for relief from the medium or long term measures being taken. Respondents have explained that they cannot return to the backyards where they came from. Hence they have nowhere to go to. He pointed out that appellant has not even suggested where respondents should go to where they would not again become unlawful occupiers.

[19] In regard to the question whether sub-section 4(6) or 4(7) of the PIE Act applies, Mr Budlender submitted that the magistrate erred in judging the question whether some of the respondents commenced their occupation of the land on 16 October 1999. As this question arose in motion proceedings he should have accepted respondents' version. It would in any event be artificial, he submitted, to distinguish between two groups of respondents on this basis. The question of the availability of alternative housing will inevitably be a highly relevant consideration in any enquiry of this nature. Section 4(6) does not exclude it from being a relevant factor. Appellant, he submitted, adopted a policy which made no provision for people in respondent' position and now they seek to rely on that very policy for evicting respondents.

[20] Mr Budlender pointed out that there could be four types of situations where the eviction of homeless people may be justified without the provision of some form of alternative housing. The first was recognized in **GROOTBOOM** in para [92], at 86 A, namely a land invasion for the purposes of coercing a state structure into providing

housing. Secondly there may be a situation where an inevitable choice must be made between two groups of people. Thirdly there may be a situation where the occupation of the land causes a real threat to safety. Fourthly there are the type of cases where the landowner urgently requires the land, particularly for social developmental purposes. Not one of these situations, he submitted, has been shown to exist in the present case.

Respondents' cross-appeal

[21] I propose to deal first with respondents' cross-appeal. It seems to me that there is merit in Mr Budlender's submission that the provisions of sub-section 4(2), read with sub-section 4(5), of the PIE Act were not complied with. In this case the magistrate authorised a combination of personal and substituted forms of service but he did not authorize a date for the hearing of the proceedings. In order to consider the effect of this non-compliance, however, it is necessary to distinguish between three categories of occupiers of the land. In the first category fall those respondents who are represented by the Legal Resources Centre and are on record as opposing the

application brought by appellant. The second category comprises those occupiers on whom service (personal or substituted) was effected but who did not oppose the application. In the third category fall those persons that took occupation of the land after the service had been effected. In regard to the first category ie respondents who are on record as opposing the application, it seems to me that it would be absurd to rely on a defect in the content of the notice authorised by the magistrate when they themselves knew about the proceedings, when they had ample opportunity to contest it and when in fact they did contest it. Although the section in question is couched in peremptory terms that is not the end of the matter. It has often been recognized that non-compliance of peremptory provisions do not necessarily lead to nullity. See **JEM MOTORS LTD v BOUTLE AND ANOTHER** 1961 (2) SA 320 (N) at 328 B and **NKISIMANE AND OTHERS v SANTAM INSURANCE CO LTD** 1978 (2) SA 430 (A) at 433 H – 434 A. Respondents were notified of the proposed date of hearing when the application was served upon them. The application to which they became parties, was in fact not heard on 15 May 2000. It was postponed a number of times and respondents' legal representatives knew about these postponements. Ultimately

respondents were represented by the Legal Resources Centre at the hearing of the matter. There can be question of respondents suffering any prejudice as a result of the defect in the notice. It seems to me therefore that the magistrate was correct rejecting this defence. In regard to the second category of persons, however, it seems that they were not given proper notice in terms of section 4(2) of the PIE Act of these proceedings. They would accordingly not be bound by any order made in these proceedings. The third category of occupiers were never served with any document as they only took occupation after service had been effected. They would in any event not have been bound by any order made in these proceedings.

Appellants' appeal on the merits

[22] I now turn to appellants' appeal against the eviction order. It seems to me that the dispute in this case falls to be determined in the light of the principles that were laid down in **GROOTBOOM.** I agree that respondents also fall into the category of "*people in desperate need*" as described in para [52] of that judgment. The foundation of

their defence is to found in section 26 of the Constitution. In **GROOTBOOM**, at para [34], 66 E – H, the Constitutional Court analysed section 26 of the Constitution as follows :

"[34] I consider the meaning and scope of s 26 in its context. Its provisions are repeated for convenience:

'(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.'

Subsections (1) and (2) are related and must be read together. Subsection (1) aims at delineating the scope of the right. It is a right

of everyone including children. Although the subsection does not expressly say so, there is, at the very least, a negative obligation placed upon the State and all other entities and persons to desist from preventing or impairing the right of access to adequate housing. The negative right is further spelt out in ss (3) which prohibits arbitrary evictions. Access to housing could also be promoted if steps are taken to make the rural areas of our country more viable so as to limit the inexorable migration of people from rural to urban areas in search of jobs."

[23] In **GROOTBOOM t**he Constitutional Court analysed the nationwide housing program as applied by Cape Metro, the relevant municipality in that case, and then formulated the following test in para [63], at 78 FG:

"[63] Section 26 requires that the legislative and other measures adopted by the State are reasonable. To determine whether the nationwide housing program as applied in the Cape Metro is reasonable within the meaning of the section, one must consider whether the absence of a component catering for those in desperate need is reasonable in the

> *circumstances. It is common cause that, except for the Cape Metro land program, there is no provision in the nationwide housing program as applied within the Cape Metro for people in desperate need."*

The Constitutional Court then proceeded, in paras [64] to [69] of the judgment, at 78 H – 80 A, to apply this test. I propose to quote these paragraphs in full:

> *"[64] Counsel for the appellants supported the nationwide housing program and resisted the notion that provision of relief for people in desperate need was appropriate in it. Counsel also submitted that s 26 did not require the provision of this relief. Indeed, the contention was that provision for people in desperate need would detract significantly from integrated housing development as defined in the Act. The housing development policy as set out in the Act is in itself laudable. It has medium and long-term objectives that cannot be criticised. But the question is whether a housing program that leaves out of account the immediate amelioration of the circumstances of*

those in crisis can meet the test of reasonableness established by the section.

[65] *The absence of this component may have been acceptable if the nationwide housing program would result in affordable houses for most people within a reasonably short time. However, the scale of the problem is such that this simply cannot happen. Each individual housing project could be expected to take years and the provision of houses for all in the area of the municipality and in the Cape Metro is likely to take a long time indeed. The desperate will be consigned to their fate for the foreseeable future unless some temporary measures exist as an integral part of the nationwide housing program. Housing authorities are understandably unable to say when housing will become available to these desperate people. The result is that people in desperate need are left without any form of assistance with no end in sight. Not only are the immediate crises not met. The consequent pressure on existing settlements inevitably results in land invasions by the desperate thereby frustrating the attainment of the medium and long-term objectives of the nationwide housing program.*

That is one of the main reasons why the Cape Metro land program was adopted.

[66] The national government bears the overall responsibility for ensuring that the State complies with the obligations imposed upon it by s 26. The nationwide housing program falls short of obligations imposed upon national government to the extent that it fails to recognise that the State must provide for relief for those in desperate need. They are not to be ignored in the interests of an overall program focussed on medium and long-term objectives. It is essential that a reasonable part of the national housing budget be devoted to this, but the precise allocation is for national government to decide in the first instance.

[67] This case is concerned with the Cape Metro and the municipality. The former has realised that this need has not been fulfilled and has put in place its land program in an effort to fulfil it. This program, on the face of it, meets the obligation which the State has towards people in the position of the respondents in the Cape Metro. Indeed, the amicus accepted that this program 'would cater precisely for the needs of

people such as the respondents, and, in an appropriate and sustainable manner'. However, as with legislative measures, the existence of the program is a starting point only. What remains is the implementation of the program by taking all reasonable steps that are necessary to initiate and sustain it. And it must be implemented with due regard to the urgency of the situations it is intended to address.

[68] Effective implementation requires at least adequate budgetary support by national government. This, in turn, requires recognition of the obligation to meet immediate needs in the nationwide housing program. Recognition of such needs in the nationwide housing program requires it to plan, budget and monitor the fulfilment of immediate needs and the management of crises. This must ensure that a significant number of desperate people in need are afforded relief, though not all of them need receive it immediately. Such planning too will require proper co-operation between the different spheres of government.

[69] In conclusion it has been established in this case that as of the date of the launch of this application, the State was not

meeting the obligation imposed upon it by s 26(2) of the Constitution in the area of the Cape Metro. In particular, the programs adopted by the State fell short of the requirements of s 26(2) in that no provision was made for relief to the categories of people in desperate need identified earlier. I come later to the order that should flow from this conclusion.”

[24] The Constitutional Court accordingly decided in **GROOTBOOM,** at 87, that the following declaratory orders should have been made in that case:

'It is declared that:

(a) Section 26(2) of the Constitution requires the State to devise and implement within its available resources a comprehensive and co-ordinated program progressively to realise the right of access to adequate housing.

(b) The program must include reasonable measures such as, but not necessarily limited to, those contemplated in the Accelerated Managed Land Settlement Program, to

> *provide relief for people who have no access to land, no roof over their heads, and who are living in intolerable conditions or crisis situations.*
>
> *(c) As at the date of the launch of this application, the State housing program in the area of the Cape Metropolitan Council fell short of compliance with the requirements in para (b), in that it failed to make reasonable provision within its available resources for people in the Cape Metropolitan area with no access to land, no roof over their heads, and who were living in intolerable conditions or crisis situations.'*

[25] In my view the principles laid down in **GROOTBOOM** also govern the present case. Appellant has not shown what measures it has taken to provide some form of relief for "*people in desperate need"* such as respondents. Nor has it suggested that this case falls into an exceptional category where these principles do not apply. Appellant has in fact adopted the attitude, both in the affidavits and in argument, that it is not under any obligation to provide such relief to respondents. I agree also with Mr Budlender's submission that it is immaterial whether some of the respondents are covered by section

4(6) or 4(7) of the PIE Act. In these circumstances appellant is not entitled to evict respondents from its land. I may point out that in **THE CITY OF CAPE TOWN v RUDOLPH AND 49 OTHERS**, case no 8970/01, an unreported judgment of this court, delivered on 7 July 2003, Selikowitz J came to a similar conclusion in regard to occupiers who were in a similar position as respondents in this matter.

Conclusion

[26] The effect of our decision in this appeal is that the order made by the magistrate stands. This is to some extent an unfortunate result inasmuch as the condition imposed by the magistrate is bound to give rise to much uncertainty and further disputes. A more appropriate order would probably have been simply to dismiss the application. In the absence of any counter-appeal in respect of this aspect of the court order, however, we are not empowered to amend the conditional order made by the magistrate.

[27] There does not seem to be any reason why costs should not follow the result of the appeal and cross appeal.

[28] In the result appellant's appeal is dismissed and respondents' cross-appeal is also dismissed with costs.

A P BLIGNAULT

N C ERASMUS J: I agree.

N C ERASMUS