

# Beyond *Blue Moonlight*: The Implications of Judicial Avoidance in Relation to the Provision of Alternative Housing

Jackie Dugard\*

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## I INTRODUCTION

Domestically and internationally, the South African Constitutional Court is rightly celebrated for having explicitly declared socio-economic rights justiciable<sup>1</sup> and developing a standard of review in terms of which the government is required to have a reasonable programme to realise each socio-economic right. It certainly cannot be said that the South African Constitutional Court is anti-poor or anti-transformative. Yet, while acknowledging what Brian Ray refers to as the Court's 'aspirational impulse' – the 'long-standing and genuine commitment to find ways to make the socio-economic rights provisions do the very difficult work of addressing the deep inequalities'<sup>2</sup> still existing in South Africa – over the years, many scholars have pointed to critical failings in the Constitutional Court's jurisprudence that limit the transformative potential of socio-economic rights.<sup>3</sup>

From a pro-transformation perspective, such critiques have identified a number of problems with the Court's approach, including a failure to develop the content and meaning of socio-economic rights, a reluctance to deal with any broad structural issues raised in a case, and an unwillingness to exercise ongoing

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\* Associate Professor, School of Law, University of the Witwatersrand and Senior Researcher at the Socio-Economic Rights Institute of South Africa (SERT). I would like to thank Bongumusa Sibiya, Kathleen Hardy, Michael Clark and Stuart Wilson for providing updates on the factual situations pertaining to the cases outlined in this article. I would also like to thank two anonymous referees for their useful comments and suggestions.

<sup>1</sup> See, eg, *Government of the Republic of South Africa and Others v Grootboom and Others* [2000] ZACC 19, 2001 (1) SA 46 (CC) (*Grootboom*) at para 20.

<sup>2</sup> B Ray 'Evictions, Aspirations and Avoidance' (2013) 5 *Constitutional Court Review* 174.

<sup>3</sup> For a discussion of the transformative potential of the Constitution generally, see for example K Klare 'Legal Culture and Transformative Constitutionalism' (1998) 14 *South African Journal on Human Rights* 146. For critiques of the failings of the Constitutional Court see, for example, D Bilchitz 'Giving Socio-Economic Rights Teeth: The Minimum Core and its Importance' (2002) 121 *South African Law Journal* 484; D Bilchitz 'Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socio-Economic Rights Jurisprudence' (2003) 19 *South African Journal on Human Rights* 1; J Dugard and T Roux 'The Record of the South African Constitutional Court in Providing an Institutional Voice for the Poor: 1995--2004' in R Gargarella, P Domingo and T Roux (eds) (2006) *Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor?* 107;

oversight of cases.<sup>4</sup> Collectively, these issues can be traced to what Iain Currie has described as an adjudicative style of ‘judicious avoidance’,<sup>5</sup> the main characteristic of which is a reticence by the Court to pronounce on any issue that does not have to be decided for the purpose of deciding the case, or to play any wider or more long-term role than delivering the judgment.<sup>6</sup> However, in light of the adverse consequences of this adjudicative style for poor people (some highlighted in this article), the ‘judiciousness’ of the Constitutional Court’s approach can be called into question. Instead, it might be more fitting to refer simply to the Court’s style of *judicial* avoidance, which also neatly encapsulates the Court’s separation-of-powers and institutional-competence concerns. As noted by Ray, such concerns have led the Court to avoid interpreting the Constitution in ways ‘that set clear and wide-reaching precedents that might have potentially significant redistributive effects’. The consequence of this reluctance has been to ‘limit the scope of substantive constitutional development over time and circumscribe the Court’s own role in that development’.<sup>7</sup>

This article takes as its starting point an analysis of *Blue Moonlight*<sup>8</sup> to engage in an examination of the negative consequences for poor people evicted from

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K McLean *Constitutional Deference, Courts and Socio-Economic Rights in South Africa* (2009); K Pillay ‘Addressing Poverty through the Courts: How Have We Fared in the First Decade of Democracy?’ 23–25 January 2004 (On file with author); S Liebenberg and G Quinot ‘Narrowing the Band: Reasonableness Review in Administrative Justice and Socio-Economic Rights Jurisprudence in South Africa’ in S Liebenberg and G Quinot (eds) *Law and Poverty: Perspectives from South Africa and Beyond* (2012); S Liebenberg *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010); S Wilson and J Dugard, ‘Taking Poverty Seriously: The South African Constitutional Court and Socio-Economic Rights’ (2011) 22 *Stellenbosch Law Review* 664.

<sup>4</sup> It should be noted that there are some notable exceptions across each of these axes of criticism. For example, on the issue of supervisory jurisdiction, in granting an eviction order in *Joe Slovo*, the Court required the parties to meaningfully engage and to report back to the Court on the progress made regarding the relocation (*Residents of the Joe Slovo Community, Western Cape v Thubelisha Homes and Others* [2009] ZACC 16, 2010 (3) SA 454 (CC)(‘*Joe Slovo I*’)). The government of the Western Cape did not adhere to the reporting timeline and ultimately abandoned the eviction, leading the Constitutional Court on 31 March 2011 to discharge the eviction order (*Residents of the Joe Slovo Community, Western Cape v Thubelisha Homes and Others* [2011] ZACC 8, 2011 (7) BCLR 723 (CC)(‘*Joe Slovo II*’)). See also *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* [2008] ZACC 1, 2008 (3) SA 208 (CC)(‘*Olivia Road*’), in which the Court granted an interim order on 30 August 2007 (some six months before the final order) requiring the parties to meaningfully engage with each other regarding the provision of alternative accommodation for the unlawful occupiers.

<sup>5</sup> I Currie ‘Judicious Avoidance’ (1999) 15 *South African Journal on Human Rights* 138. See also I Currie & J de Waal *The Bill of Rights Handbook* (2006). Currie offers both a description of and a prescription for adjudicating constitutional matters in South Africa. Whether he follows Cass Sunstein’s line of thinking accurately is another matter. See C Sunstein *One Case at a Time* (1996). Subsequent empirically grounded work by Sunstein suggests a signal misreading. See C Sunstein *Infotopia* (2007); R Thaler and C Sunstein *Nudge* (2008); C Sunstein *Why Nudging* (2014). For a rebuttal of Currie’s and the Court’s position, and avoidance jurisprudence generally, see S Woolman *The Selfless Constitution: Experimentalism and Flourishing as Foundations of South Africa’s Basic Law* (2013); S Woolman ‘The Amazing, Vanishing Bill of Rights’ (2007) 128 *South African Law Journal* 762; S Woolman ‘Application’ in S Woolman & M Bishop *Constitutional Law of South Africa* (2nd Edition, OS, 2006) Chapter 31.

<sup>6</sup> The Court’s expresses a general reluctance to exercise continued oversight over cases. Subsequent judgments that do, say *Olivia Road*, thus look rather anomalous.

<sup>7</sup> Ray (note 2 above) at 173, 174.

<sup>8</sup> *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties (Pty) Ltd* [2011] ZACC 33, 2012 (2) SA 104 (CC)(‘*Blue Moonlight*’).

inner-city Johannesburg buildings of the Court's avoidance techniques in *Blue Moonlight* and subsequent related judgments. More generally, the article offers a critique of the Court's refusal to define the content of socio-economic rights and its unwillingness to exercise any more oversight than strictly required to decide the matter at hand.

## II BLUE MOONLIGHT

The Constitutional Court has dealt with more housing-related cases than any other socio-economic rights issue. The trajectory of housing rights cases decided before *Blue Moonlight*<sup>9</sup> (*Grootboom*,<sup>10</sup> *PE Municipality*,<sup>11</sup> *Olivia Road*<sup>12</sup> and *Joe Slovo I* and *II*)<sup>13</sup> firmly established that the government must have a plan to address the housing needs of the most vulnerable and that, where poor people face eviction from public land, the state must meaningfully engage with residents and provide alternative accommodation if the eviction would otherwise render them homeless. Focused as they were on evictions where the state was seeking to evict, these cases did not address the situation of evictions by private landlords. However, in *Blue Moonlight*, the issue of private evictions fell to be decided by the Court and the Court addressed the new set of issues squarely, if not optimally.<sup>14</sup>

*Blue Moonlight*,<sup>15</sup> an application brought by 86 desperately poor people living in a disused industrial property at 7 Saratoga Avenue in Berea (Johannesburg), concerned the legal questions of whether it is just and equitable to evict poor, unlawful occupiers from private property and what (if any) state obligations are entailed by such practice. In 2006, the residents were sued for eviction by a new owner of the property, Blue Moonlight Properties 39 (Pty) Ltd. It had bought the property (knowing that it was occupied by poor people) to develop it for commercial gain. Securing legal assistance, the residents opposed the application, arguing that they could not be evicted until the City of Johannesburg had discharged its constitutional obligation to provide them with temporary alternative accommodation pending ultimate access to formal housing as part of the national housing programme. They joined the City of Johannesburg (the

<sup>9</sup> Ibid.

<sup>10</sup> *Grootboom* (note 1 above).

<sup>11</sup> *Port Elizabeth Municipality v Various Occupiers* [2004] ZACC 7, 2005 (1) SA 217 (CC) ('PE Municipality').

<sup>12</sup> *Olivia Road* (note 4 above).

<sup>13</sup> *Joe Slovo I* (note 4 above).

<sup>14</sup> To be entirely accurate, the Constitutional Court had previously considered the matter of private evictions. Although ultimately not granting an eviction order (in this case private eviction proved impossible due to the large number of occupiers living on the private land and the fact that the state had not made any alternative land available to the occupiers), in *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd* [2005] ZACC 5, 2005 (5) SA 3 (CC) the Court effectively held that, where the state's failure to fulfil its FC s 26(1) and (2) obligations to implement a reasonable housing programme infringed private land-owners' rights to use and enjoy their property, the state might be liable for constitutional damages to compensate the land-owners for any deprivation of their property rights. In actual fact, the Court decided the matter, not on FC s 25 or FC s 26 grounds (as had the Supreme Court of Appeal), but in terms of FC s 1(e), the rule of law, as read with FC s 34, the access to courts.

<sup>15</sup> *Blue Moonlight* (note 8 above).

City) to the proceedings and sought an order compelling the City to discharge its obligations.<sup>16</sup>

The South Gauteng High Court had ruled the City's housing policy to be unconstitutional in that it excluded any consideration of the status and the alternatives persons evicted from private land.<sup>17</sup> The court granted the eviction and ordered the residents to vacate the property: however, it simultaneously directed the City to either provide temporary accommodation or pay each of the residents R850 per month towards the cost of finding their own accommodation. The City appealed to the Supreme Court of Appeal (SCA) against the declarations of constitutional invalidity and the order to provide the residents with temporary accommodation or to pay them a monthly allowance. The residents cross-appealed against the eviction order and the obligation imposed upon the City.<sup>18</sup> The SCA declared the City's housing policy irrational, discriminatory and unconstitutional, and directed the City to provide temporary emergency accommodation to the residents by 1 June 2011. The City again appealed, and the appeal was heard in the Constitutional Court on 11 August 2011.

In an unanimous judgment handed down on 1 December 2011,<sup>19</sup> the Constitutional Court rejected the City's arguments that it had no obligation to plan and to budget around private evictions. Finding that the City has the same obligations towards poor residents evicted by private landlords as it has regarding residents evicted from public land, the Court ruled that, to the extent that it failed to take into consideration private evictees, the City's housing policy was unconstitutional. The Court granted an eviction order to the property owners if the residents did not vacate the building before 15 April 2012 (allowing a period of more than five months after the judgment).<sup>20</sup> However, to ensure that the residents were not rendered homeless, the Court ordered the City to provide the

<sup>16</sup> In *Sailing Queen Investments v Occupants La Colleen Court* [2008] ZAGPHC 15, 2008 (6) BCLR 666 (W) the Court held that in respect of applications for private evictions, no eviction order would be just and equitable if the municipality were not joined. The High Court found that FC s 26 imposes the provision of alternative accommodation to evictees who would otherwise be rendered homeless and that the obligation lies primarily with the state rather than with private parties. See also *Lingwood and Another v Unlawful Occupiers of Erf 9 Highlands* [2007] ZAGPHC 231, 2008 (3) BCLR 325 (W).

<sup>17</sup> *Blue Moonlight Properties 39 (Pty) Ltd v Occupiers of Saratoga Avenue and Another* [2010] ZAGPJHC 3, [2010] JOL 25031 (GS) ('*Blue Moonlight High Court*').

<sup>18</sup> *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd. and Another* [2011] ZASCA 47, 2011 (4) SA 337 (SCA) ('*Blue Moonlight SCA*').

<sup>19</sup> *Blue Moonlight* (note 8 above).

<sup>20</sup> In seeking to strike an appropriate balance between the right of property owners to use and develop their property as they want, and the rights of residents to adequate housing, the Court pointed out that private property owners do not incur the same positive obligations to provide access to housing that the state does but noted, nonetheless, that in circumstances in which poor people have no alternative shelter and have to wait until the state provides such, owners might have to endure some degree of inconvenience while the state lines up emergency shelter options (see especially para 40 of the *Blue Moonlight* judgment).

Blue Moonlight residents with temporary accommodation ‘in a location as near as possible to the area where the property is situated on or before 1 April 2012.’<sup>21</sup>

At the time it was delivered, *Blue Moonlight* was praised for appropriately balancing the rights of property owners to develop their properties, with the rights of occupiers to adequate shelter. However, subsequent developments, as set out in this article, have highlighted shortcomings of the Court’s avoidance-oriented approach to socio-economic rights, exposing loopholes through which the City of Johannesburg has been able to frustrate legal processes and compromise housing-related rights.

### III BEYOND THE *BLUE MOONLIGHT* JUDGMENT

Following the judgment, and mindful that they were to be evicted by 15 April 2012, the residents of 7 Saratoga Avenue were keen to begin discussions with the City about alternative accommodation. Expectations to be ‘meaningfully engaged’ regarding the accommodation options were relied on from the Court’s previous jurisprudence, particularly its judgments in *PE Municipality*<sup>22</sup> and *Olivia Road*.<sup>23</sup> Yet, despite multiple attempts by the residents’ lawyers to meet with the City to discuss options, as the date of the eviction loomed, no meeting between the City and the residents had taken place. Concerned about the City’s failure to act and fearing that their clients would be evicted onto the streets, on 8 March 2012 (three weeks prior to the date set for the eviction), the residents’ lawyers (from the Centre for Applied Legal Studies (CALS) and SERI) pre-emptively launched an urgent application in the Constitutional Court. In this urgent application, the lawyers asked the Court to order the City to engage meaningfully with the residents in order to give effect to the judgment of 1 December 2011, and to vary the eviction order to ensure the residents were not evicted before alternative accommodation was appropriately lined up.

As explained by residents’ attorney, Kathleen Hardy:

We have been trying to engage with the City for three months regarding the provision of accommodation to our clients. Yet it has refused to provide any meaningful information about what it intends to do to comply with the order of the Constitutional Court. If the City does not comply with the order, the occupiers will be evicted onto the streets. Regrettably, because the City has done nothing to engage with us or our clients, it has

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<sup>21</sup> *Blue Moonlight* (note 8 above) para 104(e)(iv). The reference to the location of alternative housing in *Blue Moonlight* is one of the clearest indications to date of the Constitutional Court reading the importance of location into the right to housing, in line with the United Nations Committee on Economic, Social and Cultural Rights General Comment number 4 on the right to adequate housing (1991), para 8. General Comment 4, as with all General Comments of the Committee on Economic, Social and Cultural Rights, is not legally binding (and in the South African context the non-binding nature is more pronounced as South Africa has not ratified the International Covenant on Economic, Social and Cultural Rights (1966)) but it is persuasive in respect of interpreting the right.

<sup>22</sup> *PE Municipality* (note 11 above).

<sup>23</sup> *Olivia Road* (note 4 above).

become necessary to approach the Constitutional Court again. The City only has itself to blame for this.<sup>24</sup>

In the face of the urgent application, the City offered accommodation to some of the residents in an undisclosed location for an undisclosed period and in gender-segregated dormitories. Rejecting this offer, the residents persisted with their application in the Constitutional Court, which was set down for a hearing on 30 March 2012. Responding to this rejection, two days before the case was to be heard, the City offered to revisit its plans and to provide accommodation to all the residents and to allow for the accommodation of families living together. But it signalled that it would need a further two months in order to provide such accommodation. The residents were willing to accept this offer. However, the owner of the property, Blue Moonlight Properties, would not agree to the two-month extension.

Thus, on the eve of the Constitutional Court hearing, there was a stand-off between the parties, which, arguably, should have been foreseen by the Court in its 1 December 2011 judgment and, even if not foreseen, seemed ripe for adjudication by the Court. Indeed, in the interim order in respect of *Olivia Road*,<sup>25</sup> the Court had not only insisted on meaningful engagement as a precursor to eviction, but had retained supervisory jurisdiction over the matter until it had been appropriately resolved. It was therefore a profound shock to the residents' lawyers when at the 30 March 2012 hearing the Constitutional Court dismissed the urgent application, explaining that its reasons would follow in due course.<sup>26</sup> This dismissal was all the more surprising given the property owners' concession in court that no urgency existed regarding developing the land. Responding to the dismissal, a CALS and SERI issued the following press release:

The Constitutional Court's approach risks undercutting the rights it granted to the residents in its *Blue Moonlight* judgment. The Court's ruling could lead to the residents becoming homeless. This is unnecessary because Blue Moonlights's counsel said in Court that it did not need the land before July and that the extension the residents sought would cause it little difficulty. We are also concerned that this ruling does not give effect to the City's obligations to meaningfully engage. The Court appears reluctant to oversee such engagement and to ensure remedies are appropriately implemented.<sup>27</sup>

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<sup>24</sup> Joint CALS and SERI Press Release (9 March 2012) 'City of Johannesburg Set to Breach Constitutional Court Order – Residents Go Back to Constitutional Court to Compel City to Identify Alternative Accommodation and Engage Meaningfully': available at <[http://www.seri-sa.org/images/stories/saratoga\\_pressrelease\\_final.pdf](http://www.seri-sa.org/images/stories/saratoga_pressrelease_final.pdf)>.

<sup>25</sup> *Olivia Road* (note 4 above) at para 5.

<sup>26</sup> On 24 May 2012, the Constitutional Court delivered its reasons for dismissing the urgent application, holding that the Constitutional Court is not the appropriate forum to enforce or vary the orders it gives on appeal, unless it declares a statute unconstitutional or makes a detailed supervisory order that may require variation in light of changed circumstances (see *Occupiers of Saratoga Avenue v City of Johannesburg Metropolitan Municipality and Another* [2012] ZACC 9, 2012 (9) BCLR 951 (CC)). In all other instances, a party should approach the court in which the case was first considered (in the case of *Blue Moonlight*, this was the South Gauteng High Court).

<sup>27</sup> Joint CALS and SERI Press Release (30 March 2012) 'ConCourt Ruling Could Make Residents Homeless': available at <[http://www.seri-sa.org/images/stories/saratoga\\_press\\_release\\_final\\_30mar12.pdf](http://www.seri-sa.org/images/stories/saratoga_press_release_final_30mar12.pdf)>.

On 13 April, two days before the eviction order was due to be executed, the City had still not provided accommodation to the residents. Facing imminent eviction and homelessness, the residents' legal team approached the South Gauteng High Court on an urgent basis to seek essentially the same relief it had requested in the dismissed Constitutional Court urgent application. Recognising the severity of the situation, the High Court temporarily suspended the execution of the eviction order until 2 May 2012, and ordered the City to provide shelter to the residents by 30 April 2012, as well as to report back to the Court on its progress and to organise a site visit for all parties to examine the proposed new accommodation.<sup>28</sup> Following the 13 April order by the High Court, the City identified and prepared several housing units for the residents and, on 30 April 2012, the residents moved into the temporary accommodation provided by the City, in the MBV Building (one of the buildings residents from the *Olivia Road*<sup>29</sup> case had moved to in 2006, located on the corner of Hancock and Quartz Streets in Hillbrow) and the Ekuthuleni Shelter run by Metro Evangelical Services (MES) (corner of Nugget and De Villiers Streets in Hillbrow).

As satisfactory as this outcome might have seemed on the surface, serious problems existed with the accommodation arrangements from the outset and, almost immediately, the City began to fail to comply with similar orders for temporary accommodation that had been backing up as parties waited for *Blue Moonlight*<sup>30</sup> to be decided. Regarding the accommodation offered to the Blue Moonlight residents, two issues emerged. First, the Ekuthuleni accommodation was gender-segregated, requiring men to live separately from women and babies/children, and imposed a lock-out rule during the day, meaning residents had to vacate their rooms from 8:00 am to 5:30 pm. Second, because the Ekuthuleni option was so stark, many residents felt pressured into opting for the MBV Building. However, in order to be allocated space in the MBV Building, residents had to sign sworn affidavits at a police station that they were able to afford the R600 per month rental fee. Many could not afford this rental. Indeed, once they moved into MBV Building, many residents have not paid rent. Given the restrictive housing alternatives imposed in Ekuthuleni, it is not surprising that many people did what they could to secure the MBV accommodation.

While the refusal of the Constitutional Court to exert oversight over *Blue Moonlight*<sup>31</sup> — including the reluctance to ensure meaningful engagement in line with its decision in *Olivia Road*<sup>32</sup> — can be understood as part of the Court's historical reluctance to maintain a supervisory role, the fact that residents were left with such problematic choices of accommodation can be traced to the Court's refusal to provide any substantive content to the right to housing. Certainly,

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<sup>28</sup> Unreported order of *Occupiers of Saratoga Avenue and Others v City of Johannesburg and Others*, South Gauteng High Court case no: 2012/13253 (13 April 2012). Arguably this was a brave and progressive move of the South Gauteng High Court, which, even before the Constitutional Court had handed down its reasons for dismissing the application, was prepared to hear the applicants' application to vary the eviction order and grant the required relief.

<sup>29</sup> *Olivia Road* (note 4 above).

<sup>30</sup> *Blue Moonlight* (note 8 above).

<sup>31</sup> *Ibid.*

<sup>32</sup> *Olivia Road* (note 4 above).

the Court's washing of its hands following the initial *Blue Moonlight*<sup>33</sup> order has provided the space for the City to offer inhumane accommodation and/or fail to uphold orders to provide alternative accommodation. This perhaps unintended but foreseeable consequence has led to the rise of more and more litigation by inner city residents, as discussed below.

## A Dladla

Of the two accommodation options offered to the Blue Moonlight residents, Ekuthuleni posed the greatest risk to residents' constitutional rights. Residents at Ekuthuleni had to live in gender-differentiated units that separated men from women and children thereby violating their rights to dignity, privacy, association and family life, and all were subject to draconian rules that encompassed lock-out during daylight hours and a clause allowing the City to unilaterally evict the residents without a court order.<sup>34</sup>

Representing 33 of the former residents of 7 Saratoga Avenue who ended up at Ekuthuleni, in April 2013, SERI launched an application in the South Gauteng High Court to challenge the City's implementation of *Blue Moonlight*<sup>35</sup> with respect to the clearly unconstitutional character of the accommodation at Ekuthuleni. The application contained two parts.<sup>36</sup> Part A sought the suspension of certain rules of the shelter and to interdict the City and MES from evicting the residents without an order of court pending the outcome of Part B, as well as to direct the City and MES to allow residents to reside in rooms with their families. Part B contains an application to deal with the substantive issues raised by these issues, along with other related issues. Part B requests the High Court to declare that the respondents' refusal to permit the residents to reside in communal rooms with their families constitutes an unjustifiable infringement of the residents' constitutional rights to dignity, privacy and access to adequate housing, as enshrined in FC ss 10, 14 and 26.<sup>37</sup> It also seeks a declaration from the High Court that the accommodation at Ekuthuleni does not constitute 'Housing Assistance in Emergency Circumstances' within the meaning of the Emergency Housing Programme contained in Part 3 of the 2009 National Housing Code.<sup>38</sup>

Part A of the application was heard in the South Gauteng High Court on 10 April 2013.<sup>39</sup> Satchwell J granted an interim order stating that, pending the finalisation of Part B of the application, the Ekuthuleni house rules should be relaxed to the extent that the occupiers are permitted to remain in the shelter

<sup>33</sup> *Blue Moonlight* (note 8 above).

<sup>34</sup> Other rules include: lights and music must be switched off after 10pm, the manager reserves the right to search all residents and their possessions at any time, and no visitors are allowed inside the building except with prior permission.

<sup>35</sup> *Blue Moonlight* (note 8 above).

<sup>36</sup> *Dladla and Others v City of Johannesburg and MES*, South Gauteng High Court Case No: 39502/2012 (*Dladla* application: Part A and Part B).

<sup>37</sup> *Dladla and Others v City of Johannesburg and MES*, South Gauteng High Court Case No: 39502/2012 (*Dladla* application: Part B especially at paras 2 and 4).

<sup>38</sup> *Ibid* (*Dladla* application: Part B) at para 7.

<sup>39</sup> *Dladla and Others v City of Johannesburg and MES* South Gauteng High Court Case No: 39502/2012 (10 April 2013)(*Dladla*: application Part A).

during the day; the cut-off time for entering the shelter at night is 22:00 (subject to MES's discretion to allow people to enter at a later time by prior arrangement); and for families to be permitted to occupy separate rooms at the shelter. In June 2013, the City filed its answering affidavit and on 30 August 2013 the applicants filed their response. This response contained an affidavit from a clinical psychologist setting out the inappropriateness of the Ekuthuleni regime as part of an intervention aimed at assisting recently-evicted and relocated people. The application for final relief is still to be heard.<sup>40</sup>

If the ongoing litigation that has been necessary to ensure adequate housing for the remaining former *Blue Moonlight* residents highlights the consequences of the limits of the Constitutional Court's definition (or lack thereof) of the right to housing, three related cases (*Tikwelo House*, *Chung Hua Mansions* and *Hlophe*) reveal how the City has responded to the Constitutional Court's reluctance to exercise a supervisory role over the problematic housing situation in Johannesburg. It has stalled, obfuscated, tried to offer the same accommodation to various different sets of litigants and, ultimately, done everything in its power to fail to implement subsequent and/or related orders for alternative accommodation. All of these cases, as with the original *Blue Moonlight*,<sup>41</sup> underscore a serious problem with the City of Johannesburg's housing plans and practices. This is a problem that the Constitutional Court could well have grappled with more meaningfully in *Blue Moonlight*.<sup>42</sup> However, it might also be seen as part of an ongoing pattern of avoidance. The constitutionality of the City's housing policy in light of the approximately 67 000 homeless people trying to eke out a living in Johannesburg's inner city was first addressed, and neatly sidestepped, by the *Olivia Road*<sup>43</sup> Court.<sup>44</sup> That fancy footwork remains one of the most palpable, and disappointing, features of the Court's housing jurisprudence.

## B Tikwelo House

In 2007, Changing Tides Pty (Ltd) (Changing Tides) bought Tikwelo House. The House was formerly a warehouse but had become disused and was occupied by approximately 100 unlawful occupiers at the time Changing Tides bought the property. Wanting to redevelop the property, the owners sought to evict

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<sup>40</sup> Recently, one of the City's responses to the *Dladla* matter has been to launch an application on 20 January 2014 in the South Gauteng High Court: *Ex parte City of Johannesburg Metropolitan Municipality In re All Pending Eviction Matters Where The Occupiers' Eviction May Lead To Homelessness As Set Out in Annexure A Hereto*, South Gauteng High Court Case No: 1176/2014). The application attempts to join and stay all pending final eviction applications by private landowners (that might lead to homelessness) pending the final determination of *Dladla*. At the time of writing, this application had not yet been heard.

<sup>41</sup> *Blue Moonlight* (note 8 above).

<sup>42</sup> *Ibid.*

<sup>43</sup> *Olivia Road* (note 4 above).

<sup>44</sup> See K McLean, *Constitutional Deference, Courts and Socio-Economic Rights in South Africa* (2009) 151. McLean argues that the Court's failure in *Olivia Road* to decide whether the City of Johannesburg's housing policy was constitutional, and particularly in the context of the demonstrated extent of homelessness, amounts to more than an avoidance of anything but the narrow issue before it. It amounts to the Court being unwillingness to decide the *main* issue.

the residents. Having failed in such an attempt during 2008, on 6 April 2011 Changing Tides commenced new evictions proceedings. It succeeded in an unopposed application in the South Gauteng High Court to obtain an eviction order. That order was combined with an order requiring the City to provide emergency accommodation to the residents.<sup>45</sup>

The City appealed the judgment and, on 12 October 2011, shortly before the Constitutional Court handed down its judgment in *Blue Moonlight*,<sup>46</sup> the High Court granted leave to appeal to the SCA. In the SCA, the residents, represented by the Legal Resources Centre (LRC) and SERI, was granted leave to intervene as *amicus curiae*. Because the High Court's eviction order had not adequately investigated the residents' circumstances and the City had not made any formal moves regarding the provision of emergency accommodation, the SCA's judgment remitted the application for eviction to the South Gauteng High Court. It required the lower court to determine the date when all the residents could be evicted from the property, as well as the terms on which the City was to provide emergency accommodation to those residents facing homelessness. In addition, the SCA directed the LRC to provide a list of its clients who required emergency accommodation and their circumstances, and it ordered the City to deliver a report by no later than 31 October 2012 detailing the accommodation to be made available to the residents.<sup>47</sup>

In the South Gauteng High Court, by agreement it was ordered that the residents would vacate the building by 29 April 2013, the eviction was set for 13 May 2013, and the City was to provide emergency accommodation prior to this date. However, in the weeks leading up to the agreed date of the eviction, the LRC was unable to ascertain from the City where the residents would be housed. On 7 May 2013, the City's legal team admitted that the buildings it had lined up for this purpose were not available to the residents of Tikwelo House.<sup>48</sup> As it turned out, the City was hoping to house many of the residents in Ekuthuleni. However, by this time, the constitutionality of the house rules of Ekuthuleni was the subject of the legal challenge in *Dladla*<sup>49</sup> (outlined above), and the managing agent for Ekuthuleni was refusing to manage the building without its own rules in place or to accept any new residents.

In contrast with the City's prevarications about where to house the residents, Changing Tides indicated that it would proceed to evict the residents on the agreed eviction date. Faced with the impending crisis of homelessness, the LRC approached the South Gauteng High Court on an urgent basis to compel the City to provide the residents of Tikwelo House with temporary emergency

<sup>45</sup> See *Changing Tides v Unlawful Occupiers*, South Gauteng High Court Case No: 14225/2011 (14 June 2011).

<sup>46</sup> *Blue Moonlight* (note 8 above).

<sup>47</sup> *City of Johannesburg v Changing Tides 74 (Pty) Ltd, Unlawful Occupiers of Tikwelo House, No 48 and 50 Davies Street, Doornfontein, Johannesburg and others* [2012] ZASCA 116, 2012 (6) SA 294 (SCA) ('*Tikwelo House SCA*').

<sup>48</sup> See 'LRC welcomes High Court judgment in housing matter' Legal Resources Press Release available at: <http://www.lrc.org.za/press-releases/2724-2013-05-15-press-statement-lrc-welcomes-high-court-judgment-in-housing-matter-> (accessed on 7 March 2014).

<sup>49</sup> *Dladla* application: Part B (note 37 above).

accommodation or to prevent them from being evicted onto the streets should the application to compel not be successful. The South Gauteng High Court decided that, under the circumstances, the date of eviction should be moved to the end of May 2013 and it ordered the City to specifically facilitate the access of the residents to the buildings allocated for their accommodation (Both Ekhuthuleni and Linatex adopt the same draconian rules that are currently being challenged in *Hlophbe*.) The judgment further ordered the sheriff to ‘take the necessary steps to gain entry’ to the Ekhuthuleni and Linatex buildings should the City not have facilitated access to the residents of Tikwelo House by 29 May 2013.<sup>50</sup>

Attorney for Tikwelo House residents, Bongumusa Sibiya, explains how, knowing that they were going to be housed at the problematic Ekhuthuleni and Linatex shelters, residents refused to leave Tikwelo House until the day of the eviction. They were forcibly removed as the building was demolished and further access blocked.<sup>51</sup> In the ensuing chaos, many of the Tikwelo House residents ended up moving into other slum buildings in the inner city. These uninhabitable buildings, including Chung Hua Mansions, highlight the desperate cycle of slum building living and the trauma of evictions that poor people must perpetually endure in the absence of decent low-cost alternatives.

### C Chung Hua Mansions

During early 2013, out of desperation to find a vaguely acceptable place to live in Johannesburg’s inner city, many of the former *Blue Moonlight*<sup>52</sup> residents – whether those originally housed in MBV Building or those sent to Ekuthuleni – (along with some residents from Tikwelo House) ended up by default in Chung Hua Mansions. The ‘Mansions’ is a multi-storey dilapidated building on Jeppe Street. At Chung Hua Mansions, these newcomers found themselves embroiled in a long-standing legal fight between some 253 residents, the owners of the building and the City.

In August 2010, the residents of Chung Hua Mansions were evicted with the assistance of a private security company and the police without a court order. Securing legal assistance from SERI, the residents applied to reverse their unlawful eviction. This application was dismissed by Maluleke J in the South Gauteng High Court.<sup>53</sup> The residents appealed the decision to a full bench of the South Gauteng High Court.

At issue in the appeal was whether (as the police, the owner and the security company alleged) the residents had consented to leave the property, whether (as Maluleke J found) the respondents were lawfully counter-spoliated by the owners or whether (as argued by the residents) the residents had been unlawfully

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<sup>50</sup> *Sibongile Goodness Mkhonza and the Unlawful Occupiers of Tikwelo House v City of Johannesburg and Changing Tides (Pty) Ltd.*, South Gauteng High Court Case No: 2011/14225 (13 May 2013) at para 4.

<sup>51</sup> Email from Bongumusa Sibiya on 6 September 2013.

<sup>52</sup> *Blue Moonlight* (note 8 above).

<sup>53</sup> Unreported judgment of *Mthimkulu and Others v Hoosin Mohamed and Four Others*, South Gauteng High Court Case No: 2010/31260 (20 August 2010).

evicted.<sup>54</sup> The full bench of the High Court delivered a unanimous judgment that reversed the illegal eviction and held the owner, private security company and station commander of Johannesburg Central Police Station in contempt of court.<sup>55</sup> The owner subsequently applied for leave to appeal to the SCA. This application was dismissed with costs.

Possibly seeing some solace for property owners in *Blue Moonlight*,<sup>56</sup> the owner of Chung Hua Mansions then launched a fresh application in the High Court, seeking a court order evicting the residents from the property and directing the City to provide alternative accommodation to certain of the residents. The residents, represented by SERI, sought an order directing the City to provide alternative accommodation to all 250 occupiers in a location as near as possible to the property and with assurances against eviction. The case was heard in the South Gauteng High Court on 14 June 2012. Claassen J handed down judgment on the same day. He ordered the City to provide alternative accommodation to all of the Chung Hua Mansions residents as close as possible to their current location, where they may reside ‘secure against eviction’, by no later than 30 January 2013, and to provide, by 31 October 2012, a report setting out the nature and location of the temporary shelter to be provided to the residents.<sup>57</sup> The order authorised the eviction of the residents from Chung Hua Mansions by no earlier than 15 February 2013. However, due to the City’s non-compliance with the court order – the City claimed in its report submitted that it did not have the resources to comply with the order, and missed the 30 January 2013 deadline to provide shelter – further litigation was necessary to secure enforcement. SERI pursued this enforcement of the original order in *Hlophe*.

## D Hlophe

In *Hlophe*, SERI launched an enforcement application in the South Gauteng High Court to declare the Executive Mayor, the City Manager and the Director of Housing of the City of Johannesburg, in their respective capacities, constitutionally and statutorily obliged to ensure that the City complied with the *Chung Hua Mansions* order.<sup>58</sup> The matter was heard on 6 February 2013, with Lamont J suspending Claassen J’s eviction order until a further hearing on the

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<sup>54</sup> Counter-spoliation is a legal remedy that allows anyone who is in the process of being unlawfully dispossessed of property (spoliated) to ‘snatch it back’ from the spoliator without having to go to court. It is a limited exception to the principle against self-help and is aimed at restoring the status quo ante, after which the merits of the possession can be considered in court. In this case, the residents argued that they were not lawfully counter-spoliated of their homes by virtue of the fact that they had been living on the property for periods of up to five years – long before the owner, Changing Tides, had bought the property.

<sup>55</sup> *Mthimkulu and Another v Mabomed and Others* [2010] ZAGPJHC 125, 2011 (6) SA 147 (GSJ)(Full Bench *Chung Hua Mansions*).

<sup>56</sup> *Blue Moonlight* (note 8 above).

<sup>57</sup> Unreported judgment of *Changing Tides 74 (Pty) Ltd. v The Unlawful Occupiers of Chung Hua Mansions*, South Gauteng High Court case number: 2011/20127 (14 June 2012).

<sup>58</sup> *Ibid.*

matter, postponed to 9 April 2013.<sup>59</sup> In addition, Lamont J ordered the City and its officials to comply with Claassen J's order to provide temporary shelter to the residents pending the further hearing, and directed the City to deliver a report to the court by no later than 20 March 2013 setting out the nature and location of the temporary shelter to be provided.<sup>60</sup>

The City missed the 20 March 2013 deadline for reporting and, in the subsequent hearing, the City submitted that it could not comply with Claassen J's order, and would be unable to do so for another nine months. The residents again pursued their application for the court to order the City to enforce the Claassen order and failing which, for the court to hold the City executives in contempt of court. Finding for the residents, in her judgment of 3 May 2013, Satchwell J directed the Executive Mayor, City Manager and Director of Housing for the City of Johannesburg to personally explain why the City had not acted to provide shelter to the homeless, more than 18 months after the *Blue Moonlight* main judgment.<sup>61</sup> Ordering the City to provide shelter to the 201 residents of Chung Hua Mansions within two months of the date of the judgment or to have the responsible officials face being held in contempt of court with the possibility of prison sentences, Satchwell J told the City it could not simply 'throw its hands up in horror' every time it had to house people about to be evicted.<sup>62</sup> Adopting the type of supervisory role the Constitutional Court could have played in *Olivia Road*<sup>63</sup> and *Blue Moonlight*,<sup>64</sup> Satchwell J ordered the City to report to the court by 18 May 2013 regarding the steps it had taken to respond to the more generalised housing crisis and the plans that it had put in place (as well as the budget allocated) for poor people evicted by private landlords in disputes similar to those in the current matter and *Blue Moonlight*.<sup>65</sup>

Although the City applied for leave to appeal, it is apparent that the assertiveness and clear authority of Satchwell J's judgment had an impact on the City. On the eve of the leave to appeal hearing in the South Gauteng High Court, the City for the first time tendered Linatex House as available to the residents and agreed to engage meaningfully with the residents about the relocation and the accommodation. Soon after, Satchwell J handed down an interim order directing the parties to 'meaningfully engage' with each other in relation to the City's new offer of accommodation at Linatex House, and to report back to the court by no later than 26 July 2013 regarding the suitability of the accommodation. (The original eviction order was suspended during this period).<sup>66</sup>

<sup>59</sup> Unreported judgment of *Philani Hlophe and Others v City of Johannesburg Metropolitan Municipality and Others*, South Gauteng High Court case no: 2012/48103 (consolidated with case no: 2011/20127 (*Chung Hua Mansions*)) (6 February 2013) paras 2 and 3.

<sup>60</sup> *Ibid* at paras 4 and 5.

<sup>61</sup> *Blue Moonlight* (note 8 above).

<sup>62</sup> *Hlophe and Others v City of Johannesburg Metropolitan Municipality and Others* [2013] ZAGPJHC 98, 2013 (4) SA 212 (GSJ) ('*Hlophe*') at para 26.

<sup>63</sup> *Olivia Road* (note 4 above).

<sup>64</sup> *Blue Moonlight* (note 8 above).

<sup>65</sup> *Hlophe* (note 62 above) at para 2 of the order.

<sup>66</sup> *Philani Hlophe and The Residents of Chung Hua Mansions 191 Jeppe Street, Johannesburg v The City of Johannesburg Metropolitan Municipality and Others* unreported judgment of the South Gauteng High Court, Johannesburg Case Nos: 48103/2012 and 20127/2011 (14 June 2013).

Not surprisingly, the City's response was not in lockstep with Satchwell J's order.

As a result, SERI was obliged to file an affidavit describing the engagement process to date. The affidavit adumbrated numerous problems with the engagement process. The City, once again, as in *Dladla*,<sup>67</sup> was offering gender-segregated accommodation with day-time lockout and the ability to evict without a court order after six months: this time in Linatex House rather than MES.<sup>68</sup> SERI later filed an answering affidavit in the leave to appeal application arguing that, because accommodation had now been tendered by the City and all that remained to be decided was the terms on which that accommodation will be provided. It further contended that the City's application for leave to appeal should be dismissed and, instead, the issue of the contentious rules in Linatex should be taken forward through a separate application in the High Court. Leave to appeal was dismissed by the South Gauteng High Court. However, the SCA granted leave to appeal mainly on the question of whether municipal officials can be held liable as functionaries of the city. The SCA appeal is yet to be heard.

#### IV CONCLUSION: THE NEED FOR MORE CONTENT AND OVERSIGHT AND MUCH LESS AVOIDANCE

In *Treatment Action Campaign*, the Constitutional Court stated that, 'when it is appropriate to do so, courts may – and if need be must – use their wide powers to make orders that affect policy as well as legislation'.<sup>69</sup> This declaration is in line with the Court's pronouncement in *Fose v Minister of Safety and Security*, that courts must order such relief as required to ensure that 'the rights enshrined in the Constitution are protected and enforced'.<sup>70</sup>

Yet, as set out above, enforcing *Blue Moonlight* and related lower court decisions has been a lengthy, convoluted and expensive effort. Homeless petitioners and their lawyers have been continually frustrated by the City's non-compliance with court orders to provide appropriate alternative accommodation upon eviction by private landlords. This unfortunate situation is only aided and abetted by the Constitutional Court's disposition toward judicial avoidance in socio-economic cases. The Court's reluctance to provide adequate content to the right of access to adequate housing has allowed the City of Johannesburg to tender substandard accommodation that violates multiple rights. The Court's failure to provide longer-term oversight or structural interdicts has meant that litigants cannot rely on the Court to enforce or vary its own orders. Instead, they must rather continually return to lower courts, and then defend new appeals, in an attempt to vindicate their rights.

<sup>67</sup> *Dladla* application: Part A and Part B (note 36 above).

<sup>68</sup> Available at <[http://www.seri-sa.org/images/Hlophe\\_Affidavit\\_Jul13.pdf](http://www.seri-sa.org/images/Hlophe_Affidavit_Jul13.pdf)>.

<sup>69</sup> *Minister of Health v Treatment Action Campaign (No 2)* [2002] ZACC 15, 2002 (5) SA 721 (CC) (*Treatment Action Campaign*) at para 113.

<sup>70</sup> *Fose v Minister of Safety and Security* [1997] ZACC 6, 1997 (3) SA 786 (CC) at para 19. See also FC s 172(1)(b): '[W]hen deciding a constitutional matter within its power a court' ... 'may make any order that is just and equitable'.

It is instructive, at this juncture, to recall the reason provided by the *Treatment Action Campaign* Court for not ordering a structural interdict: ‘The government has always respected and executed orders of this Court.’<sup>71</sup> In light of the manifest non-compliance of the City of Johannesburg to execute court orders, is it not time for the Constitutional Court, along with other courts, to adopt a new approach to structural interdicts, and also to reconsider its stance on the content of socio-economic rights?<sup>72</sup>

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<sup>71</sup> *Treatment Action Campaign* (note 69 above) at para 129.

<sup>72</sup> The City of Johannesburg is not the only local government offender – at the time of writing, the City of Durban (eThekweni) had ignored a court order and several interdicts to stop the demolition of shacks in the Cato Crest informal settlement. This matter ended up in the Constitutional Court in *Zulu and Others v eThekweni Municipality and Others* 2014 (4) SA 590 (CC). For an analysis of the power and potential of supervisory interdicts, see for example S Liebenberg, *Socio-Economic Rights: Adjudication Under a Transformative Constitution* (2010) 424–438.