LOCATION, LOCATION, LOCATION! AN ANALYSIS OF THE LEGAL GROUNDS FOR REQUIRING ALTERNATIVE ACCOMMODATION TO BE PROVIDED CLOSE TO THE EVICTION SITE

Sarah Fick
LLB LLM PhD
University of the Western Cape

SUMMARY

This article explores the notion of "location" in respect of the State's housing duty, especially in respect of emergency housing. Throughout, the term "location orders" are used to describe orders in which the State is required to provide emergency housing at or near a specific location. It is important to determine the legal justification for such orders, to ensure legal certainty. To answer this question, this article first sets out the facts of the most recent case in which such an order was made (*Commando v Woodstock Hub (Pty) Ltd*. Secondly, it considers the legal framework applicable to the question. Thirdly, the paper considers the history of location orders in our Constitutional Court's jurisprudence and how they came about. Thereafter, it explores the court's justifications for such orders. It considers under what circumstances courts are likely to grant such orders. This is applied to the *Commando* decision, to determine whether the decision was in line with the current approach. Final remarks are provided in the conclusion.

1 INTRODUCTION

Location, location, location! This is an effective tagline in real estate advertisements.[1] Everyone wants to live in a good location. For those who are unable to afford real estate, it is no different. Where one lives matters.[2] This is especially the case where one has connections with a place and the

[1] Struyk "The Factors of a 'Good' Location" (10 March 2022) https://www.investopedia.com/financial-edge/0410/the-5-factors-of-a-good-location.aspx (accessed 2022-03-16).

[2] Van Wyk "Can SPLUMA Play a Role in Transforming Spatial Injustice to Spatial Justice in Housing in South Africa?" 2015 30 *SAPL* 26 28; Fick "Airbnb in the City of Cape Town: How Could the Regulation of Short-Term Rental in Cape Town Affect Human Rights?" *StellLR* 2021 32(3) 455 464.

community that lives there. Being torn from such a space can have devastating effects on one's livelihood and wellbeing.[3]

This was recently confirmed by the Cape Town High Court. On 6 September 2021, in *Commando v Woodstock Hub (Pty) Ltd* (*Commando*),[4] the Cape Town High Court ordered the City of Cape Town (the City) to provide persons facing eviction with alternative accommodation "in a location which is as near as feasibly possible to where the applicants are currently residing".[5]

This article explores the notion of "location" in respect of the State's housing duty, especially in respect of emergency housing. Throughout, the term "location orders" is used to describe orders in which the State is required to provide emergency housing at or near a specific location. To ensure legal certainty it is important to determine the legal justification for such orders.

To answer this question, this article first sets out the facts of the *Commando* case. Secondly, it considers the legal framework applicable to the question. Thirdly, the article considers the history of location orders in our Constitutional Court's jurisprudence and how they came about. Thereafter, it explores the court's justifications for such orders. It considers under what circumstances courts are likely to grant such orders. These circumstances are compared to the *Commando* decision, to determine whether the decision was in line with the current approach. Final remarks are provided in the conclusion.

2 FACTS OF THE CASE

Briefly, the facts of the case are that a group of persons (the Bromwell Street evictees) were renting housing in Bromwell Street, Woodstock.[6] Most, if not all of them, had lived there their entire lives and were paying rent according to their means.[7] The erf on which all the housing was located was sold to a developer for R3.15 million and an eviction order was granted in 2016 in terms of the Prevention of Illegal Eviction From and Unlawful Occupation of Land Act (19 of 1998).[8] The eviction order did not deal with the possible homelessness that its execution might cause.[9] Several occupiers were unable to secure alternative accommodation.[10] Owing to gentrification, rentals in Woodstock had increased beyond the means of the occupiers.[11] After several abandoned court proceedings and unsuccessful discussions with the City,[12] the occupiers applied to court for the suspension of the

3 Strauss and Liebenberg "Contested Spaces: Housing Rights and Evictions Law in Post-Apartheid South Africa" 2014 13 *Planning Theory* 428 444.

4 [2021] 4 All SA 408 (WCC).

5 Par 169.2.

6 *Commando supra* par 3.

7 Par 2–3.

8 *Commando supra* par 3.

9 *Commando supra* par 11.

10 *Commando supra* par 9, 24.

11 *Commando supra* par 127, 133.

12 *Commando supra* par 7–15.

execution of the eviction order and for the City to provide alternative accommodation, within three months, in a location as near as possible to the eviction site.[13] They further requested that the court require the City to engage meaningfully with the occupiers and report on available alternative accommodation within two months.[14] Later, they amended their application to challenge the constitutionality of the City's emergency housing plan to the extent that it did not afford the occupiers alternative accommodation nearby.[15]

The court's primary focus in this matter was the constitutionality of the City's emergency housing programme. Several reasons are provided for declaring the City's emergency housing programme and its implementation unconstitutional. These include that the City's implementation was inconsistent and arbitrary, that the City's implementation violated the right to equality before the law, and that the City had given undue preference to social housing in the single housing project that was before the court.[16]

A big issue before the court was the fact that, in terms of one of its housing programmes (see City of Cape Town Transport and Urban Development Authority *Woodstock, Salt River and Inner City Precinct: Affordable Housing Prospectus* (2017) (the Woodstock Affordable Housing Programme)), the city had given preferential treatment to occupiers that it had displaced (as opposed to persons evicted in private eviction matters.[17] The City had removed persons (the Pine Road "evictees") from an informal settlement in Woodstock as part of its plan to use that land for social housing.[18] While the Bromwell Road evictees were offered remote informal structures, the Pine Road "evictees"[19] were relocated to a nearby site and were given brick buildings to live in.[20] This was the case even though the Bromwell Street evictees had faced eviction more than a year before the City's "evictees" and should therefore have been first in line to receive the alternative accommodation in Woodstock.[21] The court found this to be an irrational differentiation and therefore unconstitutional.[22] The court based this finding on *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* (*Blue Moonlight* CC).[23]

Consequently, the court declared the City's emergency housing programme unconstitutional, particularly in relation to how it affected

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13 *Commando supra* par 15–16.

14 *Commando supra* par 16.

15 *Commando supra* par 66.

16 *Commando supra* par 158.

17 *Commando supra* par 150-158.

18 *Commando supra* par 150. "Social housing is housing which is subsidized to a greater or lesser extent, depending on the financial circumstances of the applicant, and is not free. It appears that as at September 2017 it was generally available in the inner City of Cape Town for households with a monthly income of between R 3501 and R 15 000." See par 19.

19 These persons were not evicted in the legal sense because no eviction order was granted. They moved voluntarily.

20 *Commando supra* par 152.

21 *Commando supra* par 156.

22 *Commando supra* par 150–158. Irrational differentiations violate s 9(1) of the Constitution of the Republic of South Africa, 1996 (the Constitution).

23 2012 (2) SA 104 (CC); see *Commando supra* par 156, and discussion of this case in 4 1 below.

persons who face homelessness owing to eviction from the inner city and surrounds (including Woodstock and Salt River).[24] Relying on one Supreme Court of Appeal (SCA) decision and one Constitutional Court (CC) decision,[25] the court found that it would be just and equitable to require the City to provide alternative accommodation in Woodstock, Salt River or the Inner-City Precinct in a location "as near as feasibly possible" to the eviction site.[26]

Despite this order, the court found that "as a matter of law, neither the applicants nor any other evictees in the City have a right to demand to be placed in temporary emergency housing in the area or location in which they live."[27] The court continued to say that this would be a violation of the separation of powers doctrine.[28] The court found:

> "These are by definition matters of State and policy which require careful and weighty consideration, by those functionaries who are empowered by law and who are equipped with the necessary expertise, to deal with them. They are not matters which a Court can or should pronounce on. That would be in clear breach of the doctrine of separation of powers and would constitute an impermissible intrusion into the domain of the executive and legislative arms of State. Were a Court to ascribe such a power to itself it would place an impossible burden on the State, as it would result in it having to accommodate evictees who are going to be rendered homeless, in virtually every suburb or area in which they live. For obvious reasons this is untenable."

Despite clearly setting out why location orders should not be granted, the court seemed to justify its order with the following statement:[29]

> "This matter has not been decided on that basis, but on the basis of whether it is rational or reasonable for the applicants to be told that they must take up emergency housing either in a TRA or an IDA on the outskirts of the City, or alternatively in an informal settlement, whilst other similarly-placed persons do not face the same choice, because they may have the good fortune of being afforded 'transitional' housing or (as was promised by the City's Mayoral Member for urban development), 'temporary' housing, in the inner City and its surrounds."

It is unclear how this justified the court's intrusion into the domain of the executive. The court itself did not explain this. In fact, in discussing the separation of powers issue it indicated that if a court "holds that the state has failed to do so it is obliged by the Constitution to say so, and insofar as that may constitute an intrusion into the domain of the executive, it is one mandated by the Constitution." [30] A declaration of unconstitutionality is a far cry from a location order.

This case creates a lot of questions. While on the one hand it is found that no duty to provide alternative accommodation nearby exists, on the other, a duty is found in this matter. The legal grounds for this finding are unclear.

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24 *Commando supra* par 161, 169.1.

25 Although stating that they were two CC decisions.

26 *Commando supra* par 162, 169.2.

27 *Commando supra* par 159, relying on *Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 (3) SA 454 (CC) (*Joe Slovo*) par 254.

28 *Commando supra* par 159.

29 *Commando supra* par 160.

30 *Commando supra* par 126, referring to the Constitution.

Clarity is important when courts find that the State has a duty to provide alternative accommodation close to the place from where the occupiers were evicted.

To determine when this duty arises, the following section considers the legal framework relevant to location orders. The origin of the location order is then explored. The court bases its order on case law, not on its own reasoning. For that reason, it is important to see what the past reasoning of the courts has been in relation to location orders. This may give insight into when such orders would be granted and what duty lies with the State.

3 THE LEGAL FRAMEWORK

The South African Constitution protects against eviction from one's home in terms of section 26(3) of the Constitution. This section provides that no person may be evicted from their home unless such eviction is in terms of a court order. Such an order may only be granted if the court finds that the eviction would be just and equitable, considering all of the relevant circumstances.[31] Furthermore, section 26(1) and (2) of the Constitution gives everyone a right of access to adequate housing and places a duty on the State to fulfil this right progressively, within its available resources, by taking reasonable legislative and other measures.

The interpretation of this section by the Constitutional Court has led to the finding that the State's housing duty includes a duty toward persons in emergency housing situations who face homelessness.[32] This includes persons who are evicted.[33] They must be provided with at least temporary alternative accommodation, should the State's resources allow such.[34] Consequently, the State must have an emergency housing plan, setting out how it will fulfil this duty.[35] Such a plan must be flexible to cater for emergencies.[36] In response, the State has adopted the Emergency Housing Programme under the National Housing Act.[37]

Section 26 of the Constitution does not say anything about the location of the alternative accommodation. In fact, nowhere in South African legislation, policies or housing programmes is it stated that alternative accommodation should be close to the eviction site. In addition, no international instruments require that alternative accommodation be provided close to the eviction site.

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31 S 26(3) read with s 172(1)(*b*) of the Constitution. This section is given effect to by the Prevention of Illegal Eviction From and Unlawful Occupation of Land Act 19 of 1998. See Wilson "Breaking the Tie: Evictions From Private Land, Homelessness and a New Normality" 2009 126 *SALJ* 270 271.

32 *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (*Grootboom*) par 24; Wilson 2009 *SALJ* 286.

33 As was the case in *Grootboom.*

34 *Blue Moonlight* CC *supra* par 96; *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) (*PE Municipality*) par 28.

35 *Grootboom supra* par 42, 43, 68.

36 *Grootboom supra* par 43.

37 The National Housing Code was adopted in terms of s 4 of the National Housing Act 107 of 1997. It is a policy that contains the State's housing programmes, including the Emergency Housing Programme (EHP). See Socio-Economic Rights Institute of South Africa A Resource Guide to Housing (2011) 44.

The author could also not find any foreign jurisdictions in which this was required.

The only reference to location in international law is in General Comment 4 of the International Covenant on Economic Social and Cultural Rights[38]. This Comment provides that the location of the housing forms part of the consideration of whether it is adequate.[39] It states that adequate housing is located so that it "allows access to employment options, health-care services, schools, childcare centres and other social facilities."[40] Hence, alternative housing that allows such access would be adequate in terms of the Covenant regardless of whether it is close to the place from where a person is displaced.

4 THE ORIGIN OF THE LOCATION ORDER

The court, in *Commando*, justified its decision to grant a location order on the basis that this had been done in two previous Constitutional Court cases (*sic*). It went on to cite *City of Johannesburg v Changing Tides 74 (Pty) Ltd*[41] (*Changing Tides*) (an SCA decision) and *Blue Moonlight* (a Constitutional Court decision). Unfortunately, the court did not explain how these cases justified such an order in the specific circumstances of the case and what the justification for such orders was in the cited cases.

To try to determine what the justification may be, these cases are considered in 4 1 of this section. The aim is to determine the grounds on which the location orders were granted in these cases so as to determine whether these grounds applied in *Commando.* As is seen below, these cases do not expressly provide legal justification for location orders. Hence, in order to try to tease out a legal justification, 4 2 of this section explores earlier cases in which the significance of the location of alternative accommodation orders was discussed.

4 1 Cases in which location orders were granted

The Constitutional Court case relied upon in *Commando* as precedent for granting a location order is *Blue Moonlight* CC. This was not an ordinary eviction matter. The court had found that part of one of the City of Johannesburg's programmes, the Inner City Regeneration Strategy,[42] was unconstitutional for excluding private evictees from the emergency housing that was offered through that plan.[43] The programme focused on

38 (UNGA 993 UNTS 3 (1966).

39 ICESCR General Comment 4 par 8(f), discussed in Strauss and Liebenberg 2014 *Planning Theory* 443.

40 ICESCR General Comment 4 par 8(f).

41 2012 (6) SA 294 (SCA).

42 Wilson "Litigating Housing Rights in Johannesburg's Inner City: 2004–2008" 2011 27 *SAJHR* 127 134.

43 *Blue Moonlight* CC *supra* par 104, confirming the SCA decision; see *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2011 (4) SA 337 (SCA) (*Blue Moonlight* SCA) par 77. The *Blue Moonlight* case was based on the right to equality, s 9(1) of the Constitution; *Blue Moonlight* CC *supra* par 87.

"regenerating" the city by fixing "bad buildings".[44] These were dilapidated buildings in the inner city that were considered unsafe for human occupation.[45] In terms of the programme, persons evicted by the City from "bad buildings" in the inner city were provided with emergency accommodation.[46] However, no person who faced homelessness due to a private eviction from a "bad building" in the inner city could receive emergency housing through this programme.[47] The city argued that evictees from "bad buildings" faced a particular threat.[48] Their lives were threatened owing to the unsafe buildings they occupied. This, according to the City, justified dealing with them outside of its normal emergency housing plan,[49] and entailed the City providing them with alternative accommodation close to the eviction site.[50] Private evictees could still be assisted through the State's general emergency housing programme.[51] However, this programme entailed that the City apply for funding from the provincial government and did not guarantee a swift response and accommodation nearby.[52]

The court found the programme to be unconstitutional to the extent that it excluded the occupiers (who were private evictees from a "bad building") from receiving alternative accommodation. This finding was based on the right to equality before the law in section 9(1) of the Constitution.[53] The court ordered the City to provide the occupiers with accommodation "as near as possible" to the eviction site.[54] No explanation was provided as to the justification for the location order. In fact, the idea that the City must provide the unlawful occupiers with alternative accommodation "as near as possible" to the eviction site was simply taken from the SCA order.[55] From the SCA decision it is evident that this idea was similarly copied from the High Court decision without further explanation.[56] It is noted that the Constitutional Court order relied on by the court in *Commando* provides no reasoning for this order but simply confirms the order made by the High Court.

The Constitutional Court's only mention of location in the *Blue Moonlight* order is made when setting out the facts. The court states:

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44 *Blue Moonlight* CC *supra p*ar 78; see Centre on Housing Rights and Evictions (COHRE) *Any Room for the Poor? Forced Evictions in Johannesburg, South Africa* (2005) 46; on the background regarding the existence of these buildings, see Wilson 2011 *SAJHR* 131–134.

45 *Blue Moonlight* CC *supra* par 78; COHRE *Any Room for the Poor?* 46.

46 *Blue Moonlight* CC *supra* par 78.

47 *Blue Moonlight* CC *supra* par 79.

48 *Blue Moonlight* SCA *supra* par 21.

49 *Blue Moonlight* CC *supra* par 78–81.

50 The buildings identified for emergency housing were all located in the inner city, see Tugwana "City Buildings Converted" (28 August 2007) https://www.joburg.org.za/media_/Mediastatements/Pages/2007%20Press%20Releases/2007-08-28;-City-buildings-converted-.aspx (accessed 2022-03-15).

51 *Blue Moonlight* CC *supra* par 81.

52 *Blue Moonlight* CC *supra* par 82.

53 *Blue Moonlight* CC *supra* par 87.

54 *Blue Moonlight* CC *supra* par 104.

55 *Blue Moonlight* CC *supra* fn 91.

56 See order cited at the start of the SCA decision. The wording in both the SCA and High Court orders differs slightly from that in the Constitutional Court order in that the earlier wording required the accommodation to be "as near as *feasibly* possible" (emphasis added).

> Most of them do not have formal employment and make their living in the informal sector in the central business district. The location of the building is crucial to the Occupiers' income. The majority of them say that they would not be able to afford the transport costs necessitated by living elsewhere.[57]

This seems to provide factual justification for the order but does not ground it in the law.

Even the High Court decision provides no reasoning. The High Court addresses the desirability of the City providing alternative accommodation nearby without grounding it in law:

> The occupiers sought orders to be placed effectively close to where they presently live. ... In my view the City should avoid disrupting the lives of the occupants unduly, particularly where children are enrolled in nearby schools or employment is in close proximity.[58]

Interestingly, the High Court stated that the City cannot be obliged to spend more money than usual simply because someone was able to occupy land unlawfully in a more expensive area. Nevertheless, it found that alternative accommodation should be "within a reasonable radius, having regard to the circumstances and the cost of available transport".[59]

A possible justification for the order could be that alternative accommodation provided to the state evictees was in the inner city.[60] Hence, a finding that private evictees from bad buildings should be treated the same would mean that they must also be accommodated in the available inner-city buildings. This would have the effect that location orders should be limited to exceptional circumstances, such as where the State is unconstitutionally providing nearby alternative accommodation only to a certain group) and might not be justified in ordinary eviction matters.

In fact, the only other Constitutional Court matter in which a location order was granted confirms this notion that exceptional circumstances should exist. In 2012, the Constitutional Court in *Pheko v Ekurhuleni Metropolitan*[61] (*Pheko*) dealt with an unlawful eviction from and demolition of homes.[62] In this matter, the municipality had authorised the eviction from and demolition of the homes of several people in terms of the Disaster Management Act.[63] The municipality had declared the area "a local state of disaster" because of the "dolomite instability of the area".[64] The court found that the evacuations and demolitions effected without a court order amounted to a violation of

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57 *Blue Moonlight* CC *supra* par 6.

58 *Blue Moonlight Properties (Pty) Ltd v Occupiers of Saratoga Avenue* SGHC (unreported) 2010-02-18 2006/11442 (*Blue Moonlight* HC) par 181.

59 *Blue Moonlight* HC *supra* par 182. This coincides with the *Joe Slovo* decision (*supra* and see discussion below).

60 The buildings identified for emergency housing were all located in the inner city; see Tugwana https://www.joburg.org.za/media_/Mediastatements/Pages/2007%20Press%20Releases/2007-08-28;-City-buildings-converted-.aspx.

61 2012 (2) SA 598 (CC).

62 *Pheko supra* par 3.

63 57 of 2002; see *Pheko supra* par 8–11.

64 *Pheko supra* par 8.

sections 26(3) and 10 of the Constitution.[65] As a remedy, the court required the State to provide alternative accommodation "in the immediate vicinity" of the area.[66]

No reasons were provided for the finding that the land must be in the immediate vicinity of the area. However, in a letter to the municipality, the occupiers objected to being relocated far away owing to it being too far from where they "work, attend school, and access basic services".[67] This was only mentioned by the court in a footnote. Based on the facts of the case, the location order does, however, make legal sense, since the eviction was unlawful. Hence, the location order was almost like a reinstatement. It is unclear why the court did not simply require the municipality to provide them with the means to rebuild their homes, since the court based its order on the fact that there was no disaster.[68] The only reason could be that the court did in fact believe that the area was not suitable for occupation.[69]

This, therefore, seems like another exceptional circumstance where a location order was granted – that is, an unlawful eviction where return to the property might be unsafe. Based on these two Constitutional Court cases, it seems clear that such orders should be reserved for exceptional circumstances and should not be granted in normal eviction matters.

However, this reasoning is challenged by the other case relied on by the court in *Commando* – that is, the SCA case of *Changing Tides.* This matter was a straightforward eviction matter, in which the occupiers had faced homelessness.[70] The State's housing programme was not found to be unconstitutional in that case. As is the Constitutional Court cases, no reasoning is provided for the order that alternative accommodation must be "as near as feasibly possible" to the eviction site.[71] As with *Blue Moonlight*, the wording was copied from the decision of the court *a quo* .[72] This is the likely reason for the order mirroring that of *Blue Moonlight*. The order in *Changing Tides* was specifically amended to take into account the decision in *Blue Moonlight* SCA, which was handed down just three months prior to the *Changing Tides* High Court decision.[73] The High Court had held itself bound by the *Blue Moonlight* SCA decision,[74] probably because of the principle of *stare decisis.*[75] The High Court's decision was despite the

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65 *Pheko supra* par 44. S 10 of the Constitution concerns the rights to have your dignity respected and protected.

66 *Pheko supra* par 53.

67 *Pheko supra* par 9, fn 9.

68 *Pheko supra* par 34–46.

69 For further discussions on the case, see Strauss and Liebenberg 2014 *Planning Theory* 438-439; Kotze *Effective Relief Regarding Residential Property Following a Failure to Execute an Eviction Order* (master's thesis, University of Stellenbosch) 2016 87-95.

70 *Changing Tides supra* par 10.

71 *Changing Tides supra* par 65.

72 See the High Court order quoted in *Changing Tides supra* par 6.

73 *Changing Tides supra* par 4.

74 *Ibid*.

75 The principle that courts are bound by previous decisions, especially of higher courts, see *Gcaba v Minister for Safety and Security* 2010 (1) SA 238 (CC) par 58–62 (referring to several other cases); see also Pretorius *A Critical Analysis of Recent Supreme Court of Appeal Judgments That Have Deviated From the Stare Decisis Principle* (higher diploma

difference between the cases and the fact that the *Changing Tides* case did not involve the court declaring the State's housing programme to be unconstitutional. Nevertheless, this matter involved the same municipality whose emergency housing programme had been declared unconstitutional in *Blue Moonlight*. Since the *Blue Moonlight* matter was on appeal at that stage, one can accept that a new emergency housing programme had not been adopted. Therefore, the court was still dealing with the exceptional circumstance of an unconstitutional housing programme in which the State had unjustifiably provided nearby accommodation to one group of people at the expense of another.

From the above, it is evident that the cases relied on by the *Commando* court, as well as the other Constitutional Court case in which a location order was granted, do not provide much clarity regarding the legal grounds for such an order. At most, a factual explanation that alternative accommodation far from the eviction site would make it difficult to access their schools and jobs was provided. The cases do seem to suggest that such an order would only be granted in exceptional circumstances, such as where the State had unconstitutionally excluded an entire segment of the population from a plan involving the provision of nearby accommodation or had unlawfully evicted persons from their homes.

4 2 Earlier cases dealing with the location of alternative accommodation

Since no legal justification for the location orders was provided by the courts that granted them, this section considers earlier Constitutional Court and SCA cases in which the location of alternative accommodation was discussed, although no location order was granted. While the Constitutional Court, in granting the location orders discussed above did not expressly rely on these cases, they may still shed some light on the court's reasoning.

In 2004, the Constitutional Court first dealt with the location of alternative accommodation in the case of *PE Municipality.* This matter involved the eviction of 68 people from an unused, undeveloped piece of land.[76] They had been living there for between two and eight years.[77] The eviction was brought by the municipality following a petition by the neighbours insisting that the municipality evict the occupiers on the basis that the informal settlement increased crime in the area.[78] The occupiers argued that they would only move if they were provided with alternative accommodation.[79] The municipality offered alternative accommodation at two sites.[80] One site was rejected by the occupiers as unsafe and overcrowded and the other as being "too far away for them to go to their work and for their children to

thesis, International Institute for Tax & Finance in association with the Thomas Jefferson School of Law) 2012 9–11.

76 *PE Municipality supra* par 1.

77 *PE Municipality supra* par 2.

78 *PE Municipality supra* par 1–2.

79 *PE Municipality supra* par 2.

80 *PE Municipality supra* par 54.

school"[81] – that is, owing to the location of the alternative accommodation. The court seemed to agree with the occupiers that alternative accommodation that is too far away is not suitable. It found that "[w]hat is just and equitable could be affected by the reasonableness of offers made in connection with suitable alternative accommodation or land".[82] In fact, the court did not seem to consider these to be serious offers made by the municipality, finding that "[t]he real question in this case is whether the Municipality has considered seriously or at all the request of these occupiers that they be provided with suitable alternative land".[83]

Importantly, the court places much emphasis on the fact that the occupiers had occupied the property for a long time. It found that

> "[t]he longer the unlawful occupiers have been on the land, the more established they are on their sites and in the neighbourhood, the more well settled their homes and the more integrated they are in terms of employment, schooling and enjoyment of social amenities."[84]

This led the court to find that

> "a court should be reluctant to grant an eviction against relatively settled occupiers unless it is satisfied that a reasonable alternative is available, even if only as an interim measure pending ultimate access to housing in the formal housing programme."[85]

The far-away accommodation did evidently not constituting a "reasonable alternative" in the court's opinion. As a result, the court denied the eviction order, citing the fact that the land is unused and not needed for a productive purpose.[86]

This case highlighted that alternative accommodation far away may not be reasonable if the evictees are settled and integrated in the community. The reasonableness of the offer affects whether the eviction would be just and equitable, as is required by section 26(3) of the Constitution.

In 2007, the SCA, in *City of Johannesburg v Rand Properties (Pty) Ltd*,[87] (*Rand Properties*) found:[88]

> "The shelter that the City is obliged to provide need not necessarily be located within the inner city as demanded by the respondents. … More particularly, the Constitution does not give a person a right to housing at State expense at a locality of that person's choice (in this case the inner city). Obviously, the State would be failing in its duty if it were to ignore or fail to give due regard to the relationship between location of residence and the place where persons earn or try to earn their living but a right of the nature envisaged by the court and the respondents is not to be found in the Constitution."

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81 *Ibid*.

82 *PE Municipality supra* par 30, Strauss and Liebenberg 2014 *Planning Theory* 435.

83 *PE Municipality supra* par 58.

84 *PE Municipality supra* par 27.

85 *PE Municipality supra* par 28.

86 *PE Municipality supra* par 59.

87 2007 (6) SA 417 (SCA).

88 *Rand Properties supra* par 44.

This paints a completely different picture to that of the *Commando* court. The SCA found that there is no duty on the City to provide alternative accommodation close to the eviction site. The location is only a factor to consider. This is similar to what the court in *PE Municipality* found. The court further justifies its reluctance to grant a location order on the basis of the separation of powers doctrine.[89] The *Commando* court, similarly, acknowledged the importance of this doctrine, but still granted a location order without justifying it in relation to the separation of powers implications.[90]

To avoid separation of powers issues, the court in *Rand Properties* found that the location of the alternative accommodation should be determined by the City after consultation with the occupiers.[91] This led to an agreement between the occupiers and the State that it would provide them with alternative accommodation close to the eviction site.[92]

In 2009, the Constitutional Court in the *Joe Slovo*[93] case again addressed the issue of location. This case involved the eviction of unlawful occupiers (of what was known as the Joe Slovo informal settlement) from state land so that state housing could be built on the land.[94] The occupiers were promised that 70 per cent of the homes built would be offered to the them once the project was completed.[95] The State offered to relocate the occupiers to Delft, some 15km away from the original settlement.[96] It offered free transport for children to school and pledged to build more schools and hospitals in the area.[97] The court allowed for relocation but required the municipality to provide transportation to those who needed to reach schools, health care facilities and work places.[98]

In his order,[99] Ngcobo J found that:[100]

> "In the past we have stressed that the government faces an extremely difficult task in addressing the injustices of the past. This is compounded by the limited availability of resources, including the availability of land where decent houses can be built. These factors will invariably compel the government to provide access to adequate housing in areas available to it. And these areas will invariably not be located close to the areas from which people are being relocated. This is a consequence of our history. All that the government can and should do is, as far as is possible, have regard to the proximity of schools and employment opportunities when it seeks to relocate people for the purposes of providing them with decent houses.

89 *Rand Properties supra* par 44–45.
90 *Commando supra* par 159.
91 *Rand Properties supra* par 78.
92 *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg* 2008 (3) SA 208 (CC) par 24–26.
93 *Supra*.
94 *Joe Slovo supra* par 8.
95 *Joe Slovo supra* par 32; this was made an order of court.
96 *Joe Slovo supra* par 254.
97 *Ibid*.
98 Par 11.6 of the order; see *Joe Slovo supra* par 7.
99 While the judges handed down a single decision on the points on which they concurred, five wrote their own separate judgments; *Joe Slovo supra* par 1.
100 Par 255–256.

> In some instances this may be possible, in others it may not. Where this is not possible, all that the government can do is ameliorate the disruptive effect of relocation by providing access to schools and other public amenities as the government has done in this particular case. In this case, the government, consistently with its obligation to promote access to adequate housing, has committed itself to alleviating the consequences of relocation. What must be stressed here is that it is the primary responsibility of the government to provide adequate housing. This responsibility carries with it the authority to determine how and where to provide adequate housing. However, in doing so, the government must act reasonably."

Joe Slovo confirmed that there is no right to alternative accommodation close to the eviction site. Even settled persons may be relocated to a location far away if closer accommodation is not possible. In fact, similar to the International Covenant on Economic Social and Cultural Rights (the ICESCR), the court focused not on whether the alternative accommodation is close to the eviction site but whether it is close to schools and employment opportunities. Where this is not possible, transport should be provided to ensure access to these things. The separation of powers doctrine gives the State authority to determine how it fulfils its duty.[101]

5 THE COURT'S JUSTIFICATION OF THE LOCATION ORDER

The cases above highlight the court's concern for the consequences of displacement faced by evictees. In all of the cases, this was mentioned. However, this is not a legal justification for such orders. This section aims to distil the legal justifications for granting such orders from the cases discussed above. It also seeks to determine when such orders would be granted in the future.

5 1 Exceptional circumstances

The nature of the matters in which location orders have been granted seems to suggest that such orders will only be granted under exceptional circumstances. These include matters in which there was an unlawful eviction or where a state housing programme is found to be unconstitutional for excluding an entire segment of the population from nearby alternative accommodation. Nevertheless, such matters would still require legal justification. In *Pheko*, the justification was probably a type of reinstatement after an unlawful eviction. *Blue Moonlight's* legal justification relates to the fact that the State's programme aimed to provide state evictees with alternative accommodation close to the eviction site,[102] but excluded private evictees. This leads to the conclusion that all evictees should be treated alike, as per s 9(1) of the Constitution. However, not all state evictees were provided with alternative accommodation nearby. The programme focussed

[101] The decision has had its critics. Strauss and Liebenberg criticise the court for not engaging with the "grave consequences" that this order would have, Strauss and Liebenberg 2014 *Planning Theory* 440.

[102] The buildings identified for emergency housing were all located in the inner city; see Tugwana https://www.joburg.org.za/media_/Mediastatements/Pages/2007%20Press%20Releases/2007-08-28;-City-buildings-converted-.aspx.

only on persons evicted from "bad buildings" in the inner city. The declaration of unconstitutionality would therefore not have had the effect that all evictees receive alternative accommodation close to the eviction site – only those in similar circumstances to the state evictees. This highlights the link between location orders and the relevant circumstances of the evictees. Moreover, it is clear from the discussion in the following section that the location orders in *Blue Moonlight* and *Changing Tides* would also have been validated by this legal justification.

5 2 Relevant circumstances

The Constitutional Court, in *PE Municipality*, has suggested another legal justification for requiring the State to provide alternative accommodation close to the eviction site. As indicated, the court found:

> What is just and equitable could be affected by the reasonableness of offers made in connection with suitable alternative accommodation or land.[103]

This is a reference to the standard for evictions in section 26(3). A court may not grant an eviction order without finding that it would be just and equitable. The court criticised the State's offer of alternative accommodation far from the eviction site for not being "serious".[104] Hence, this finding suggests that a location order may be granted so as to ensure that an eviction is just and equitable. In other words, the location of alternative accommodation is a relevant circumstance to be taken into account when determining whether an eviction would be just and equitable. Moreover, the duty lies with the State to make a reasonable offer of alternative accommodation because of its duty to take reasonable legislative and other measures to realise the right of access to adequate housing.[105]

This is in line with the other cases discussed above. In *Rand Properties,* the SCA similarly found that there is no duty on the State to provide alternative accommodation close to the eviction site but the State must have "due regard to the relationship between location of residence and the place where persons earn or try to earn their living".[106] Hence, it is a factor to be considered. In *Joe Slovo*, the court again found that the only duty on the State is to "have regard to the proximity of schools and employment opportunities".[107] Having regard to the location is not the same as providing alternative accommodation in a nearby location. This is confirmed by the fact that the court stated that "[i]n some instances this may be possible, in others it may not".[108]

What is clear is that the City's response to the eviction must be reasonable. When it is required to provide alternative accommodation, its offer must be reasonable. An important question is, therefore, under what circumstances would reasonableness require an offer of alternative

[103] Par 30; see Strauss and Liebenberg 2014 *Planning Theory* 435.
[104] *PE Municipality supra* par 58.
[105] S 26(2) of the Constitution.
[106] *Rand Properties supra* par 44.
[107] *Joe Slovo supra* par 255.
[108] *Joe Slovo supra* par 256.

accommodation that is close to the eviction site. This would depend on the circumstances of the case. To determine the needs of the occupiers, the City would have to engage meaningfully with the occupiers.[109] One of the circumstances that would weigh heavily in favour of offering housing close to the eviction site would be that the occupiers are settled in the community. Being settled means that a person has occupied the land for a long time and is integrated in terms of "employment, schooling and enjoyment of social amenities".[110] This led the court, in *PE Municipality*, to find that "a court should be reluctant to grant an eviction against relatively settled occupiers unless it is satisfied that a reasonable alternative is available".[111]

Another relevant circumstance in determining the reasonableness of the State's offer is the effect thereof on spatial justice. This was argued in *Commando*. In support of their argument that the City's programme was unconstitutional, the occupiers referred to then-Cllr Herron's statement that the City is committed to "reverse the legacy of apartheid spatial planning". He said that this legacy is perpetuated when the State provides housing on the outskirts of the City.[112]

The notion of "spatial justice" links social justice with space.[113] "Spatial justice" acknowledges the geographical element of justice.[114] This entails recognising that geographical inequalities, like segregation, have an effect on people's lives.[115] Where distributive justice focuses on unequal outcomes, spatial justice focuses on the structural causes of these outcomes.[116] Where one is located matters.[117] Geographical inequality is not always problematic. However, it becomes oppressive when it is "maintained over a long time period and [is] rooted in persistent division in society such as those based on race, class, and gender".[118] This applies to geographical inequality throughout South Africa, especially in the urban areas. The cities are segregated along racial and income lines.[119] During (and prior to) apartheid, Black people were removed and excluded from urban land.[120] Even after apartheid, the Black poor have often been evicted from urban areas and relocated far away from the inner city.[121] It has been argued that the post-

[109] *City of Johannesburg v Rand Properties (Pty) Ltd supra* par 78; *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg supra* par 9–23; Wilson 2011 *SAJHR* 148.

[110] *PE Municipality supra* par 27.

[111] *PE Municipality supra* par 28.

[112] *Commando supra* par 67.

[113] Van Wyk 2015 *SAPL* 27. Spatial justice can also be linked to Lefebvre's right to the city; see Lefebvre *Writings on Cities* (1996). This topic falls outside of the scope of this article. See also Fick 2021 *StellLR* 464.

[114] Soja "The City and Spatial Justice" 2009 1 *JSSJ* 1 2;.Van Wyk 2015 *SAPL* 28; Fick 464.

[115] Soja *Seeking Spatial Justice* (2010) 72; Fick 2021 *StellLR* 464.

[116] Soja *Seeking Spatial Justice* 77; Fick 2021 *StellLR* 464.

[117] Van Wyk 2015 *SAPL* 28; Fick 2021 *StellLR* 464.

[118] Soja *Seeking Spatial Justice* 73; Fick 2021 *StellLR* 464.

[119] Strauss and Liebenberg 2014 *Planning Theory* 429; Fick 2021 *StellLR* 465.

[120] Strauss and Liebenberg 2014 *Planning Theory* 429; Madlalate "Dismantling Apartheid Geography: Transformation and the Limits of Law" 2019 9 *CCR* 195 200; Fick 2021 *StellLR* 465.

[121] Strauss and Liebenberg 2014 *Planning Theory* 429; Fick 2021 *StellLR* 465.

apartheid city still resembles the apartheid city.[122] Integration has been slow.[123] This is confirmed by the court in *Commando.*[124]

The Constitution imposes no express duty on the State to ensure spatial justice. Nevertheless, it has been argued that this obligation is implicit in the "spirit, purport and objects" of the Constitution.[125] This is because an important purpose of the Constitution is to redress the injustices of the past. Central to these injustices is the racial segregation effected by the previous government, which caused (ongoing) spatial injustice.[126] This means that redressing past injustices necessarily involves the achievement of spatial justice.[127] The first piece of South African legislation to make specific reference to spatial justice is SPLUMA. It lists spatial justice as a principle of spatial planning.[128] Moreover, the Act requires municipalities to consider spatial justice when developing land use schemes.[129] It grounds this duty on municipalities in section 26 of the Constitution.[130]

An eviction that requires poor Black people to leave the city, exacerbates spatial injustice.[131] It is, therefore, a factor that the court must consider in determining whether the State's offer of alternative accommodation is reasonable. Nevertheless, as a stand-alone factor, spatial justice is unlikely to necessitate a location order. This is due to the separation of powers doctrine. While the State has a duty to achieve spatial justice, it has the prerogative to decide how this should be done. With land in and around the inner city being expensive and sought-after,[132] the City cannot achieve spatial justice immediately and solely through its emergency housing programme. It has to plan how this will be achieved. Such plans may include a range of different types of housing, such as social housing and permanent

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122 Christopher "The Slow Pace of Desegregation in South African Cities, 1996–2001" 2005 42 *Urban Studies* 2305 2305; Seekings "Race, Class and Inequality in the South African City" (2010) *CSSR Working Paper No 283* 15; Parry and Van Eeden "Measuring Racial Residential Segregation at Different Geographic Scales in Cape Town and Johannesburg" 2015 97 *SAGJ* 31 33; Madlalate 2019 *CCR* 200; Fick 2021 *StellLR* 466.

123 Parry and Van Eeden 2015 *SAGJ* 33; Seekings (2010) *CSSR Working Paper No 283* 15. See also, Fick 2021 *StellLR* 466.

124 *Supra* par 128.

125 Strauss and Liebenberg 2014 *Planning Theory* 431; Fick 2021 *StellLR* 464.

126 Soja 2009 *JSSJ* 3 specifically identifies apartheid as a form of "political organization of space [which] is a particularly powerful source of spatial injustice"; See also Strauss and Liebenberg 2014 *Planning Theory* 429–430; Van Wyk 2015 *SAPL* 29; Strauss *A Right to the City for South Africa's Urban Poor* (doctoral thesis, University of Stellenbosch) 2017 182–183; Fick 2021 *StellLR* 464.

127 Strauss and Liebenberg 2014 *Planning Theory* 431; Strauss *A Right to the City* 204 discusses the fact that this is acknowledged in the Preamble to the Spatial Planning and Land Use Management Act 16 of 2013 (SPLUMA); see also Van Wyk 2015 *SAPL* 31; Martin *Does a Right to Have Access to Adequate Housing Include a Right to the City in South Africa?* (master's thesis, University of the Western Cape) 2017 92–93; Fick 2021 *StellLR* 464.

128 Strauss and Liebenberg 2014 *Planning Theory* 434; Van Wyk 2015 *SAPL* 31; Fick 2021 *StellLR* 464.

129 S 6 of SPLUMA; Strauss and Liebenberg 2014 *Planning Theory* 434; Van Wyk 2015 *SAPL* 36; Fick 2021 *StellLR* 464–465.

130 Preamble to SPLUMA; Fick 2021 *StellLR* 465.

131 Strauss and Liebenberg 2014 *Planning Theory* 435.

132 *Commando supra* par 146.

housing.[133] A location order interferes with this planning. While the poorest of the poor should not be excluded from such plans,[134] spatial justice need not be achieved by focusing solely on them. For this reason, a location order based on spatial justice is more likely where other factors also point to a location order. This would especially be the case where people are settled and integrated into their community and their eviction would exacerbate spatial injustice. This is illustrated below, where these principles are applied to the *Commando* case.

As indicated above, the relevant circumstances in *Blue Moonlight* justify a location order. First, the occupiers were settled in their communities. Several had lived there for "many years".[135] Their children were enrolled in nearby schools and they were dependent on the location for an income.[136] Secondly, spatial justice considerations also pointed to a location order since the occupiers were facing eviction from the inner city of Johannesburg, a city characterised by its untransformed landscape.[137]

5 3 Effect of s 26(2) of the Constitution

The State's housing duty is found in section 26(2) of the Constitution. This includes its emergency housing duty, which is fulfilled when it has to execute a location order. This means that the granting of such an order is subject to the internal limitations that section 26(2) places on the State's housing duty. Hence, such an order can only be granted if the State's available resources will allow it. Alternatively, such an order could be granted, but what constitutes "as near as feasibly possible" might be quite far away, depending on the State's resources.

Since location orders constitute emergency accommodation, the accommodation must be available within a short period of time. This means that the State must have existing access to the accommodation. If it is to be land on which the occupiers can settle, the State must already own the land. Otherwise, land or accommodation can be rented or provided by another entity.[138] It is preferable that the municipality own the land because the emergency housing programme states that emergency accommodation should, where possible, be upgradable to permanent housing.[139]

That the State must have land available in the vicinity for a location order to be granted is confirmed in the cases discussed above. In *Blue Moonlight*, the City seemed to have buildings in the vicinity that could be used for

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133 Such as the Woodstock Affordable Housing Programme, under scrutiny in *Commando supra* par 59–61.

134 *Grootboom supra* par 44 – this would perpetuate spatial injustice among socio-economic lines, as referred to in par 119.

135 *Blue Moonlight* CC *supra* par 7.

136 *Blue Moonlight* HC *supra* par 181; *Blue Moonlight* CC *supra* par 6.

137 Strauss and Liebenberg 2014 *Planning Theory* 429; Fick 2021 *StellLR* 465.

138 As was the case in *Dladla v City of Johannesburg* 2018 (2) SA 327 (CC) par 7.

139 See, the EHP par 2.2. The City adheres to this vision, calling the land to be used for emergency housing "incremental development areas" par 37.

alternative accommodation.[140] In *Pheko*, the City acknowledged that it had land in the vicinity.[141]

An important question is when one could say the land is "available". In both *Blue Moonlight* and *Pheko* the municipality argued that the identified land was earmarked for other projects.[142] Similarly, in *Commando*, the land identified was said to be earmarked for other projects.[143] In fact, the court in *Commando* sets out the immense struggle faced by the City and the hundreds of thousands of people needing assistance, and the laudable plans by the city to assist but then easily interferes with these plans.[144] This creates separation of powers issues. Ideally, location orders should not identify a piece of land or an area, but should just confirm the State's duty based on the relevant circumstances to provide alternative accommodation as near as *feasibly* possible, and place on the State the responsibility indicate how it can fulfil this.

5 4 When location orders are not granted

The relevant circumstances and/or the State's limited housing duty may mean that a location order should not be granted. This could be the case where the occupiers are not settled or where the State does not have the requisite resources available.

It is clear from the ICESCR and the *Joe Slovo* case that all alternative accommodation should be close to schools, employment opportunities and social amenities.[145] In other words, even if the State is not required to provide alternative accommodation close to the place from where the occupiers were evicted, the alternative accommodation should still allow access to these things, even if they are not the same amenities that the occupiers were accessing. Should this not be possible, the State should, where possible, ensure access by providing transport to schools, employment opportunities and social amenities.[146] In matters where the occupiers' circumstances favour a location order, transport should ideally provide access to the same schools, jobs and amenities that the occupiers accessed prior to eviction.

6 APPLICATION TO THE CASE

The previous section aimed to determine the legal justification(s) for location orders. From the cases in which location orders were granted, it seems that such orders should only be granted under exceptional circumstances. Nevertheless, in considering the other relevant case law, it could be argued that location orders may be granted if the relevant circumstances require it.

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140 *Blue Moonlight* CC *supra* par 79.

141 *Pheko supra* par 50.

142 *Blue Moonlight* CC *supra* par 79; in *Pheko* the land belonged to another State department, par 50.

143 *Commando supra* par 39–41.

144 *Commando supra* par 28–34.

145 Strauss and Liebenberg 2014 *Planning Theory* 443–444.

146 *Joe Slovo supra* par 256 and ICESCR General Comment 4 par 8(f).

This is most likely to be the case where the occupiers are settled and integrated into the area. Whichever justification is relied on, assessing the reasonableness of the distance of the alternative accommodation from the eviction site must be guided by the State's available resources. Discussion under the following subheading considers whether the location order in *Commando* could have been justified because the facts mirrored those in *Blue Moonlight*. The subsequent subheading considers whether the location order in *Commando* could have been justified based on the relevant circumstances of the case.

6 1 Exceptional circumstances

The *Blue Moonlight* order was made in the context of exceptional circumstances. The court had found that part of one of the City of Johannesburg's programmes was unconstitutional for excluding private evictees from the emergency housing offered through that plan. The programme provided persons evicted by the City from "bad buildings" in the inner city with emergency accommodation, whereas private evictees from similar buildings could not receive emergency housing.

If the facts of the *Commando* case were to closely resemble those in *Blue Moonlight*, the doctrine of *stare decisis* would justify a location order.[147] Hence, if the same exceptional circumstances existed, the *Commando* court was justified in granting the location order. However, if the facts were not sufficiently similar, the court should have shown how the order under the current circumstances was justified.

In both cases, the courts had before them a single municipal housing programme that which treated private evictees differently from state evictees. In *Blue Moonlight*, the court declared the specific housing programme to be unconstitutional to the extent that it excluded the occupiers in the case before it. In *Commando*, however, instead of focusing on the validity of the relevant programme (the Woodstock Affordable Housing Programme), the court declared the municipality's entire emergency housing programme to be unconstitutional. What is even more confusing is that the programme under consideration, in *Commando*, was not an emergency housing programme – it dealt with social housing.[148]

Nevertheless, emergency housing was involved because the plan entailed removing informal settlements from land that was earmarked for social housing in terms of the programme, and housing the occupiers elsewhere.[149] The alternative land on which these occupiers were to be housed was well-located.[150] The municipality did not seem to follow its own rules regarding the provision of emergency accommodation,[151] potentially to avoid

147 That is, courts are bound by previous decisions, especially of higher courts, see *Gcaba v Minister for Safety and Security* 2010 (1) SA 238 (CC) par 58–62 (referring to several other cases); see also Pretorius *Supreme Court of Appeal Judgments That Have Deviated From the Stare Decisis Principle* 9–11.

148 Woodstock Affordable Housing Programme 9.

149 Woodstock Affordable Housing Programme 25.

150 *Ibid*.

151 *Commando supra* par 151.

resistance from the occupiers. This is similar to *Blue Moonlight*, in which the City's inner city regeneration programme had focused on providing emergency accommodation to state evictees from "bad buildings" outside of its normal emergency housing plan.[152] There was no evidence before the court in *Commando* that the City was treating its other evictees differently. Hence, it would have made more sense to declare only the offending part of the Woodstock programme to be unconstitutional, as was done in *Blue Moonlight.*

While the court's finding in *Commando* might not justify declaring the municipality's entire housing emergency housing programme unconstitutional,[153] the question is still whether the facts are sufficiently

[152] *Blue Moonlight* CC *supra* par 78–81.

[153] The court's other reasons for declaring the emergency housing programme unconstitutional do not seem to justify such a finding either. The one is that the City does not have an emergency housing programme of its own; instead, it applied the national emergency housing programme (par 138–139). This is a comprehensive programme adopted as part of the National Housing Code. It is unclear why the City was required to adopt its own separate programme.

The second reason is that the City's implementation of its housing programme was inconsistent and arbitrary (*Commando supra* par 138). This was primarily based on the fact that the City had applied its programme flexibly to try to accommodate specific needs and that it was addressing emergency housing situations as they arose, with the resources it had available (*Commando supra* par 140–145, 149). The court referred to the fact that the City maintained that it had a policy that evictees from the City and surrounds could not be provided with alternative accommodation in the inner city. They could only be housed in one of the city's designated emergency housing areas.

The court then continued to refer to statements and situations that did not support this policy. The court relied heavily on statements made by a former mayoral member who had since left both the City's employ and the political party governing the City. It also cited the fact that the occupiers had been offered alternative accommodation in Kampies, which was not designated for emergency housing. Statements made by politicians cannot be taken as part of the City's housing programme. Furthermore, the fact that the City had been flexible and tried to accommodate the occupiers closer by, albeit not in a designated emergency housing area, is in line with its constitutional mandate. The City made an exception to its policy so as to try to accommodate the needs of the occupiers. The court criticised the city for not indicating "how determinations and placements are made by its officials in emergency housing eviction cases i.e., how and on what basis it is decided which evictees must go where, and how allocations of emergency housing in such instances are made."

The City cannot be faulted on its approach. Flexibility is a key requirement in an emergency housing programme, as set out by the Constitutional Court in *Grootboom* (*supra* par 43). Furthermore, the nature of providing emergency housing within constrained resources is that people will be assisted on a first-come-first-serve basis and that some might get better accommodation than others (*cf Commando supra* par 149). The real problem here is probably not the location of emergency housing but the fact that such housing is not temporary, as should ideally be the case (*Commando supra* par 141, and see also below Conclusionary remarks under heading 7).

The final reason for the finding of unconstitutionality is perhaps the court's best justification. That is that the city gave undue preference to social housing in the inner city (*Commando supra* par 158). Nevertheless, this finding was a single sentence added on to the end of the findings. It did not take into account that it had only one of the city's housing projects before it. This programme had the specific aim of creating social housing (Woodstock Affordable Housing Programme 10). A finding that the City's stance never to provide emergency housing in the inner city is unconstitutional, based perhaps on spatial justice, could have been more sound. Nevertheless, even though the City was reluctant to provide emergency housing in the inner city, the same project under fire in court included areas for emergency housing. In addition, the shelters within the inner city and surrounds also qualify as emergency housing.

similar to that of *Blue Moonlight* to justify a location order. As explained, in *Blue Moonlight*, the City had, in terms of its plan, given state evictees from "bad buildings" well-located alternative accommodation, while it refused to provide the same to private evictees from "bad buildings". It was treating people in exactly the same circumstances differently and the court forced it to treat them similarly, provided that the City had the available resources. In *Commando*, the City, in terms of its plan, was moving people (the Pine Road "evictees'" from land needed for housing purposes to well-located alternative land. It refused to treat evictees from private land that was to be commercially developed (the Bromwell Street evictees) in the same way. Unlike in *Blue Moonlight*, the Bromwell Street evictees were not in exactly the same circumstances as the Pine Road "evictees". The *Blue Moonlight* case dealt with a programme focused on a unique type of evictee – persons evicted from bad buildings, of which the persons before the court formed a part. *Commando* did not deal with a similarly unique type of evictee. The court could not have similarly found that the Bromwell Street evictees are in exactly the same circumstances as the Pine Road evictees and should be treated similarly.

The facts of the *Commando* case might, therefore, not have been sufficiently similar to that of *Blue Moonlight* to justify the granting of a location order based on precedent. Should this be the case, justification for the location order in *Commando* would have to be based on the second potential legal justification – the relevant circumstances of the case.

6 2 Relevant circumstances

As indicated, the Constitution provides that the court may only grant an eviction order if, based on the relevant circumstances, it would be just and equitable. The decisions analysed above indicate that the reasonableness of the State's alternative accommodation offer would weigh in the balance. Two factors are likely to influence the reasonableness of the State's offer heavily.

The first, and probably the most important, is the degree to which the occupiers are settled in their community – in other words, the extent to which they have become integrated in respect of nearby jobs, schools and social amenities. The more integrated they are, the more important the location of the alternative accommodation relative to the eviction site would be. In *Commando*, the occupiers were well settled in the community. They had stayed there for many years – some all of their lives. These circumstances weigh in favour of a location order.

The second factor that may influence the reasonableness of the State's offer is spatial justice. As indicated above, this, as a stand-alone factor, is unlikely to justify a location order, since it is the State's prerogative to choose how to fulfil this duty. Nevertheless, when combined with other factors, this factor may shift the balance in favour of a location order. In the *Commando* scenario, spatial justice was a very important consideration. During apartheid, Woodstock was one of the only areas close to the inner

city that was allowed to remain mixed-race.[154] This means that the people being evicted in this case (or their ancestors) managed to resist the spatial injustices perpetrated during apartheid, only to face eviction during an era that should be characterised by spatial justice and transformation. Such injustice cannot be allowed and strongly endorses a location order under the circumstances.

6 3 Effect of s 26(2) of the Constitution

While the abovementioned factors may weigh on the side of a location order, this can only be granted to the extent that the City has the available resources. In *Commando,* the City had offered alternative accommodation in Wolwerivier, some 30km away from Woodstock. There was no public transport from Wolwerivier to Cape Town. The daily commute by taxi would cost R60 per day and several hours of travel.[155] The question is, therefore, whether the City could afford alternative accommodation closer to Woodstock. If so, then the Wolwerivier offer would not have been reasonable.

The court found that the City could afford it. As in *Blue Moonlight* and *Pheko* the court found that the City owned land close to the eviction site.[156] The City had announced that it was making five properties available in the area for inclusionary and affordable housing in terms of the Woodstock Affordable Housing Programme.[157] Part of one of these properties, as well as two further properties were earmarked for emergency housing.[158] The court explained further that the City had not placed any evidence before it regarding its financial position.[159] Moreover, despite arguing that it could not afford emergency accommodation nearby, it had provided such to its own "evictees".[160] This put its arguments in doubt.[161]

As in *Blue Moonlight* and *Pheko*, the properties identified by the court as available were already earmarked for other beneficiaries.[162] As discussed above, a court should be hesitant to interfere with the State's existing housing plans. This may create separation of powers issues. In this situation, however, the emergency housing is earmarked for an emergency that developed after the instant application was launched. The applicants in the instant matter should, therefore, have enjoyed preference. The City cannot reserve land earmarked for emergency housing for its own evictees.

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154 *Commando supra* par 129;.Garside "Inner City Gentrification in South Africa: The Case of Woodstock, Cape Town" 1993 30 *GeoJournal* 29 31; Gregory "Creative Industries and Neighbourhood Change in South African Cities" in Knight and Rogerson (eds) *The Geography of South Africa* 2019 203 205; Fick 2021 *StellLR* 467.

155 *Commando supra* par 23.

156 *Commando supra* par 17, 39–41, 44–47, 51–53.

157 *Commando supra* par 58–61.

158 *Commando supra* par 60–61.

159 *Commando supra* par 146.

160 *Commando supra* par 155; the "evictees" were not evicted as such because they moved willingly – see par 150–158.

161 *Commando supra* par 155.

162 *Commando supra* par 61.

If the City could not afford alternative accommodation close to the eviction site, it should have ensured access to such.[163] The court found that the city was unwilling to provide public transport from Wolwerivier.[164] Nevertheless, the City did indicate that "should it be required" it would ensure that a bus stop be added at the site.[165] The court did not seem to be persuaded that the City was committed to this proposal.

Furthermore, if the City could not afford alternative accommodation in or near Woodstock, then the alternative accommodation should at least be close to other employment opportunities, schools and social amenities, as required by the ICESCR and *Joe Slovo*. There were no schools in Wolwerivier.[166] The court states that the closest school would be in Du Noon (12km).[167] Without public transport 12km[168] is too far to commute. Hence, Wolwerivier might not have constituted adequate housing. If no housing opportunities closer to schools, jobs and social amenities were available, the City would at least have been required to provide public transport to these things, something that the court was not convinced it was prepared to do.

From the above it seems as though the location order granted in *Commando* was justified. That said, courts should be hesitant to grant location orders that specify the area in which the alternative accommodation should be provided. This matter involved special circumstances in which the emergency had arisen years before and an offer outside of Woodstock would not have been reasonable based on the circumstances. There was evidence that the City had land earmarked for emergency housing in the vicinity and there was no evidence before the court that there were other emergency housing situations that had arisen prior to the launch of the instant application.

7 CONCLUSIONARY REMARKS

The aim of this article was to determine the court's justification for requiring the State to provide alternative accommodation close to the eviction site in eviction matters. Ascertaining this assists in establishing when such orders should be granted.

Two possible legal justifications for location orders were identified. The first is that such an order should only be granted under exceptional circumstances. The second is that it should be granted if the relevant circumstances require it. This is most likely to be the case where the occupiers are settled and integrated into the area. Whichever justification is relied on, assessing the reasonableness of the distance of the alternative accommodation from the eviction site must be guided by the State's available resources. Courts should be hesitant to find that land nearby is available simply because it is owned by the State.

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163 As decided in *Joe Slovo.*

164 *Commando supra* par 23.

165 *Commando supra* fn 10.

166 *Commando supra* par 23.

167 Par 23. This might be incorrect as the area might be closer to Melkbosstrand.

168 Or even 7km.

The *Commando* location order can most probably be justified on the second potential ground – the relevant circumstances of the matter. The occupiers were settled in the community and spatial justice considerations supported that they not be moved from the area. Moreover, the City seemed to have the requisite available resources.

Based on the findings in this paper, there are a few things to consider.

First, considering that the more settled a person is the more important alternative accommodation nearby would be, one has to accept the possibility that unlawful occupiers may be treated differently among themselves depending on how integrated they are in the community. Often with group evictions the occupiers have not all been occupying the land for the same amount of time. This might mean that those who are not integrated into the community need not be offered alternative accommodation close to the place from where they are evicted.

Secondly, the effect of long-term unlawful occupation on the State's housing duty highlights the significance of moratoriums on the protection of land against unlawful occupation and delays in eviction proceedings. Such factors could result in the occupiers being settled once the final decision is made, triggering the State's duty to provide alternative accommodation nearby. Importantly, allowing the protection of land against eviction or speedy eviction proceedings does not mean that homeless persons should remain without a roof over their heads. The State has a general duty toward the homeless regardless of whether they occupy land unlawfully. It simply means that a homeless person cannot choose where the State should assist them with access to housing by unlawfully occupying land in a specific area.

Thirdly, this article highlights that alternative accommodation provided in emergency housing situations is not really temporary. Rather, it is substandard permanent housing. When emergency housing is truly temporary, its location should not play that big of a role. Location has become so important in eviction matters because the State has failed to keep emergency housing temporary. There is a general housing failure on the side of the State owing to the enormous backlog in the availability of permanent housing.